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PEACEKEEPERS: VICTIMS, CRIMINALS AND, SOMETIMES, BOTH.

Robert Cryer and Natalia Perova[‡]

INTRODUCTION

Peacekeepers, as with peacekeeping more generally, have always existed in an uncertain legal area. After all the term 'peacekeeping' does not appear in the UN Charter, it was developed under the inspirational leadership of Dag Hammarskjøld rather than on the basis of the wording of the Charter.[1] This is not necessarily a bad thing. Necessity is, as the cliché goes, the mother of invention, but it is rarely the parent of legal clarity. This means that the legal regime surrounding peacekeepers is far from simple, not least as the concept of peacekeeping is one which has undergone development, and has its generations. As such first generation peacekeepers may be close to civilians for the purposes of international humanitarian law (IHL), but second and third generation peacekeepers can come close, if not actually being, combatants from an IHL point of view.[2]

In addition to this, peacekeepers, whatever their legal characterisation, tend to be put into situations of significant tension, if not armed conflict, and therefore they can be placed in positions of vulnerability, where they may be the victims of various crimes. Equally, in such situations, peacekeepers can also be in positions of power, and, as such, may be perpetrators of crimes as well as victims of them. Although peacekeepers may have been taken hostage and used as human shields in former Yugoslavia,[3] and attacked, *inter alia*, in Sierra Leone and Darfur,[4] there have also been highly credible allegations of offences, including sexual offences, by such forces, although accountability has proved hard to achieve.[5]

Also, the vulnerable position in which peacekeepers find themselves sometimes means that they find themselves in an invidious position, in which they may find themselves engaging with and perhaps assisting those involved in international crimes. The situation of DUTCHBAT in Srebrenica may be a sobering example of this situation.[6] To be a peacekeeper is not necessarily to be a sacrificial lamb, but nor are peacekeepers necessarily the modern day analogues of paladins such as Sir Galahad. Therefore this piece will look at both sides of the equation. First, it will look at

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[1] See generally Michael Bothe, 'Peacekeeping' in Bruno Simma *et al* (eds.) *The Charter of the United Nations: Commentary* (Oxford: OUP, 3rd ed., 2012) 1171. See also Magdalena Pacholska, '(Il)legality of Killing Peacekeepers: The Crime of Killing Peacekeepers in the Jurisprudence of the International Criminal Tribunals' (2015) 13 *Journal of International Criminal Justice* 43, 47-51.

[2] See Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3.

[3] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary Humanitarian Law* (Cambridge: CUP, 2005) 338.

[4] See *Prosecutor* v *Kallon, Kamara and Sesay* Judgment, SCSL-04-15-T 558, 2 March 2009 (hereinafter *RUF*) and *Prosecutor v Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09, 8 February 2010 (hereinafter *Abu Garda).*

[5] Marten Zwanwenberg, *Accountability of Peace Support Operations* (Leiden: Nihjhoff, 2005); Melanie O'Brien, 'Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold' (2012) 10 *Journal of International Criminal Justice* 525.

[6] See generally Otto Spijkers, "Legal Mechanisms to Establish Accountability for the Genocide in Srebrenica" (2007) 1 *Human Rights & International Legal Discourse* 231. For the most recent case in this saga see *The Netherlands* v *Nuhanović*, Supreme Court of the Netherlands, Judgment 6 September 2013.

the legal regime surrounding crimes committed against peacekeepers, then that which deals with crimes committed by them. What we will see is that whilst fairly well protected by international law, peacekeepers remain, in many respects, protected from the consequences of their actions when they engage in criminal behaviour. As another cliché goes, with great power comes great responsibility. For peacekeepers (and their sending States) this, however, has not, usually, proved to be the case.

PEACEKEEPERS AS VICTIMS: INTERNATIONAL LAW AND CRIMES AGAINST PEACEKEEPERS

The concept of peacekeeping post-dates the, broadly speaking, modern day Genesis of international criminal law, the Nuremberg International Military Tribunal. The development of peacekeeping also, unsurprisingly, coincided with the low point of post-War international criminal law, the Cold war.[7] Rather than concentrating on identifying, even less prosecuting, wrongdoers, Peacekeeping was designed as a neutral response which prioritised peace over attempts to achieve (criminal) justice. Interestingly, the increase in what was asked of peacekeepers in the then called 'New World Order', when peacekeeping took on a more normative role,[8] led to the issue of crimes committed against those forces becoming the subject of separate international legal regulation. The necessity of doing so came about owing to the fact that, in spite of duties to prosecute crimes against peacekeepers, host States tended to prove themselves unwilling or unable to do so.[9]

To respond to this problem, two routes were taken on point, the first being the creation of transnational crimes relating to them, and then later direct liability international crimes.[10] Both approaches show the ambivalence that States have about the precise legal regime that can be said to apply across the various forms of peacekeeping operations. Still, let us take them in turn, although remembering, that offences against peacekeepers overlap with other crimes in international and transnational crimes. Here we will focus only on those that relate specifically to peacekeepers, but there is nothing, for example to prevent charges of hostage taking, as an international or transnational crime, being brought against relevant actors,[11] or indeed the use of unlawful weapons against peacekeepers, but they fall outside the scope of our investigation on this occasion.

Attacks on Peacekeepers as Transnational Crimes: The 1994 Convention on the Safety of United Nations and Associated Personnel[12]

This convention, rather than creating a direct liability international crime, is a classic transnational crime convention,[13] requiring States to create domestic crimes related to attacks on peacekeepers and other protected persons, and subject that conduct to the *aut dedere aut judicare* regime that is

[7] For a brief historical overview see Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP, 2005) 48-51.
[8] Report of the Panel on United Nations Peace Operations, 21 August 2000, paras 10-28. UN Doc. A/55/305–S/2000/809.
[9] M. Christiane Bourloyannis-Vrailas, 'Crimes Against United Nations and Associated Personnel' in Gabrielle Kirk-McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal* Law (Dordrecht: Kluwer 2000) 333, 339-40; Evan T. Bloom, 'Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel' (1995) 89 *AJIL* 621, 622.
[10] On the distinction see Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford: OUP 2012) Chapters 1-2.
[11] Indeed, some such charges have been brought, e.g. before the SCSL, see *RUF*, Count 18. On the case generally, see James Sloan, 'Peacekeepers under Fire: Prosecuting the RUF for attacks against the UN Assistance Mission in Sierra Leone' (2010) 9 *The Law and Practice of International Courts and Tribunals* 243.
[12] 2051 UNTS 391. See generally, Bloom, above note 9.
[13] On which see Neil Boister, 'Transnational Criminal Law?' (2003) 13 *European Journal of International Law* 953.

common amongst modern transnational crime conventions.[14] Hence, Article 9(1)(a)(b) requires States to criminalise, *inter alia*, but primarily,

(a) Murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty.

As Christiane Bourloyannis-Vrailas has pointed out, this language is very similar to the earlier Convention on Internationally Protected Persons (i.e., broadly speaking Heads of State and Government, Foreign Ministers, and Diplomats).[15] But, unlike those personnel, who are reasonably well defined in existing international law,[16] peacekeepers are not. As a result, it became necessary to define those who were 'protected' by the Convention (or, more precisely, the domestic crimes created under it). Article 1(a) of the Convention defines such people as

(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations Operation;
(ii) Other officials and experts on mission of the United Nations or its specialised agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted

This is further elaborated upon by Article 1(c), which explains that the Convention only applies

(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or
(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

These provisions, when read together, set a restrictive regime, and it is notable that, although there have been many operations that could fall under Article 1(c)(i) there have been no declarations under Article 1(c)(ii).

The Convention does, however, accept one of the difficulties that attend the situations in which peacekeepers now find themselves, being in place with mandates that render them less than civilians, and against a backdrop of the Security Council authorising the use of force. Therefore Article 2(2) of the Convention reads that

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[14]See generally Raphaël van Steenberghe 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9 *Journal of International Criminal Justice* 1089. For further detail and discussion see Bourloyannis-Vrailas, above note 9, 347ff; Bloom, above note 9, 626-28.

[15] Bourloyannis-Vrailas, above note 9, 346. See also Rob McLaucghlin, 'The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising "All Necessary Means"' (2008) 12 *Journal of Conflict and Security Law* 389; Nigel D. White, 'Security Council Mandates and the Use of Lethal Force by Peacekeepers: What Place for the Laws of War' in Caroline Harvey James Summers and Nigel D. White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Peter Rowe* (Cambridge: CUP, 2014) 95.

[16] At least relatively, for controversies on point see, e.g., Christos l. Rozakis, 'Terrorism and the Internationally Protected Persons in the Light of the ILC's Draft Articles' (1974) 23 *International & Comparative Law Quarterly* 32, 43-48; Michael C. Wood, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents' (1974) 23 *International & Comparative Law Quarterly* 791, 799-802; Julian Sutor, 'The Problem of Ensuring Adequate Safety of Persons Enjoying Special International Protection' (1976) 8 *Polish Yearbook of International Law* 201, 208-209.

> This Convention shall not apply to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

As Bourloyannis-Vrailas notes, this provision is pregnant with ambiguity.[17] But, to some extent, this reflects the fact that the Security Council has extended the mandates of peacekeepers to involve them *inter alia*, in combat operations.[18] Nonetheless, to call the drafting of the provision unfortunate is to do a disservice to misfortune. Indeed, it is possible (although perhaps not necessary) to go as far as to say that the provision could imply that any force put in place with a Chapter VII mandate might, in practice, suffer a diminution of protection as a result of the Convention.[19]

Unfortunately the Convention has not had any appreciable effect. There has not been a single reported conviction based on crimes introduced into a domestic legal order owing to the Convention.[20] Still, the simple fact that the Convention exists is evidence of an acceptance that such attacks are a matter of international concern, not least owing to the appreciation that such attacks have a symbolic as well as a practical effect on peacekeeping. The former being that it is a repudiation of notionally neutral representatives of the 'international community',[21] the latter is that troop contributing States, may be understandably wary of putting their nationals in harm's way without some form of legal protection. Whether or not the Convention does that, or contributes to the protection of peacekeeping forces, in the absence of systematic enforcement, though, is unclear.

Attacks on Peacekeepers as International Crimes

Although international crimes and transnational crimes are conceptually separate, that does not make them completely impermeable categories, as Neil Boister has shown, there is the possibility of consensus on point changing, and transnational crimes may as a result become international crimes.[22] The level of agreement between States is key, and is a matter of degree rather than being a binary distinction, and attacks on peacekeepers exist at a liminal point in this regard. As much can be seen from the background to, and the negotiations of the Rome Statute.

The International Law Commission had included some such crimes in their Draft Code of International Crimes.[23] Frequently the question of whether the 1994 Convention was customary was elided with the question of whether attacking peacekeepers was a direct liability international crime,[24] a conceptual confusion that did not assist in the run up to,[25] and drafting of, the Rome

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[17] Bourloyannis-Vrailas, above note 9, 435.
[18] Perhaps most notably, in Resolution 2098, in which a peacekeeping mission was authorised to create an 'offensive brigade' to measures to 'eliminate' rebel groups. For a detailed review see Pacholska, above note 1.
[19] F.J. Hampson, 'The Protection of "Blue Helmets" in International Law' (1997) 36 *Military Law and Law of War Review* 203.
[20] Although there are examples of domestic murder convictions, see Bourloyannis-Vrailas, above note 9, 365.
[21] With all due caveats on the ontological issue this raises.
[22] See Boister, above note 13, 972.
[23] 1996 Draft Code of Crimes Against the Peace and Security of Mankind, 1996 *Yearbook of the International Law Commission Volume II,* Article 19.
[24] See, on the distinction, Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: CUP, 3rd ed., 2014) Chapter 1.
[25] On which see Bourloyannis-Vrailas above note 9, 350-355.

Statute,[26] even though the Security Council had at least implied that attacks on peacekeepers in certain contexts amounted to international crimes.[27] Nonetheless, after considerable discussion, the Rome Statute included as an offence in international and non-international armed conflicts[28] the attacking of certain types of peacekeepers. However, the controversies over the role of peacekeepers and customary law led to a compromise provision: Article 8(2)(b)(iii) (which is applicable in international armed conflicts-Article 8(2)(e)(iii) applies the same offence to non-international armed conflicts) provides for liability for

> … Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

Like with much agreed language in treaties, this provision has found its way into cognate documents verbatim, as few have the appetite to reopening difficult drafting issues.[29] Hence Article 8(2)(e)(iii) is repeated in Article 4(b) of the Statute of the Special Court for Sierra Leone.[30]

Probably the most important aspect of the offence that came from the drafting is the limitation that the peacekeepers have to be entitled to civilian status. This compromise means that Articles 8(2)(b)(iii) and 8(2)(e)(iii) are, in fact applications of the prohibition on intentional attacks on civilians and civilian objects in Articles 8(2)(b)(i-ii) and 8(2)(e)(i-ii) respectively.[31] Given that, therefore, substantively, they offer no additional substantive protection for Peacekeepers, it might, understandably, be asked why the provision was separately included.[32]

The reason for this is, in addition to the compromise between those who wanted violations of the 1994 Convention to be included in the ICC's jurisdiction and those that did not, was that it was generally felt that the specific reprobation of attacks on Peacekeepers, the notional emissaries of the world, ought to be given particular (and symbolic) recognition.[33] This idea weighed upon the mind of the first Prosecutor of the International Criminal Court. In explaining his choice of indicting rebels for the attack on the Haskanita camp in Darfur, in which twelve peacekeepers were killed, in the light of the gravity threshold in the Rome Statute he explained the symbolic nature of the attacks on peacekeepers (who he considered to be representatives of the international community) rendered them sufficiently grave to warrant the attention of the ICC.[34]

This may be the case, but the separation off of peacekeepers from other civilians raises two issues. The first is, how fine grained should such recognition be, it could be argued that, for example the Rome Statute ought also specifically single out attacks on other civilians, for example those who are, women, refugees, or children, but this was not done. Secondly, since peacekeepers, and, the

[26] For useful discussion see Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S. Lee (ed.) *The International Criminal Court: Making of the Rome Statute: Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999) 110.
[27] Bourloyannis-Vrailas, above note 9, 355-58.
[28] For International Armed Conflicts. For the analogous provision in non-international armed conflicts see Article 8(2)(e)(iii).
[29] See, e.g. Annelise Riles 'Models and Documents: Artefacts of Legal Knowledge' (1999) 48 *International and Comparative Law Quarterly* 805.
[30] On the difficulties involved in the drafting of this provision see Robert Cryer, 'A Special Court for Sierra Leone?' (2001) 50 *International and Comparative Law Quarterly* 435, 444.
[31] von Hebel and Robinson, above note 26.
[32] China, for example took the view that the provision should not be separate, see Bing Bing Jia, 'China and the International Criminal Court' (2006) 10 *Singapore Yearbook of International Law* 1, 3-4.
[33] von Hebel and Robinson, above note 26.
[34] Summary of the Prosecutor's Application under Article 58, ICC/02/05, 20 November 2008, para 7. The charges, nonetheless, did not lead to convictions, as the prosecution could not prove the charges.

undefined[35] 'humanitarian assistance' missions may differ very much in type, such that the symbolic aspect is far less clear.[36] For example, the paradigmatic UN peacekeeper may clearly fall within this iconography, but perhaps regional ones would do so to a lesser extent.

Similarly, perhaps representatives of the ICRC would be close to the core of the specific protected interest, but maybe, in spite of all the very good work done by *Médecins sans Frontierès* (MsF), there may be less consensus about their status. It is true that the definition contains limitations that could be thought to mitigate this issue. The first of these is that, definitionally, missions have to be in accordance with the UN Charter, but, as we will see, this is not synonymous with authorised by a particular UN body, hence it may not amount to such a significant limitation as might be thought. It is, at the least, less determinate than is often thought. Second, of course, is that the victims of the attack have to be entitled to civilian status. This is a significant limit, however, it is no answer to the question of who should fall within the sub-set of such people against whom attacks are singled out for particular opprobrium.

The best way of investigating the various issues is by looking in detail at the definition of the offence. The 'bare bones' of the offence are fleshed out by the Elements of Crimes which are intended to guide the ICC in its interpretation of the Rome Statute. These provide that the elements are

> 1. The perpetrator directed an attack.
> 2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
> 3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
> 4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
> 5. The perpetrator was aware of the factual circumstances that established that protection.
> 6. The conduct took place in the context of and was associated with an armed conflict.
> 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

We will investigate the first five of these, the final two not being specific to this particular war crime.[37] Although the SCSL has not adopted the elements directly, much of what it has had to say on point relates to a provision that is, to all intents and purposes identical, so its comments are useful in interpreting the Rome Statute too, although the interpretation has not been quite the same at times.[38]

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[35] ICC OTP, Situation on Registered Vessels of Comoros, Greece, and Cambodia: Article 53(1) Report, 14 November 2014 (available at http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf [hereinafter *Mavi Marmara Report*], para 111. See also Michael Cottier and Elisabeth Baumgartner, 'Article 8(2)(b)(iii) in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart, 3rd ed., 2016) 365, 375. This piece (in the second edition) was influential on the OTP in the report.

[36] This is hinted (alongside a representative nature of peacekeeping bodies set up by the Security Council, at in Michael Kearney, 'Initial Thoughts on the ICC Prosecutor's Mavi Marmara Report' 8 November 2014, available at http://opiniojuris.org/2014/11/08/guest-post-initial-thoughts-icc-prosecutors-mavi-marmara-report/. See also Pacholska, above note 1, 48-51, noting the complexity of understanding neutrality and consent in this context, and critiquing the jurisprudence of the Tribunals on point.

[37] For discussion see Daniel Franck, 'Article 8(2)(b)(iii) in Roy S. Lee *et al*(eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 2001) 145. See also Pacholska, above note 1, 45.

[38] There are also considerable practical difficulties in prosecuting crimes against peacekeepers, but these are not within our mandate for this piece, for discussion see Mohamed A Bangura, 'Prosecuting the Crime of Attack on Peacekeepers:

1. The perpetrator directed an attack.

The main issue that had arisen in this regard is what amounts to an 'attack'. On this both the ICC and the Special Court have taken the same view, which is that the term attack is, in essence, the term as it is interpreted in the law of armed conflict.[39] Given that the offence is being prosecuted as a war crime therefore subject to the applicability requirements of that law,[40] this is understandable. Therefore the ICC, in the *Abu Garda* case[41] noted that owing to the fact that there is no definition of attack in the Rome Statute, but the chapeau to Article 8(2)(e) of the Rome Statute refers to the 'established framework of international law', and Article 21(1)(b) refers to the 'established principles of the international law of armed conflict' took the view that this referred to the Geneva Conventions, and Additional Protocol I and II.[42] This is almost certainly correct in terms of the intentions of the drafters of the Rome Statute, but it is notable that the definition of attack as part of the 'established principles of the international law of armed conflict' were taken to include (in relevant part) Additional Protocol I and II. Not all aspects of which are always considered customary. On point, those treaties probably are though.[43]

In terms of what amounts to an attack, this means, according to the ICC, following the Additional Protocols, 'acts of violence against the adversary, whether in offence or in defence'.[44] This same test was applied by the Special Court for Sierra Leone as including violent attacks that led to the killings of peacekeepers in relation to the assault on Lunsar.[45] In relation to this, it is uncontroversial. In a perhaps broader interpretation the Special Court did determine that holding peacekeepers captive, even where there was no physical abuse of them, or even physical restraint, still amounted to an attack on the basis that 'an act of violence against a peacekeeper requires a forceful interference which endangers the person or impinges on the liberty of the Peacekeeper'[46] But, in reaching this conclusion the SCSL relied on Article 9(1)(a) of the 1994 Convention, which, although relevant, is not, if we are to be strict, an international criminal law instrument, and the SCSL took the view that being kept under guard and having their belongings (including money and passports) confiscated, and being threatened by armed guards sufficed to amount to 'attacks'. Whether this may suffice for an attack more generally under the Additional Protocols and customary IHL might be questioned. What is notable here though is that the attack in and of itself does not have to lead to any harm in itself, the fact of the attack itself suffices.[47]

A Prosecutor's Challenge' (2010) 23 *Leiden Journal of International Law* 16; Sloan, above note 11, 269-276. For discussion see Pacholska, above note 1, 51-2.

[39] It ought to be noted that 'attack' in tis context it not the same as that in relation to crimes against humanity.

[40] For details on this see Robert Cryer, 'Individual Responsibility for Violations of the Law of Armed Conflict' in Timothy L.H. McCormack and Rain Livoja (eds.) *Research Handbook on The Law of Armed Conflict* (London: Routledge, 2016) 536.

[41] *Abu Garda*.

[42] *Ibid*., paras 64-5.

[43] The UK *Manual on the Law of Armed Conflict* (Oxford: OUP, 2004) 67 does not treat it as controversial.

[44] *Abu Garda*, para 65; which was relied upon by the Prosecution in its application in relation to Georgia, see Office of the Prosecutor, *Situation in Georgia*, ICC-01/15-04/Corr, Request for Authorisation of an Investigation Pursuant to Article 15, 16 October 2015, para 143.

[45] *RUF*, para 1896.

[46] *RUF*, para 1889. Threats, *per se* are not attacks, *ibid.*, see also Sandesh Sivakumaran, 'War Crimes before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments' (2010) 8 *Journal of International Criminal Justice* 1009, 1025.

[47] *RUF*, para 220, see Sivakumaran, above note 46, 1024. This is consistent with other offenses relating to civilians on the Rome Statute, see Alice Gadler, 'The Protection of Peacekeepers and International Criminal Law: Legal Challenges and Broader Protection' (2010) 11 *German Law Journal* 585, 596. See also Sloan, above note 11, 262 and Pacholska, note 1, 51-2.

2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.

This second aspect is not simple.[48] It is clear, though, given the backdrop to the adoption of the provisions traced above (which were included to compensate for the dropping of the 1994 Convention from the Statute), the broad intention was to ensure additional protection for Peacekeepers. This is not, however as clear as might be hoped. The ICC in *Abu Garda* explained the issue quite well saying that

> While noting the requirement that the peacekeeping mission be established in accordance with the UN Charter, as analysed below, the Majority considers it worth emphasizing that the UN Charter: does not define' "peacekeeping", nor does it mention the term. "Peacekeeping" developed out of practical experience, and has been described by the United Nations as a "unique and dynamic instrument developed by the Organization as a way to help countries torn by conflict create the conditions for lasting peace"…. The United Nations further states that the term "peacekeeping [...] defies simple definition" and that "[o]ver the years, UN peacekeeping has evolved to meet the demands of different conflicts and a changing political landscape UN peacekeeping continues to evolve, both conceptually and operationally, to meet new challenges and political realities".[49]

The SCSL dealt with this issue rather quickly, briefly concluding that owing to the fact that UNAMSIL was established by the Security Council meant that it was a peacekeeping mission for the purposes of the war crime.[50] The ICC entered into a little more discursive depth, looking to the classic conditions for "traditional" peacekeeping, i.e. '(i) consent of the parties; (ii) impartiality; and (iii) the non-use of force except in self-defence'.[51] What is notable here, building on the language of the Rome Statute that only requires that the mission be established 'in accordance with the United Nations Charter, and Article 52 of the Charter, the Chamber in *Abu Garda* determined that such a condition is not tantamount to a requirement that the mission be established by the United Nations only, and should also be understood to 'encompass missions that are otherwise foreseen by the UN Charter'. As such, this includes missions established by regional agencies 'based upon a collective treaty or a constitution and consistent with the Purposes and Principles of the United Nations, whose primary task is the maintenance of peace and security under the control and within the framework of the United Nations.'[52]

How broadly this might be expanded is a matter of conjecture, it may be thought that ECOWAS peacekeepers might fall under this provision, but the ambit of this statement is, to say the least, uncertain. This, in some ways returns us to the basic issue that the concept of Peacekeeping is not one that is textually based in the UN Charter, but one that has developed in practice.[53] Hence the reference to the Charter here provides little real help with respect to Peacekeepers *per se*.

Furthermore, the language of the relevant provisions of the Rome Statute is clearly not so limited, referring instead to a 'humanitarian assistance or peacekeeping mission'. 'Humanitarian assistance' is a term drawn from IHL, especially Article 55 of Geneva Convention IV and Article 61 of

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[48] Nor has the matter been simplified by inconsistent terminology here in some ICC decisions, see *Situation in Georgia*, Decision on the Prosecutor's Request for Authorisation of an Investigation, ICC-01/15, 27 January 2016, ('*Georgia* Decision on Article 15 Application'), paras 12-13.
[49] *Abu Garda*, paras 69-70.
[50] *RUF,* para 1888.
[51] *Abu Garda*, para 74. On the boundaries of self-defence here see Sivakumaran, above note 45, 1026-8, Gadler, above note 46, 590ff.
[52] *Ibid*., paras 75-6. For an earlier view see Bangura, above note 38, 172-3.
[53] See e.g. Nigel D. White, *Keeping the Peace* (Manchester: MUP, 2nd ed, 1997) Chapters 7-8.

Additional Protocol I. In the Prosecutor's report on the Mavi Marmara incident, the OTP, looking to these and academic commentary, said it was largely made up of objects indispensable to the survival of civilians, such as food, items for shelter clothing, medical supplies and the like.[54]

Referring, unlike *Abu Garda*, to the language on the UN Charter means certain significant things for such missions. The principal of these is that these missions (what amount to a mission has not been the subject of debate) must not amount to intervention,[55] hence, pursuant to the *Nicaragua* Case, they must be 'to prevent or alleviate suffering', 'to protect life and health and to ensure respect for the human being', and above all, be given without discrimination to all in need"',[56] to which the ICC has added have the consent of the relevant parties.[57]

Probably the body that would fall 'four square' within this would be the ICRC, not least because of it tradition of neutrality, and its particular role in providing humanitarian assistance and developing humanitarian law.[58] Hence it is no surprise that the OTP drew upon the practice of the ICRC to draw further consequences for what is required of humanitarian assistance missions. They opined, in a manner which is not always lapidary:

> the fundamental underlying principles of its humanitarian operations are "humanity, impartiality and neutrality". Neutrality means "not taking sides in hostilities" or "engaging at any time in controversies of a political, religious or ideological nature." For non-ICRC related humanitarian efforts, independence is generally taken as the third criteria for humanitarian relief organisations instead of neutrality. Impartiality has been defined as the "absence of any discrimination based on race, nationality, religion, political opinions or any other similar criterion, with priority given to those in most urgent need." This forms the lynchpin for obtaining the requisite consent of the parties to the conflict and is an individual obligation on relief workers themselves so as not to jeopardise their operation and compromise relief for the civilian population.[59]

This needs some unpacking. The OTP does not discus 'humanity' directly, other than insofar as it falls under the idea of humanitarian assistance, and the two have a separate existence.[60] The first form of neutrality is inherent in the nature of such missions, along the lines of traditional Peacekeeping missions (other than in individual self-defence).

The next, (of not taking positions on controversial issues) is something not always kept to by the ICRC in its developmental role, but very much its principle in field work (although upon occasion it will make a public statement, albeit in diplomatic terms, to say the least).[61] The ICRC is at one end of the spectrum on this, hence the OTP's statement that impartiality is actually non-discrimination on various grounds (including political ones). Although they do not draw the links with the *Nicaragua* Case, much of the same ground is covered there in the quote mentioned above. The links

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[54] *Mavi Marmara Report* para 111, referring to Helen Durham and Phoebe Wynn-Pope 'Chapter 10: Protecting the 'Helpers': Humanitarians and Health Care Workers During Times of Armed Conflict' (2011) 14 *Yearbook of International Humanitarian Law* 327, 330.
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid*., para 112-3. This is not to say that where there are obligations to allow humanitarian assistance, that 'technical agreements' cannot be required to govern how it is done, *ibid*., para 114.
[58] See e.g. David P. Forsythe, *The Humanitarians The International Committee of the Red Cross* (Cambridge: CUP, 2005).
[59] *Ibid*., para 113 [footnotes omitted].
[60] See e.g. Kjetil Mujezinović Larsen, Camilla Guldahl Cooper, and Gro Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge: CUP, 2012).
[61] For an example see 'ICRC Condemns Bombing of MSF Hospital in Kunduz' 3 October 2015 available at https://www.icrc.org/en/document/afghanistan-icrc-condemns-bombing-msf-hospital-kunduz.

between the concepts, however, are not entirely clear and interpreted consistently.[62] So MsF declares itself dedicated to the principles of neutrality and independence, this may, in certain situations may be questioned (which is not to say that they are wrong in doing so, neutrality is not always the best option).For example, it would be difficult to imagine to imagine, for example, the ICRC following MsF and publicly broadcasting that the medicines it has used in more than sixty countries were made (off patent) in India, and directly calling on the Indian Prime Minister not to give in to pressure from developed States to end the production of 'generic' medicines.[63] Although this, admittedly, did not relate to a specific conflict. On the other hand and perhaps understandably, MsF have been very outspoken about US bombing of its facilities, demanding an independent inquiry into it (although the ICRC, again more diplomatically, and not going as far, made statements in cognate circumstances that have made their displeasure known).[64]

What is problematic here is that there is, seemingly an instrumentalisation of non-discrimination. This is not consistent with the equal application of IHL, the commitments State enter into when they ratify IHL treaties are deontological, not simply reciprocal commitments, as the ICTY has made clear.[65] Political statements are not, in the vast majority of circumstances, direct participation in hostilities.

> *3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.*

This aspect, so far has accused little practical difficulty. This is owing to the fact that the charges brought for attacks on peacekeepers have in all cases, been brought on the basis that the attacks concerned (or alleged to be) were undertaken on the basis that the direct objects of the attack were peacekeepers. In other words, on the basis that the defendants were fully aware of the status of the victims as protected persons in the sense of the Rome Statute and that the attacks on them were precisely that they were peacekeepers and that attacking peacekeepers had a broader symbolic aspect.[66] It is undoubtedly the case that there are issues with what intention means in international criminal law, and there is considerable literature on point,[67] but they have not really been at issue here.

> *4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.*[68]

As discussed above, one of the compromises in the Rome Statute was that peacekeepers are only specifically protected as such insofar as they are entitled to civilian status under IHL. Article 8(2)(iii)

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[62] Durham and Wyn-Pope, above note 53, 331-32.
[63] *Médecins Sans Frontières* <http://handsoff.msf.org/>.
[64] ICRC Press Releases 01/43 "ICRC Warehouse Bombed in Kabul" 16 October 2001, ICRC Press Release 01/48, "Bombing and Occupation of ICRC Facilities in Afghanistan" 26 October 2001, see Robert Cryer, 'The Fine Art of Friendship: (2002) 7 *Journal of Conflict and Security Law* 37, 53-4.
[65] *Prosecutor v Kupreškić*, Judgment, IT-95-16-T, 14 January 2001, paras 515-20.
[66] *Prosecutor v Brima, Kanu and Kamara,* Judgment, SCSL-2004-16-T, 20 July 2007, (hereinafter *AFRC*) paras 1901-5.
[67] See e.g. Mohamed Elawa Badar, *The Concept of Mens Rea in International Criminal Law* (Oxford: Hart, 2013); Roger S. Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 *Criminal Law Forum* 291. For the view that the crime requires (in civilian terms) *dolus directus* in the first degree see Kai Ambos, *Treatise on International Criminal Law: volume II: Crimes and Sentencing* (Oxford: OUP, 2014) 175. For reasons of space we will not enter into this particular debate here. Suffice it to say that we are sceptical that such a high *mens rea* is required, and so far, the issue has not proved important. It may well do so, but that is something for a different day.
[68] See further Pacholska, above note 1, 52-60. The ICC has not been especially helpful on pot, see *Georgia* Decision above note 47, para 29; *Prosector* v *Bemba,* Judgment, ICC-01/05-01/08, 21 March 2016, para 94.

thus contains an express renvoi to the law of armed conflict on point. Not that such a reference refers out to a clear, simple area of law. Direct Participation in Hostilities, is, shall we say, somewhere south of settled,[69] never mind in the context of peacekeeping missions, where the concept of self-defence is even more complex.[70]

Still, in this specific context, the subject has been the subject of considerable discussion by the SCSL. In the *RUF* case, the SCSL looked in depth at the status of UNAMSIL, and decided, rightly, the question turned on whether or not its members were directly participating in hostilities.[71] Given the huge controversy over the issue, some judicial consideration of the issue is welcome.[72] They decided to look at ‘the totality of the circumstances surrounding the establishment, deployment and operation of the UNAMSIL mission in Sierra Leone and the interactions between UNAMSIL and the RUF’ to decide this. In doing so, they largely followed the criteria previously announced by the Trial Chamber in the *Sesay* case. These were

> (a) the relevant Security Council resolutions for the operation; (b) the role and practices actually adopted by the peacekeeping mission during the particular conflict; (c) their rules of engagement and operational orders; (d) the nature of the arms and equipment used by the peacekeeping force; (e) the interaction between the peacekeeping force and the parties involved in the conflict, (f) any use of force between the peacekeeping force and the parties in the conflict, and (g) the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.[73]

In relation to UNAMSIL’s mandate, Resolution 1270 set up UNAMSIL and was, in part a Chapter VII resolution, however, the Chamber determined that overall it was set up under Chapter VI, not least as the parties had consented to the mission, and the nomenclature used did not determine the issue, but the actual mandate given.[74] In paragraph 14 of Resolution 1270, the sole mandate to use force, UNAMSIL members were only permitted to ensure its own safety and freedom of movement, and to protect civilians from physical violence. In other words, in defence of itself or others.

The Chamber determined that this was simply the Security Council granting its imprimatur to the rights of self-defence UNAMSIL already had. Some question may be raised about this.[75] However, the Chamber then also looked to UNAMSIL’s Rules of Engagement ad Operational orders, neither of which provided for the use of force other than for defensive purposes.[76] Turning to UNAMSIL’s practice the Chamber placed considerable stock in the fact that their practice was to build

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[69] On point generally see Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC: Geneva, 2009), and the multifarious commentaries thereupon: e.g. Dapo Akande, Clearing the Fog of War: The ICRC’s Interpretative Guidance on Direct Participation in Hostilities’ (2010) 59 *International and Comparative Law Quarterly* 180. For harsh critique see W. Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study, No Mandate, No Expertise, and Legally Incorrect’ (2009-2010) 42 *New York University Journal of International Law and Politics* 769, *contra* Nils Melzer, ‘Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’ (2009-10) 42 *New York University Journal of International Law and Politics* 831. For what it is worth, at least one of us has some sympathy for it, see Robert Cryer, ‘The ICRC Guidance on Direct Participation in Hostilities: See a Little Light’ in, Robin Geiß, Andreas Zimmermann, and Stefanie Haumer (eds.), *Humanizing the Laws of War - the Red Cross and the Development of International Humanitarian Law* (Cambridge: CUP, forthcoming 2016).

[70] See e.g. White, above note 15, 101-3, Sloan, above note 11, 282-4.

[71] *RUF,* para 1906.

[72] Although, for critique, see Pacholska, above note 1, 59-60.

[73] *RUF*, para 234, as parsed in *Abu Garda* para 84.

[74] *RUF,* para 1909.

[75] *Ibid.,* para 1911.

[76] *Ibid.*, paras 1912-17.

constructive relationships with the parties, and ensure they understood that disarmament was voluntary, and they would not enforce it.[77]

Where there had been the use of force by UNAMSIL the Chamber determined that it was only as a proportionate measure of self-defence, hence not direct participation in hostilities, although it ought to be said that its reasoning is not lengthy here.[78] Furthermore, the Chamber opined, UNAMSIL was lightly armed, ans some parts were unarmed.[79] As a result UNAMSIL members were considered by the SCSL as being protected as civilians.[80] It might be queried whether this is objectively correct, but it does show that the decisions on point are complex, factually contingent, and not easily reduced to abstractions.

The ICC, in the *Abu Garda* case, took a more treaty-based approach, looking to Additional Protocols I and II, noting that civilians are protected by those Treaties (which on point probably reflect customary law) so long as they do not directly participate in hostilities.[81] On the basis of ICTY jurisprudence and (more awkwardly) the first ICC Judgment the *Lubanga* case, they determined that 'under the Statute, personnel involved in peacekeeping missions enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities. The Majority also found that such protection does not cease if such persons only use armed force in exercise of their right to self-defence.'[82] They also noted the criteria mentioned above in the *Sesay* case.[83] On these bases, they concluded that AMIS personnel were peacekeepers entitled to protection as civilians for the purposes of the Rome Statute. What is interesting though is the level of inter-judicial dialogue here, and the extent to which the ICC has, in this regard, taken on board the jurisprudence of the ICTY and SCSL. Inter-judicial influence has proved important in international criminal law[84] and on this point, it has served to some extent as a barrier to the fragmentation of international criminal law, which is, largely, to be commended.[85] However consistency between the relevant Courts and Tribunals has not been the case for the next aspect of this crime.

5. The perpetrator was aware of the factual circumstances that established that protection.

What is important about this criterion is that it does not require that the legal judgment had been made by the suspect that the peacekeepers were actually entitled to protection afforded to civilians. Here though, we see a disjunction between the jurisprudence of the SCSL and the ICC. In the *RUF* case the SCSL perhaps in accordance with its rather broad approach to *mens rea*, which tends towards recklessness (or sometimes here being one example) of something approaching negligence,[86] has asserted that

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[77]*Ibid.,* paras 1918-21.
[78] *Ibid.,* paras 1925-36.
[79] *Ibid.,* paras 1922-4.
[80] *Ibid.,* para 1937.
[81] *Abu Garda* paras 77-9. Although their reference to Article 43 as excluding protection is perhaps more controversial, although not in this context.
[82] *Ibid*., paras 80-83, the quotation being from para 83.
[83] Space constraints prevent the detailed investigation of the protection of peacekeeper's installations and the like as civilian objects here.
[84] See e.g. Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* Cambridge: CUP, 2014).
[85] Robert Cryer 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' (2009) 12 *New Criminal Law Review* 390. Although see Elies van Sliedreght and Sergey Vasiliev (eds.), *Pluralism and International Criminal Law* (Oxford: OUP, 2015).
[86] See Cryer, Friman, Robinson and Wilmshurst, above note 24, 382.

> We are of the opinion that the Prosecution is not required to establish that the perpetrators had knowledge of the legal protections afforded to peacekeepers under international humanitarian law. Rather, this element of Count 15 will be made out where the perpetrators knew or had reason to know of the factual basis for the protection: that is, that the peacekeepers were not taking a direct part in hostilities at the time of the attack.[87]

This was not irrelevant to their findings, in that they found that

> even if some or all RUF fighters did subscribe to a belief that the UNAMSIL peacekeepers were taking part in hostilities, the RUF fighters had reason to know of the peacekeepers' protected status, on account of UNAMSIL's mandate as originating in the Lomé Agreement; UNAMSIL's practices in Sierra Leone and interactions with the RUF in the preceding months; the nature of UNAMSIL's arms and equipment; and the use of force by peacekeepers only in self-defence. On the totality of the evidence, the actions of the peacekeepers in the circumstances were not reasonably capable of being construed as participation in hostilities.[88]

The ICC, in accordance with Article 30 of the Rome Statute, has taken a sterner view, requiring that the suspect had knowledge of the relevant facts, not merely a reasonable understanding of them.[89] As they said,

> this fifth element under article 8(2)(e)(iii) of the Elements of Crimes excludes the defence of mistake of law provided for in article 32 of the Statute, as only knowledge in relation to facts establishing that the installations, material), units or vehicles and personnel were involved in a peacekeeping mission is necessary, and not legal knowledge of the protection thereof.[90]

This is a quite significant difference, in that the mental element is now framed in terms of knowledge. It stands in notable contrast to the approach taken, for example to the Elements of Crimes for other war crimes, such as that of the use of child soldiers, where the more lax 'should have known' standard ,which has been interpreted as being a negligence level standard has been taken by the ICC in the *Katanga* Case.[91] Whatever the merits of the relevant *mens rea* standards it is not at all clear why different approaches were adopted for the relevant statuses.

PEACEKEEPERS AS CRIMINALS: CRIMINAL RESPONSIBILITY OF PEACEKEEPERS

Having looked at crimes against peacekeepers, which reflect their often assumed special status in international law, we now turn to the individual criminal responsibility of peacekeepers for the crimes committed during peacekeeping operations (PKOs) in the territory of states where they are deployed ("host states"). There are two distinguishing features of the individual criminal responsibility of peacekeepers. Firstly, while being deployed in the host state, peacekeepers commit crimes outside the territory of their state of nationality or their troop contributing country ("TCC"). The question of state jurisdiction arises. Secondly, the international status of peacekeepers may attract international immunities from prosecution in domestic courts. The scope of their immunities and the way the immunities affect individual criminal responsibility of peacekeepers also needs to be explored.

[87] *RUF* para 1938. For critique, see Sloan, above note 11, 274-5; Pacholska, above note 1, 61-4.
[88] *Ibid*., para 1942.
[89] *Abu Garda*, para 94.
[90] *Ibid*., para 94.
[91] See e.g. *Prosecutor v Katanga*, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008, paras 152-153.

In this sense it is important to distinguish between jurisdiction and immunities from jurisdiction. As it was pointed out by the International Court of Justice ("ICJ") in the *Arrest Warrant* case, only where a state can establish jurisdiction the question of immunities with regard to exercise of that jurisdiction can be considered.[92] At the same time the jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.[93] Another distinction should be made between jurisdiction and immunities in domestic courts and jurisdiction and immunities of international courts. They will be considered separately in different parts of this section. The International Criminal Court ("ICC") and its jurisdiction and immunities will be taken as an example because of its permanent nature and broad geographical scope of its jurisdiction.

Individual criminal responsibility of peacekeepers in domestic courts

With regard to criminal jurisdiction over crimes committed by peacekeepers in the territory of host states two questions ought to be considered: first, whether the host state and TCCs are entitled to exercise their jurisdiction over peacekeepers; and second, whether they are obliged to do so under international law. Here, we focus on analysing of prescriptive jurisdiction (as opposed to enforcement jurisdiction) which concerns state's ability to criminalise particular conduct and can be based on the following principles: territoriality, nationality, passive personality, the protective principle, and universal jurisdiction.

These principles apply identically to situations where peacekeepers commit crimes. However, it is also the case that States are entitled to waive jurisdiction. Such a rule is contained in the United Nations Status of Force Agreements, bilateral agreements, which are normally concluded between the UN and host states on the status of PKOs. Although for each PKO a separate agreement is normally concluded, they are usually based on the UN Model of Status of Force Agreements ("UN SOFA").[94] The UN SOFA provides that "military members of the military component of the [UN PKO] shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [host country/territory]."[95] This provision suggests that only TCCs and no other state (including the host state) can exercise jurisdiction over crimes committed by peacekeepers.

The following observations need to be made in this regard. Firstly, the UN SOFA excludes territorial jurisdiction of the state over all crimes, including the most serious ones, and not simply provides immunities for peacekeepers. Accordingly, there is no possibility for waiver of this rule (as it may be the case with immunity provisions).[96] The consequences of operation of this provision may be far-reaching, especially because it is not conditioned on the state of nationality exercising jurisdiction over a crime. It may result in impunity of peacekeepers committing serious crimes, if their state of nationality for any reason fails to prosecute them.[97]

[92] *Case* C*oncerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgement, ICJ, 14 February 2002 ("*Arrest Warrant")* case, para 46. Even though the ICJ declined to consider the question of jurisdiction of Belgian courts in this case owing to the fact that the Congo ultimately abandoned its arguments in this regard, the distinction between jurisdiction and immunities was spelled out by the Court.
[93] *Arrest Warrant*, para 59.
[94] Report of the Secretary-General, Model Status-of-Forces Agreement for Peace-Keeping Operations, 9 October 1990, A/45/594, ("UN Model SOFA"). See G. Simm, "International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers" (2012) 17 *Journal of Conflict & Security Law* 473, 500. The present analysis will focus on the UN Model SOFA.
[95] UN Model SOFA, para 47(b).
[96] See also Derek W. Bowett, *United Nations forces: a legal study of United Nations practice* (Stevens, 1964) 441.
[97] See also Simm, above note 93, 506; R. Burke, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity" (2011) 16 *Journal of Conflict & Security Law* 63, 92.

Secondly, as SOFAs are, by their nature, bilateral they only bind the UN and the host state and cannot preclude other states (non-parties to the agreement) establishing jurisdiction and prosecuting peacekeepers for the crimes committed in the host state where they have a basis in international law for doing so. In particular, although not solely, this relates to those states that are willing to assert jurisdiction on the basis of passive personality principle, especially where the victim of a crime may have nationality of a neighbouring state.[98] The host state may be more willing to extradite a peacekeeper to a neighbouring state, should it decide to request that action, than to wait for the TCC to take any action with regard to members of its national contingent.

Were this to occur, the question arises of whether the host state is allowed to extradite a peacekeeper to a third state. On one hand, the host state does not need to establish jurisdiction over the offence committed by the peacekeeper in order to extradite him to the state which has already lawfully established its jurisdiction, subject to the double criminality rule. On the other, the decision to extradite may violate other provisions of the UN SOFA concerning immunities (para 46) or the provision regulating arrest of peacekeepers by the host state (paras 42(b) and 43), which provide that if arrested, peacekeepers should be immediately transferred to representatives of the PKO. Accordingly, even if any other state established jurisdiction over a crime committed by the peacekeeper and requested extradition from the host state, the host state may still be precluded from complying with that request. Given this, in practice only the states of nationality of TCCs may be able to exercise jurisdiction over crimes committed by peacekeepers. The host states are precluded to do so by virtue of the UN SOFA, whereas all other states although in principle entitled to establish their jurisdiction, may be precluded to prosecute peacekeepers as their extradition requests cannot be satisfied by the host states.

The next question is whether the states under certain circumstances are obliged to exercise jurisdiction over the crimes committed by peacekeepers. Such obligations can derive from some treaties of multilateral character. The two most relevant treaties to the crimes committed by peacekeepers, are the UN Convention against Torture (“CAT”) and the Geneva Conventions (GCs).

The CAT provides for three obligations of the states parties relevant to the present analysis: an obligation to establish jurisdiction (Article 5), to take a suspect into custody (Article 6) and to prosecute or extradite an accused (Article 7). These obligations need to be further examined in the light of the UN SOFA and peacekeepers’ special status in the host state.

The obligation of state parties under Article 5 is not particularly affected by the UN SOFA. It simply requires states to provide under its national law a basis for exercise of territorial, national or universal jurisdiction, should the occasion arise that a perpetrator of torture is found in its territory. Whether or not such a basis exists in the national law of the host state does not affect the question of whether the host state must actually exercise its jurisdiction over the crimes and prosecute the peacekeepers for them.

The obligation under Article 6 to take into custody a person suspected in committing torture does not suggest that the host state will exercise jurisdiction and prosecute peacekeepers for the crimes committed either. A person taken into custody may be further released or transferred to another state which is prepared and able to exercise jurisdiction. This obligation is however relevant to other provisions of the UN SOFA that restrict the actions of the host state in arresting peacekeepers. In this regard the host state’s powers are limited to the possibility of taking into custody a peacekeeper

[98] See also Z. Deen-Racsmany, “The Amended UN Model Memorandum of Understanding: a New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?” (2011) 16 *Journal of Conflict & Security Law* 321, 353.

apprehended in the commission or attempted commission of a criminal offence.[99] Moreover, that person must be immediately delivered to the representative of the PKO.[100] After that the host state may conduct an investigation into offences,[101] but no other actions can be taken by the host state beyond that, because as soon as a suspected offender is transferred to the UN, the provision providing for exclusive jurisdiction of the TCC, applies.[102] It will be for the UN to take any further actions in respect of the peacekeeper.

Although the host state's obligations under Article 6 CAT may be fulfilled, when it apprehends the peacekeeper in the commission of the offence (taking him into custody or taking other legal measures to ensure his presence),[103] the fact that the state's powers are limited to the cases of such apprehension means that if the host state receives information that a suspected offender has already committed the crime of torture (as oppose to currently committing), the state may not be able to take the peacekeeper into custody in contravention to Article 6 CAT. The UN, however, may take a more proactive role in this regard by taking the peacekeeper into its custody. Suffice it to say (diplomatically) however, this is not the norm.

A state's obligation under the CAT that appears to be the most affected by the UN SOFA provisions is the *aut dedere aut judicare* principle under Article 7 CAT. It requires the state parties to submit the case concerning a suspect in a torture-related offence to the competent authorities for the purpose of prosecution or to extradite them. The *aut dedere aut judicare* obligation provided for in Article 7 clearly depends on the presence of the alleged offender in the state's territory. The principle requires the states to prosecute an offender in its custody or extradite him to another state having links with the offender or the crime.[104] However, as it was pointed out by the Committee against Torture and the ICJ, the obligation to prosecute the alleged perpetrator for acts of torture does not depend on the prior existence of a request for his extradition or any condition other than presence of the alleged offender in the state's territory.[105] Therefore, if no other state has issued an extradition request, the state where the perpetrator is found is obliged to submit the case for the competent authorities for the purpose of prosecution, which may or may not result in institution of proceedings.[106] The state will not be obliged to prosecute an alleged offender only if it can show that there is no sufficient evidence to prosecute,[107] but still will have to extradite that person, if any extradition request was made.[108]

Thus, but for the UN SOFA, the host state (if it is a state party) has an obligation under the CAT to establish jurisdiction over the crimes allegedly committed by peacekeepers in its territory and either to extradite those peacekeepers, which are still present there (if another state has issued an extradition request), or to submit the case to its competent authorities for prosecution. The UN SOFA, however, makes it impossible excluding jurisdiction of the host state over peacekeepers completely leaving the host state with potentially contradicting obligations: to exercise jurisdiction over peacekeepers who have allegedly committed acts of torture in its territory under the provisions

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[99] UN SOFA, para 42(b).
[100] *Ibid*., para 42(b).
[101] *Ibid*., para 44.
[102] *Ibid*., para 42; para 47.
[103] See Article 6(1) CAT.
[104] See e.g. Neil Boister, *An Introduction to Transnational Criminal Law (*Oxford: OUP 2012) Chapter 12.
[105] *Question Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgement, ICJ, 20 July 2012, ("*Habré* case"), para 94; *Suleymane Guengueng et al. v Senegal*, Communication No. 181/2001, Judgement, Committee against Torture, 19 May 2006, CAT/C/36/D/181/2001, ("*Suleymane Guengueng* case"), para 9.7; see also M. Nowak, E. Mcarthur, K. Buchinger, *The United Nations Convention against Torture: a Commentary* (Oxford University Press, 2008) 360.
[106] See also the *Habré* case, paras 90, 94.
[107] *Suleymane Guengueng* case, para 9.8.
[108] See *ibid*., para 9.11.

of the CAT or to refrain from exercising any criminal jurisdiction over peacekeepers under the UN SOFA.

Prima facie, this situation may seem to be analogous to the one that concerns immunity from prosecution of heads of state and some other high-ranking officials who enjoy personal immunities under customary international law.[109] However, although the result may be the same (like those high-ranking officials, peacekeepers are exceptionally unlikely to be prosecuted in the host state), the legal basis of exclusion of such prosecution is different. As it was pointed out by the ICJ in the *Arrest Warrant* case, the rules governing jurisdiction are separate from those governing immunities: although some conventions impose on the states obligations of prosecution or extradition, they in no way affect immunities, which "remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions."[110] Accordingly, with regard to those immunities, the states can, in principle, exercise jurisdiction over people enjoying such immunities (and thus fulfilling the obligations under the relevant treaties, including the CAT), but they will not be able to prosecute those persons when the immunities are invoked in court. It should be also reiterated that under Article 7 CAT, states are required only to submit the case relating to the relevant suspect to the competent authorities for the purposes of prosecution. This may or may not result in an actual prosecution. Therefore there is no direct contradiction between the CAT and personal immunities of the high-ranking officials.[111]

The same may not be true for the provisions of the UN SOFA excluding host state jurisdiction over the peacekeepers, who may commit the acts of torture. Because the provisions concern the host state's jurisdiction rather than immunities, the rules governing jurisdiction (and not immunities) apply. By virtue of the UN SOFA the host state cannot establish and exercise its jurisdiction over the peacekeepers allegedly committing torture or submit their case to the competent authority for the purposes of prosecution, and therefore may violate its obligations under the CAT. If jurisdiction is not established, the question of immunities does not arise.

This analysis in relation to host state obligations under CAT has shown that the host state's obligations under international conventions of humanitarian nature may conflict with the relevant State's UN SOFA. Our other example of conventions with obligations to establish jurisdiction and prosecute of direct relevance to PKOs is the GCs. They provide similar obligations with respect to conduct that amounts to grave breaches of those conventions, although the language used there is different.[112] The obligation of states to search for alleged perpetrators of grave breaches of the GCs corresponds to the obligation of the states to take the offenders into custody provided by Article 6 CAT. The same is true for the obligation to bring such persons before the state's own courts, or alternatively to hand the persons over for trial to another state party, which corresponds to the analogous obligation to submit the case to its competent authorities for the purpose of prosecution or to extradite the offender under Article 7 CAT. Therefore the state is required under the GCs to search for (and potentially arrest) and in the absence of extradition, to prosecute those suspects who are present in its territory.[113]

The host state under GCs may find itself in a similar position here as with the CAT, where it is bound to establish jurisdiction and prosecute peacekeepers under the GCs and is prohibited to do so by the relevant SOFA. Accordingly, the question of immunities of peacekeepers may not even arise,

[109] See *Arrest Warrant* case, para 51.
[110] *Ibid*., para 59.
[111] See also *Arrest Warrant* case, para 59.
[112] GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146.
[113] See Commentary to Article 148 GC IV; see also Roger O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction", (2009) 11 *Journal of International Criminal Justice* 811-831, 828; Claus Kress, "Reflections on the *Iudicare* Limb of the Grave Breaches Regime" (2009) 11 *Journal of International Criminal Justice* 789, 800.

if the host state is unable to establish jurisdiction over the crimes committed by them at the first place. Although the UN SOFA provides peacekeepers with immunities *ratione materiae* in respect of words spoken or written and all acts performed in their official capacity,[114] they will have limited effect in relation to criminal proceedings against them in the host state, as the criminal jurisdiction of the host state has already been excluded. Equally, the provisions of the UN SOFA are not binding on other states (including TCCs) and therefore such immunities would not extend beyond the host state's borders, should any other state decide to assert its jurisdiction over the relevant peacekeepers. Whether they would do so or not is, admittedly, another question.

Individual criminal responsibility of peacekeepers in the ICC

National courts are, though, not the only possible forum for the prosecution of peacekeepers. Hence, this section will further analyse whether the international status of peacekeepers may affect the ICC's possible jurisdiction over international crimes committed by them. With regard to this two issues need to be analysed: firstly, whether the UN SOFA excludes the ICC jurisdiction in general or self-referrals by the host states in particular; and secondly, how the UN SOFA affects complementarity with respect to the ICC.

Comment [rc1]: I think we ought to refer to the issue of jurisdiction being over a situation here too. Rather than later

With regard to the first point, it should be reiterated that the UN SOFA only binds the UN and the host state. Therefore the ICC, as a non-party to such agreements, is not bound by their terms, and could, therefore, exercise its jurisdiction irrespective of their existence. If both the host state and TCC are state parties to the ICC Statute, there is no question of jurisdiction. If the host state is a state party, but not the TCC, the situation is the same, because although the host state jurisdiction is excluded by the SOFA, the ICC is not a party to the SOFA and therefore its jurisdictional provisions operate independently from the SOFA. The US's controversial practice in relation to Security Council Resolutions such as 1422 and 1487 is good evidence that it did not think that the SOFA itself is sufficient.[115]

As for self-referrals by host states, the UN SOFA does not explicitly prohibit a referral of the relevant situation to an international court. It excludes the jurisdiction of the domestic courts of the host state, and not jurisdiction of all other courts in the world. Moreover, the state would refer a "situation" and not a particular peacekeeper to the ICC. Neither would it be in a position to influence a choice of crimes under consideration by the ICC prosecutor. To consider a particular provision of a UN SOFA as precluding the host states from referring its internal situation to the ICC would be too far to extend the reach of its provisions. Therefore the host state will not be precluded by the UN SOFA to refer its own situation to the ICC prosecutor. Whether or not the Prosecutor would, as a matter of practice, choose to indict a peacekeeper is a separate matter.

[114] UN SOFA, para 46.
[115] On the US practice regarding Security Council Resolutions 1422/1487, see e.g. Carsten Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)", (2003) 14 *European Journal of International Law* 85; Salvatore Zappalà, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements' (2003) *1 Journal of International Criminal Justice* 114; Neha Jain, 'A Separate Law for Peacekeepers: the Clash between the Security Council and the International Criminal Court' (2005) 16 *European Journal of International Law* 239.

However, even if a state refers the situation to the ICC prosecutor or he/she initiates the investigation *proprio motu*, the case may still be declared inadmissible.[116] This is because the Court's jurisdiction is based on the principle of complementarity. In relation to this, it is necessary to consider whether the investigation conducted by the UN or the host state itself count with respect to Article 17, if neither of them would be able to prosecute the peacekeepers (the UN, because it does not have such capacity,[117] and the host state by virtue of the SOFA provision on the exclusive jurisdiction of the TCC). UN investigation seems to be excluded because the UN is not a state, and Article 17 (a), (b) and impliedly (c) apply only to the states' investigations.

Moreover, with regard to the host state, it seems that its investigation would also be excluded because both paragraphs (a) and (b) and impliedly (c) refer to the investigation or prosecution by a state "which has jurisdiction over" the case. The host state's jurisdiction is excluded by the relevant SOFA. Therefore, the host state does not have jurisdiction and its investigation cannot lead to a prosecution. This cannot be considered enough to exclude the jurisdiction of the ICC by virtue of Article 17. It seems that only the genuine investigation or prosecution by the TCC would suffice to require the ICC to declare the case inadmissible where the peacekeepers were involved. There may be situations where other states may initiate investigation or prosecutions, but any examples which exist are vanishingly small. Therefore, in an appropriate case the ICC may step in, if the TCC does not start an investigation or prosecution of the crimes committed by peacekeepers.

If the ICC is able to establish jurisdiction over the crimes committed by peacekeepers, owing to Article 27 ICC Statute, which provides for the irrelevance of official capacity and the immunities attached to it, peacekeepers will not be able to enjoy the *ratione materiae* immunities provided for by the UN SOFA against the ICC. As for the provision on the exclusive jurisdiction of the TCC over peacekeepers, it will not be relevant because it does not provide for any immunity, but rather excludes jurisdiction of domestic, not international, courts.

There is another provision – Article 98(2) of the ICC Statute, which may be relevant to the immunities provided by the SOFA. This article provides that the Court may not request surrender or assistance from the state which would have to violate, in particular, its obligations under international agreements, where the consent of a sending state for surrender is required.[118] However, even if Article 98(2) is applicable in situations covered by the UN SOFA, its application will have a limited effect. The application of Article 98 will not affect the ICC's jurisdiction and a peacekeeper can still be indicted and prosecuted (if surrendered to the ICC), because the ICC Statute treats the question of immunities for peacekeepers under the heading of cooperation and surrender of persons to the court, and not as an issue of jurisdiction.[119] Any other state party must comply with the Court's request for cooperation and surrender such person to the ICC, once it finds them present on its territory. Moreover, this provision may prevent surrender of nationals of non-parties only and may not apply where the TCC is a state party to the ICC Statute.[120] Therefore this provision may

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[116] Even with respect to self-referrals the Court conducts an admissibility analysis. See *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", 25 September 2009, ("*Katanga* Appeal Admissibility Decision"), paras 80-83.
[117] The UN does not have a court martial or other integrated penal system to deal with crimes committed by peacekeepers. See Marten Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?" (1999) 11 *European Journal of International Law* 124, 127-128.
[118] ICC Statute, Article 98(2).
[119] Carsten Stahn, above note 115, 94.
[120] See e.g., Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", (2004) 1 *Journal of International Criminal Justice* 618, 643; see also Paoula Gaeta, "Does President Al Bashir Enjoy Immunity From Arrest?" (2009) 7 *Journal of International Criminal Justice* 315, 328, who argues that by accepting the provision embodied in Article 27(2) the state-parties, unlike non-state parties (who are not bound by the ICC Statute), waived their rights for immunities before the ICC and therefore 'the ICC Statute contains a derogation

have effect only in relation to the host state, when a peacekeeper of a non-party to the ICC, is present there.

The obligation under the UN SOFA that the host state may infringe while complying with the Court's possible request for surrender, does not derive from the provision requiring exclusive jurisdiction of the TCCs over peacekeepers,[121] as it regulates the question of allocation of jurisdiction between the host state's courts and TCC's courts, and does not affect the issue of surrender to an international court which has jurisdiction. Nor does it concern the jurisdiction of international courts, as opposed to national ones. Moreover, the provision on *ratione materiae* immunity for official acts of peacekeepers[122] does not preclude the host state from surrendering a peacekeeper to the ICC either by virtue of Article 27 ICC Statute, where this immunity is expressly excluded. Therefore the only obligation under the UN SOFA that may preclude the host state from surrendering a peacekeeper to the ICC is the obligation to not to arrest peacekeepers, except in very limited circumstances.[123]

Therefore if the ICC issues a request for surrender, the host state may be precluded from arresting a peacekeeper or if arrested, must deliver him to the UN. However, the UN SOFA does not expressly preclude the host state from complying with a surrender request issued by the ICC. Any such possibility will depend on the willingness of the UN to cooperate with the Court. At the same time, the ICC itself may not be precluded from issuing a surrender request to the host state, which is under the obligations of the UN SOFA, simply because of specific nature of the UN SOFA it may not be covered by Article 98(2). There is no provision in the UN SOFA which would require the consent of a sending state to surrender a person of that state to the Court.[124] Neither does the UN SOFA explicitly prohibit the surrender of peacekeepers, especially to an international court. Even if it could be inferred from the UN SOFA that the consent of the UN is required (as it is an agreement between the UN and the host state), it is not "a sending state", as provided by Article 98(2). Therefore the application of Article 98(2) to a UN SOFA is, in fact questionable.

Comment [rc2]: I',m not sure that this could occur

CONCLUSION

To end as we began, the legal position of peacekeepers is not simple, and has arisen by practice rather than been based on principle. Furthermore, the position of peacekeepers as both vulnerable and powerful, depending on the situation, requires that their legal position needs to be understood through various lenses. Therefore crimes against peacekeepers need to be effectively prosecuted at the national or international level. It is heartening that the Rome Statute, the ICC and SCSL, have taken on this challenge, especially given that the 1994 Convention has not proved in any way effective to prevent or properly ensure the prosecution (and stigmatisation) of crimes against peacekeepers. Their practice on point also does show some interesting issues of inter-judicial dialogue, fragmentation, and influence in international criminal law which deserve further investigation.

On the other hand, irrespective of existing immunities of peacekeepers under the standard UN SOFA, the jurisdiction of host states in relation to peacekeepers is excluded by UN SOFAs and is unable to exercise jurisdiction over peacekeepers, even when they commit serious crimes, even where host states are obliged to exercise such jurisdiction under certain international conventions

from the international system of personal immunities for charges of international crimes, but only among state parties to the Statute.'

[121] UN SOFA, para 47(b).
[122] *Ibid.*, para 46.
[123] *Ibid.*, para 42.
[124] ICC Statute, Article 98(2).

which contain *aut dedere aut judicare* obligations. However, the SOFA provisions bind only the host state and the UN but not any other state, including the TCC. At the same time, the ICC is not precluded from exercising jurisdiction over peacekeepers as the UN SOFA contains no provision preventing the ICC jurisdiction over peacekeepers. Moreover, Article 27 of the ICC Statute excludes peacekeeper's immunities. Article 98(2) may take into account the host state's obligations under the UN SOFA not to arrest and/or surrender peacekeepers to the ICC. However, its application to the UN SOFA is doubtful.

We have sought to how in this piece that the legal regime concerning crimes by and against peacekeepers arises at many liminal points, between national implementation and international criminal law, transnational law, and the relationship of both to general international law, including the law of international organisations. We call for a holistic approach, but in an international legal order that remains disaggregated and, sadly, deeply divided, we do not pretend to be optimistic that this will come about any time soon.