

# **Victims of Peace: Current Abuse Allegations against U.N. Peacekeepers and the Role of Law in Preventing them in the Future.**

## **I. INTRODUCTION**

Peacekeepers, and peacekeeping, have had a special place in society since the time of the Bible,<sup>1</sup> and indeed have taken on a new, international dimension since the end of World War II and the creation of the United Nations.<sup>2</sup> Unfortunately, since the creation of the United Nations peacekeepers (U.N. peacekeepers) as a reality of international conflict intervention,<sup>3</sup> a disparity in how one defines peacekeepers has been created. For laymen, Webster's Dictionary defines "peacekeeping" as "the preserving of peace."<sup>4</sup> For lawyers, Black's Law Dictionary does not define the term outright, but defines the concept of "peace" at law as "[a] state of tranquility; freedom from civil disturbance or hostility."<sup>5</sup> However, for an increasingly visible number of people living in the areas to which U.N. peacekeepers have been deployed, peacekeepers are defined in other terms: rapists,<sup>6</sup> patrons of prostitutes,<sup>7</sup> child pornographers,<sup>8</sup> molesters,<sup>9</sup> absentee fathers,<sup>10</sup>

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<sup>1</sup> Matthew 5:9.

<sup>2</sup> See MICHAEL P. SCHARF, *THE LAW OF INTERNATIONAL ORGANIZATIONS* 1-10 (2001) (describing the Allies' efforts to create and implement a functional international organization, known as the U.N., in the wake of their victory in World War II).

<sup>3</sup> *Id.* at 477 – 524 (outlining the administrative and legal governance of U.N. peacekeepers). See also GEERT-JAN ALEXANDER KNOOPS, *THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW* 1-3 (describing the recent expansion of the peacekeeping function of the U.N. in terms of troops and monetary expenditures).

<sup>4</sup> *Peacekeeping*, MERRIAM-WEBSTER ONLINE, available at [www.m-w.com/peacekeeping](http://www.m-w.com/peacekeeping) (last visited Apr. 22, 2005).

<sup>5</sup> BLACK'S LAW DICTIONARY 7th ed. 1151.

<sup>6</sup> See, e.g., Nick Wadhams, *U.N. Probes Sex Abuse Allegations in Congo*, AP ONLINE REGIONAL – AFRICA (Nov. 11, 2004), available at 11/22/04 APONLINEAFR 23:46:2.

<sup>7</sup> See, e.g., Wadhams, *supra* note 6; Leyla Linton, *Report: U.N. Troops Exploited Congo Girls*, AP ONLINE REGIONAL – AFRICA (Jan. 8, 2005) available at 1/18/05 APONLINEAFR 05:11:30.

<sup>8</sup> See, e.g., Mark Turner, *Call to act over sexual abuse by UN peacekeepers*, FINANCIAL TIMES (LONDON), Nov. 18, 2004 at 7.

<sup>9</sup> See, e.g., *id.*

<sup>10</sup> See, e.g., Thalif Deen, *Politics: U.N. Battles Sexual Abusers in Congo Peacekeeping*, ALLAFRICA.COM ENGLISH (Mar. 25, 2005) available at 3/25/05 ALLAFRICACOM 15:20:4.

tormentors,<sup>11</sup> spreaders of contagion and disease,<sup>12</sup> to name some of the most egregious. Indeed, the U.N. itself defines the multi-national contingent which it deploys as peacekeepers<sup>13</sup> to trouble spots across the globe not only as humanitarians, but also as “boys,”<sup>14</sup> using the idea of “[b]oys will be boys”<sup>15</sup> to justify supplying the peacekeepers with pouches of condoms along with their uniforms and official status.<sup>16</sup>

On a basic humanitarian level, the above should shock readers of any nationality and profession. To lawyers, however, especially those concerned with international law, the above should serve as a wake-up call to the need to change the legal parameters of multi-national peacekeeping. American lawyers should be particularly concerned with U.N. peacekeeper abuses because of the role of the U.S. in creating the U.N.,<sup>17</sup> and the close ties between the largely U.S. written U.N. Charter<sup>18</sup> and the current, inferential concept of the acceptability of peacekeeping which has grown out of it.<sup>19</sup>

The goal of this paper is not merely to critique the U.N. and its handling of the current peacekeeper abuse allegations, as such a critique would only serve half of the

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<sup>11</sup> See Edith M. Lederer, *U.N. Seeks Police for Congo Peacekeeping*, AP ONLINE REGIONAL – AFRICA (Feb. 2, 2005) available at 2/10/05 APONLINEAFR 02:28:21 (describing the “sexual exploitation” alleged to have occurred at the hands of the U.N. peacekeepers in the Congo).

<sup>12</sup> See Transcript, Fox News Special Report with Brit Hume, Mar. 2, 2005 (Steve Harrigan reporting) (telling, among other things, the story of a woman named Bijou, who contracted HIV/AIDS from a U.N. peacekeeper and unwittingly passed the virus on to her husband and baby) (hereinafter FOX NEWS REPORT)

<sup>13</sup> See THE SURGE IN U.N. PEACEKEEPING, UNITED NATIONS PEACEKEEPING, available at <http://www.un.org/Depts/dpko/dpko/pub/exhibition> (last visited Apr. 22, 2005) (detailing the rise in U.N. peacekeeping activities and the member states which participate in the multi-national peacekeeping forces).

<sup>14</sup> Colum Lynch, *U.N. Faces More Accusations of Sexual Misconduct; Officials Acknowledge ‘Swamp’ of Problems and Pledge Fixes Amid New Allegations in Africa, Haiti*, WASH. POST, Mar. 13, 2005 at A22 (describing a U.N. official in Cambodia’s response to sexual abuse allegations in Cambodia in 1990 as “[b]oys will be boys”).

<sup>15</sup> *Id.*

<sup>16</sup> Tobias Kuhlmann, *Educating Peacekeepers about AIDS*, U.N. CHRONICLE (Mar. 1, 2004) (explaining the condom distribution under the logic of “[w]ith many of them [peacekeepers] young and sexually active, often deployed to or from regions with high HIV/AIDS prevalence, and by profession inclined to risky behavior, some consider the peacekeepers to be ‘more likely to contract or transmit the virus than the average population’”).

<sup>17</sup> See SCHARF, *supra* note 2, at 1-10.

<sup>18</sup> *Id.*

<sup>19</sup> See *infra* Part II.

problem. Rather, this paper will use the past and current understandings of the U.N. Charter,<sup>20</sup> peacekeeping,<sup>21</sup> international law,<sup>22</sup> and military justice<sup>23</sup> to suggest several options for handling both the current allegations facing U.N. peacekeepers, especially those in the Congo, and for a fundamental change in the peacekeeping mission, apparatus, and law in the future.

Part II of this paper will examine the origins of the concept of peacekeeping. It will go beyond the current and past concepts of U.N. peacekeeping to explore the plain language of Chapter VII of the U.N. Charter,<sup>24</sup> and the way in which it was originally interpreted – namely to substantiate a standing U.N. military force and centralized command with no mention of peacekeeping activities per se.<sup>25</sup>

Part III will discuss the current allegations against U.N. peacekeepers in the Congo and elsewhere,<sup>26</sup> as well as the vague allusions to decades of peacekeeper abuse found in sources from across the world and the political spectrum.<sup>27</sup> Also included in this Part is the U.N. reaction to the allegations<sup>28</sup> and the above mentioned condom distribution system in effect for U.N. peacekeepers.<sup>29</sup> Finally, this Part will discuss the spread of HIV through U.N. peacekeepers<sup>30</sup> and the lax testing requirements in place for peacekeepers both before and during their active duty.<sup>31</sup>

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<sup>20</sup> *See infra* Part II

<sup>21</sup> *See infra* Part III.

<sup>22</sup> *See infra* Part IV.

<sup>23</sup> *See infra* Part V.

<sup>24</sup> *See infra* Part II.

<sup>25</sup> *See id.*

<sup>26</sup> *See infra* Part III.

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

Part IV will discuss the current laws in effect regarding peacekeepers.<sup>32</sup> Perhaps the simplest part of the inquiry, this discussion will illustrate that U.N. peacekeepers are essentially shrouded in protection from their home countries.<sup>33</sup> The iniquity of this system will be examined, looking at the inequality of military justice available against peacekeepers based on their country of origin.<sup>34</sup> Part IV will then look at the current International Criminal Court (ICC) statute<sup>35</sup> and discuss why the extension of the ICC crimes and procedures to peacekeepers would not be an effective way to ensure either prosecution of peacekeepers for individual abuses or eligibility for prosecution at all.<sup>36</sup> To set the framework for the discussion in Part VI, this Part will also include a basic outline of the sanction power possessed by the United Nations Security Council (UNSC).<sup>37</sup>

In contrast to the legal morass presented in Part IV, Part V will describe the current status of the United States Code of Military Justice (USCMJ)<sup>38</sup> and what prosecutions of peacekeepers would be allowed under it.<sup>39</sup> A comparison of the procedural aspects of a prosecution under the USCMJ and the ICC statute provisions will be made as well.<sup>40</sup>

The culmination of this paper is Part VI, in which the author presents several possible options for addressing the current U.N. peacekeeper abuse allegations and for

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<sup>32</sup> See *infra* Part IV.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *infra* Part V.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

changing peacekeeping in the future.<sup>41</sup> It is the author's belief that, in light of past attitudes of U.N. officials towards peacekeeper abuse allegations<sup>42</sup> and the current spate of corruption allegations plaguing the U.N. and its administration,<sup>43</sup> the U.N. is an inappropriate organization to handle the peacekeeper abuses. To deal with the immediate allegations, the author recommends that the UNSC direct (and send trusted representatives to oversee) the creation of secure peacekeeper compounds, as well as promulgate rules creating new positions of overseers of peacekeepers who are representatives from at least two of the five permanent UNSC members based on their relative contribution. The author's reasoning for this suggestion, outside of the basic sense of responsibility for the U.N. forces which is imparted to the permanent members of the UNSC under the U.N. Charter,<sup>44</sup> is her very strong belief that U.S. taxpayers, who are protected by concrete laws regarding such crimes as rape and molestation, would not want their money to go towards the further subsidization of peacekeepers who can prey on victims without a guaranteed recourse.<sup>45</sup> In addition, the author highly advocates the use of economic sanctions against any countries which have contributed peacekeepers implicated in the abuse and have failed to prosecute, or failed to vigorously prosecute, those implicated peacekeepers.<sup>46</sup> These sanctions should be followed up by removal of the home countries' currently stationed peacekeepers, and blacklisting of these countries for future peacekeeping missions, if vigorous criminal prosecution of the errant peacekeepers is not made by the home countries.<sup>47</sup>

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<sup>41</sup> See *infra* Part VI.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

To address the future of peacekeeping, the author then proposes a reading of the Chapter VI provisions of the Charter closer to the original interpretation that these provisions evince the intent to create a military apparatus attached to the UNSC and under its ultimate control and authority.<sup>48</sup> This reading would allow for the creation of a separate, standing military and peacekeeping force which would be under the joint command of at least two of the five permanent UNSC members. While this in and of itself is not a new idea, the author then proposes that the recruitment and staffing of this force would not come from voluntary participation by U.N. member countries, but rather from international recruitment similar to that used by the American military. In this way, the peacekeepers would be under the control and law of the force itself and not their home countries. Given the many problems with the ICC statute as applied to at least the current peacekeeper abuses, the author would further propose that the most compatible military laws of the five permanent members (in all likelihood the U.S. and the U.K.) be used and applied to the peacekeepers in this force.

The conclusion of this paper, Part VII, restates the problems and suggestions discussed and offered throughout the paper. It also expresses the author's belief that peacekeeping as a concept offers many benefits, but that these benefits are outweighed by any types of abuses. The problem of the U.N. peacekeepers illustrates that international law is flawed in its attempts to create legal consensus throughout the world, with the ultimate result being that peacekeepers who prey on those they are assigned to protect are not subject to the same justice. In this situation, it is imperative that the countries which founded the U.N., particularly the U.S., provide structure to the peacekeepers. Lawyers facing conflicts of law issues will ultimately always have to choose one law over the

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<sup>48</sup> See *infra* Part VI.

other; if this works for commercial transactions then it should certainly work for the protection of people.

## II. CHAPTER VI AND PEACEKEEPING HISTORY

The primary mandate of the U.N. is set out in Chapters V and VII of the Charter.<sup>49</sup> These provisions make it the stated aim of the UNSC to “maint[ain] . . . international peace and security,”<sup>50</sup> and to take action when there are perceived threats to international peace and/or security.<sup>51</sup> A great deal of scholarly work has focused on when a threat would rise to the level of endangering either international peace and/or security, but, in recent years at least, there has not been as much focus on the military provisions of the Charter set out in Chapter VII.<sup>52</sup>

These provisions are the backbone of the inference that there should be a U.N. peacekeeping force established and maintained by the UNSC, however this is only an inference.<sup>53</sup> A literal reading of the plain language of the Charter leads one to believe that

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<sup>49</sup> U.N. CHARTER chs. V, VII.

<sup>50</sup> *Id.* at ch. V. art. 24.

<sup>51</sup> *See id.* at ch. VII.

<sup>52</sup> The author posits that this dearth of literature is due to the documented trend of interpreting the Chapter VII provisions as solely authorizing peacekeeping activities through inferential and, it has been argued, practical readings of the Charter. *See* ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004). Concededly, part of the reason for the inability to enforce the literal Chapter VII provisions stemmed from the Cold War. *Id.* However, it is interesting to note that in the wake of the collapse of the Soviet Union and the end of the Cold War there was no push to re-evaluate the understanding and application of Chapter VII, rather, there has been a push towards more peacekeeping activity and missions in the years since the end of the Cold War. *See id.*; *see also* TIMELINE OF UNITED NATIONS PEACEKEEPING 1948-2005, UNITED NATIONS PEACEKEEPING, *available at* <http://www.un.org/Depts/dpko/dpko/timeline/pages/timeline.html> (last visited Apr. 22, 2005) (documenting a dramatic increase in the number of peacekeeping operations undertaken by the U.N. from the mid-1980s/early 1990s onward); *Peacekeeping Resurgence*, U.N. CHRONICLE (Mar. 22, 2000).

<sup>53</sup> *See* DE WET, *supra* note 52 (charting the growth and development of the peacekeeping concept out of inferences in the Chapter VII provisions); Q&A – WHAT IS PEACEKEEPING, U.N. PEACEKEEPING, *available at* <http://www.un.org/Depts/dpko/dpko/faq/q1.htm> (last visited Apr. 22, 2005) (stating that the basis for the power to establish and implement peacekeeping operations through the U.N. is because “[t]he Charter of the United Nations gives the UN Security Council the power and responsibility to take collective action to maintain international peace and security”); *Fifty unforeseen years (U.N. peacekeeping operations)*, U.N. CHRONICLE (Sept. 22, 1998) (admitting that the U.N. Charter does not explicitly call for peacekeeping

the goal of the framers of the U.N. Charter (which is to say the framers of the U.N. itself) was to create a standing military body,<sup>54</sup> under joint command,<sup>55</sup> to serve at the ready if necessary to protect that stated mission of the U.N.<sup>56</sup> On the heels of World War II, the victorious powers had seen their share of war and destruction,<sup>57</sup> and certainly peacekeeping and stabilization in the wake of war as well, yet the only literal provisions in the Charter are for the standing military idea.<sup>58</sup> Unfortunately, there are no interpretative aids for divining the intent of the drafters of the U.N. Charter with regard to these provisions, however it is not a stretch of the imagination to suggest that the intent was to create a standing military which would provide a host of services to the U.N. and the world population as a whole,<sup>59</sup> as a standard national military would do. Using this interpretation, peacekeeping would not need to be elaborated or inferred because it is part of standard military procedure;<sup>60</sup> the corollary to this is that there is no elaboration of a

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operations and positing that “[t]he Security Council presumably paused for detailed deliberation when, in 1948, it established the first peacekeeping mission, which built on the intent, if not the letter, of its assigned responsibility”).

<sup>54</sup> U.N. CHARTER ch. VII, art. 47 (“There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council’s military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.”). This works in conjunction with the article 43 provisions requiring that the members of the UNSC provide military forces and other resources to the UNSC for the international peace and security mission. *Id.* at art. 43.

<sup>55</sup> *Id.* at art. 47 (“The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives.”).

<sup>56</sup> *Id.* (“The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council.”)

<sup>57</sup> *See generally* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL (1994) (providing details of the horrors inflicted on the world by the Nazis who were tried at the Nuremberg tribunal).

<sup>58</sup> U.N. CHARTER ch. VII.

<sup>59</sup> *See id.*; *see also id.* at ch. V (providing the UNSC, and particularly the permanent members of the UNSC with the onerous task of the “maintenance of international peace and security”); *id.* at ch. I (listing, among the methods for maintaining international peace and security, “to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace”).

<sup>60</sup> For example, part of the current U.S. mission in Iraq is to keep the peace and rebuild the country, however there are no specified “peacekeepers” tasked to this purpose; rather, the military itself embraces these responsibilities as part of its standard protocol and mission.



separate peacekeeping force, implying that all services were to be under the auspices of a joint command that was to be associated with the UNSC.<sup>61</sup>

Regardless of how one interprets the actual language of the Charter provisions, once the Cold War started it was accepted that the concept of a standing military force under a joint command would not be feasible.<sup>62</sup> In this climate, the Charter provisions were re-examined, and found to infer the idea of a peacekeeping mandate which would grow to become the current U.N. peacekeeping force,<sup>63</sup> also known colloquially as the “blue helmets” due to the color of the uniforms used.<sup>64</sup>

At present, there are 66, 918 deployed peacekeepers from 103 countries stationed in various political and military hot spots throughout the world.<sup>65</sup> When conceptualizing the makeup of this peacekeeping force many, including the author, initially assume that there is some form of obligation on the part of U.N. members to provide troops and personnel to serve as peacekeepers. In truth, however, the provision of troops and personnel is entirely voluntary on the U.N. member countries,<sup>66</sup> which are compensated by the U.N. for these troops and services.<sup>67</sup> A persistent problem for U.N. members

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<sup>61</sup> At law, there are many methods for the interpretation of statutes, depending on the context and the question. Many of these are based on U.S. law and tradition, and therefore would be potentially problematic to use when attempting to interpret the U.N. Charter. *See* WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, ELIZABETH GARRETT, *CASES AND MATERIAL ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 818 (3d ed. 2001). However, using a textual canon not based in these laws and traditions does not present the same conflict. Therefore, the author bases the analysis of the Chapter VII provisions on the interpretative canon of *expressio unis*, meaning that “the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced.” *Id.* at 824.

<sup>62</sup> *See* DE WET, *supra* note 52.

<sup>63</sup> *Id.*

<sup>64</sup> *See* Wadhams, *supra* note 6.

<sup>65</sup> ONGOING PEACEKEEPING MISSIONS, UNITED NATIONS PEACEKEEPING OPERATIONS (Feb. 28, 2005), available at <http://www.un.org/Depts/dpko/dpko/bnote.htm> (last visited Apr. 22, 2005).

<sup>66</sup> *See* Linton, *supra* note 7.

<sup>67</sup> Q & A – HOW ARE PEACEKEEPERS COMPENSATED?, UNITED NATIONS PEACEKEEPING, available at <http://www.un.org/Depts/dpko/dpko/faq/q7.htm> (last visited Apr. 22, 2005).

which provide troops and services is recouping payment for these provisions.<sup>68</sup> The troops provided are military personnel within their home countries and, as will be discussed further in Part IV, are subject to the jurisdiction of their home countries for prosecution should the event occur.<sup>69</sup>

Over the course of their history, U.N. peacekeepers have served in every conceivable situation, and indeed many have lost their lives in the course of peacekeeping activities.<sup>70</sup> In the spirit of these activities, the U.N. peacekeepers were awarded the Nobel Peace Prize in 1988,<sup>71</sup> and are honored by the U.N. with a yearly ceremonial day of recognition and commendation.<sup>72</sup> Perhaps this is the most disturbing contrast given the current abuse allegations, as various sources have reported that U.N. peacekeepers have been implicated in sexual abuse scandals and activities since their inception.<sup>73</sup> As with the composition of the peacekeeper missions themselves, these abuse allegations are a truly global phenomenon, with new and old allegations coming from Cambodia to the

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<sup>68</sup> See generally *id.* (explaining some instances in which compensation for volunteering peacekeepers has been withheld, and the financial hardships developing countries face when they provide volunteer peacekeepers to the U.N. and are compensated afterwards).

<sup>69</sup> See Linton, *supra* note 7; Deen, *supra* note 10 (citing the U.N.'s own report – discussed in greater detail below-

[t]here is a . . . presumption that peacekeeping personnel who commit acts of sexual exploitation and abuse that constitute crimes under generally accepted standards (for example rape or sexual relations with young children) are not normally subjected to criminal prosecution, whether it be by court martial or by trial before a national criminal court, which would have been the inevitable result had they committed such acts in their home countries.)

<sup>70</sup> Examples of peacekeeper deaths in action are spread throughout the course of missions over the last 50 plus years. For detailed statistics, see FATALITIES, UNITED NATIONS PEACEKEEPING, available at <http://www.un.org/Depts/dpko/fatalities> (last visited Apr. 22, 2005). For recent incidents of peacekeeper deaths in action, see, e.g., *DRC president condemns killing of UN peacekeepers*, XINHUA GENERAL NEWS SERVICE (Feb. 26, 2005) (stating that nine peacekeepers were killed in an ambush attack in the Congo).

<sup>71</sup> 1988: *UN Peacekeeping forces: 'the imperial soldiers' (Nobel Prize)*, U.N. CHRONICLE (Sept. 1, 2003).

<sup>72</sup> *UN Peacekeeping missions best way of ensuring sustainable peace*, M2 PRESSWIRE (May 25, 2004).

<sup>73</sup> See Linton, *supra* note 7 (“Charges of sex abuse and other crimes have been lodged against U.N. peacekeeping missions around the world for decades. Officials have found it difficult to crack down because the United Nations doesn’t want to offend the relatively small number of countries that are willing to provide peacekeepers.”).

Congo to Haiti to name only a few.<sup>74</sup> Indeed, in 2004, only months before the first Congo abuse stories started to surface, there was a public admission by a U.N. official that there were sexual abuses by peacekeepers assigned to the border area of Ethiopia and Eritrea.<sup>75</sup>

Thus, the history of the U.N. peacekeepers is one of questionable interpretation and activities as well as humanitarian awards and missions. What is most bothersome to this author is that the history of the peacekeepers has such a pronounced dichotomy between saving people and countries and acting as criminals. No matter how the U.N. Charter provisions are interpreted, the wording evinces the idea that some kind of security force was necessary to protect the world from the ravages of war and human atrocities, and indeed many peacekeepers have given their lives for this goal. However, those charged with carrying out the administrative charge created by the Charter have failed to protect both the intent of the Charter's framers and those who find themselves in the midst of war and chaos, and have allowed the peacekeepers to become victimizers.

### **III. ALLEGATIONS, CONTRACEPTIVES, AND HIV/AIDS**

The primary abuse allegations addressed in this paper are the sexual abuse allegations made against the peacekeepers, as these represent the gravest breach of the duty of peacekeepers and represent an utter disregard for the sanctity of human life, particularly the lives of young girls. It is important to note, however, that in the days prior to the writing of this paper there have been increasing questions regarding the use of

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<sup>74</sup> Victoria Engstrand-Neascu, *News Feature: Predators in Congo sometimes wear uniforms*, DEUTSCHE-PRESS AGENTUR (Jan. 11, 2005); Joseph Loconte, *The U.N. Sex Scandal*, THE WEEKLY STANDARD (Jan. 3, 2005) (citing a history of allegations of peacekeeper abuse in Kosovo, Liberia, Guinea, and Sierra Leone as well as the Congo); Peter Moszynski, *NGOs in sex for food scandal*, NEW AFRICAN (Apr. 1, 2002) (identifying that, as early as 2002, reports regarding U.N. peacekeeper abuses of young children were surfacing to NGOs such as Save the children in Sierra Leone, Guinea, and Liberia).

<sup>75</sup> Cathy Majtenyi, *Radio Scripts – Correspondent Report 2-315770*, VOICE OF AMERICA NEWS (May 10, 2004) (explaining that the official admitted to some of these allegations in an effort to undermine public complaints from Eritrean officials regarding peacekeeper conduct).

force by peacekeepers,<sup>76</sup> and whether force is used outside of the sanctioned self-defense realm.<sup>77</sup> This issue highlights the need for a central military law governing peacekeepers of all nationalities, as such a system would allow for a more immediate adjudication of such allegations and would ensure that those peacekeepers involved would be uniformly investigated, and either exonerated or prosecuted under the same legal principles and terms.

### A. ALLEGATIONS AGAINST THE PEACEKEEPERS

A young girl, out gathering coal for her family to use as they try to sustain themselves in the middle of a war, encounters a soldier on her errand.<sup>78</sup> In seconds she goes from coal bringer to rape victim at the hands of the soldier, who cavalierly walks away from his deed.<sup>79</sup> Worse yet, it is possible that this girl could face reprisals from her family if she tells them of the crime. Another young girl, roughly the same age as the first, prostitutes herself to a man in a uniform.<sup>80</sup> She is not a troubled teen, she is not a runaway, she is merely trying to get an egg so that her family might have something to eat for dinner.<sup>81</sup>

A young mother looks at her baby unsure of how to provide for it or how it will be accepted in her village. The father, a man in a uniform from another country and another race, has left and she cannot find him.<sup>82</sup> Those who worked with him refuse to

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<sup>76</sup> *Hemisphere Briefing: Haiti: U.N. peacekeepers accused in dispute*, SUN-SENTINEL (FT. LAUDERDALE, FL.) (Mar. 6, 2005) (detailing Haitian government officials' allegations that peacekeepers stationed in Haiti inappropriately fired on an unarmed crowd of pro-Aristide protesters).

<sup>77</sup> *See id.*

<sup>78</sup> Transcript, Fox News Special Report with Brit Hume, Fox News (Steve Harrigan reporting) (Mar. 2, 2005) (hereinafter FOX NEWS 2).

<sup>79</sup> *Id.*

<sup>80</sup> *See* Engstrand-Neascu, *supra* note 74 (noting that these acts usually take place in local hotel rooms).

<sup>81</sup> *See id.* (explaining that many young girls in the Congo were enticed into prostitution for a few eggs, some bread, or some chocolate).

<sup>82</sup> *See* FOX NEWS REPORT, *supra* note 12.

help her or her baby survive, let alone find the father.<sup>83</sup> Another mother, just 17 years old, looks at her child and her husband in horror as she finds out that the soldier who attacked her gave her HIV/AIDS and she, unknowingly, has passed the disease on to her husband and newborn child.<sup>84</sup>

These vignettes might sound as though they are a combination of stories from various recent wars and tortured movie plots, however in reality they are the stories of many women who have made allegations of various types of sexual abuse against U.N. peacekeepers in the Congo. These stories are not uncommon, and indeed typify what the U.N. describes as the problem with placing troops like peacekeepers in a wartime setting: social upheaval and instability, coupled with the economic position of the peacekeepers, creates an environment where peacekeepers can easily prey on those they should be protecting.<sup>85</sup>

The allegations of abuse in the Congo are actually more sordid and distasteful than the above vignettes, and implicate not only the peacekeeping forces but also the U.N. administration sent to the conflict areas with them.<sup>86</sup> An official's computer files were screened and found to contain pornographic images of the official with local children.<sup>87</sup> The same official was caught in a sting operation started by local authorities in which he attempted to engage in sexual activities with a local, very underage girl.<sup>88</sup> He could not be prosecuted by the local authorities, as he was deemed to fall under the

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Engstrand-Neascu, *supra* note 74.

<sup>86</sup> See Thomas P. Kilgannon, *Outside View: Peacekeepers or Predators?*, U.P.I. (Feb. 15, 2005) (noting a portion of the U.N.'s Congo investigation report which blames the sexual abuses perpetrated by peacekeepers in the Congo in part on "the absence of any programs for off-duty peacekeepers").

<sup>87</sup> *Id.* (stating that a French official was implicated in an online pedophile operation).

<sup>88</sup> *Sex! Shocking Sex at the U.N.!*, INVESTOR'S BUSINESS DAILY (Feb. 24, 2005), at A13 (explaining that the sting operation allowed the Congolese police access to the official's house, thus allowing them to discover that he had taped his activities with children and that he had filmmaking equipment set up in his bedroom).

peacekeeper exception, and was not prosecuted by his home country for his crimes either.<sup>89</sup> On the point of age, to date the youngest reported victim of abuse at the hands of the peacekeeper was seven years old at the time of the alleged abuse.<sup>90</sup> Under the terms of peacekeeper protocol before these allegations came to light, peacekeepers were forbidden to have relations with anyone who was under 18 years old.<sup>91</sup>

The Congo allegations were the result of both an internal U.N. investigation<sup>92</sup> and news exposes by U.S. news programs 20/20<sup>93</sup> and Fox News.<sup>94</sup> The allegations make concrete the stories of victims through these accounts, both in news and on television, and it is easier to estimate the types of offenses the peacekeepers are alleged to have committed. However, there have been numerous allegations of abuse at other missions over the history of the U.N. peacekeeping operations which are not as detailed and provide murkier waters for lawyers looking at potential criminal charges.<sup>95</sup> Since the Congo allegations have surfaced, however, there has been more discussion of the past allegations in the media, and indeed an allegation made by a Haitian woman was picked up by the media in the days after the initial Congo story broke.<sup>96</sup> While the peacekeepers

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<sup>89</sup> See generally Kilgannon, *supra* note 86

<sup>90</sup> See FOX NEWS REPORT, *supra* note 12.

<sup>91</sup> See Engstrand-Neascu, *supra* note 74.

<sup>92</sup> See Deen, *supra* note 10 (explaining that the report, created under the watch of Jordanian Prince Zeid Ra'ad Zeid Al-Hussein, a Jordanian representative to the U.N., "says there is a widespread perception that peacekeeping personnel, whether military or civilian, who commit acts of sexual exploitation and abuse rarely if ever face disciplinary charged for such acts").

<sup>93</sup> See Kilgannon, *supra* note 86 (crediting the 20/20 investigative team sent to the Congo with uncovering many important incidents of peacekeeper misconduct).

<sup>94</sup> See FOX NEWS REPORT, *supra* note 12. Fox News ran a four part series on the U.N. peacekeeper abuse allegations.

<sup>95</sup> See, e.g., *Congress Probes UN Peacekeepers' Misconduct in Congo*, VOICE OF AMERICA NEWS (Mar. 1, 2005) (citing a top U.N. official as admitting that the allegations of peacekeeper misconduct are not limited to the Congo mission);

<sup>96</sup> *UN Peacekeepers in Haiti cleared of rape allegations*, XINHUA GENERAL NEWS SERVICE (Feb. 25, 2005).

in the Haitian allegation were cleared of rape charges,<sup>97</sup> they were nonetheless found to have engaged in prostitution with the woman in question,<sup>98</sup> which constituted a breach of the peacekeeper policies and resulted in the peacekeepers being publicly sent back to their home countries.<sup>99</sup>

## B. CONFLICTING MESSAGES

As stated above, the U.N. has maintained a prohibition on sexual relations between peacekeepers and locals under the age of 18,<sup>100</sup> and does not condone peacekeepers engaging in prostitution.<sup>101</sup> What the U.N. does condone, and indeed accommodate, is easy access to condoms for peacekeepers,<sup>102</sup> going so far as to provide them with pre-filled pouches when they are being briefed for their mission assignments.<sup>103</sup> The official reasoning for this program is the health and safety of the peacekeepers while they are on their assignments, using the logic that these are typically young men, and that “[b]oys will be boys.”

The pouches are accompanied by the distribution of cards detailing how to protect oneself from contracting HIV/AIDS;<sup>104</sup> these cards are conveniently printed in over 10 languages for easy understanding.<sup>105</sup> These cards have a twofold purpose, the education of peacekeepers and the education of those living in the areas to which the peacekeepers

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See Engstrand-Neascu, *supra* note 74.

<sup>101</sup> See, e.g., *UN peacekeepers in Haiti cleared*, *supra* note 101.

<sup>102</sup> See Kuhlmann, *supra* note 16. Interestingly, the peacekeepers profiled in the Kuhlmann article are those bound for Eritrea where, as mentioned above, at least one U.N. official has recently admitted that there were instances of sexual abuse involving peacekeepers and local girls. *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

are sent.<sup>106</sup> Interestingly, despite the attempts to educate the peacekeepers and provide them with protection, the U.N. does not require potential peacekeepers to be screened for HIV/AIDS before they are sent on peacekeeping missions.<sup>107</sup> While HIV/AIDS pre-screening is standard practice in at least the armed forces of the U.S. and U.K.,<sup>108</sup> it is not necessarily the standard practice in the other U.N. member countries willing to volunteer troops as peacekeepers.<sup>109</sup> The lack of pre-deployment screening of peacekeepers by the U.N. is particularly disturbing when one notes that in recent years many of the peacekeeping missions have been comprised of troops from countries where HIV/AIDS infection rates are rising at catastrophic rates,<sup>110</sup> and affecting a large portion of the population.

However well intentioned the peacekeeper pouches might be, they appear to have limited success rates in stopping either the transmission of HIV/AIDS to the local populations or the fathering of children with women from the local population.<sup>111</sup> Turning to the HIV/AIDS transmission issue, at least one study has charted an alarming correlation between the deployment of U.N. peacekeepers from countries with high and steadily increasing HIV/AIDS infection rates and an increase in the rates of locals infected by HIV/AIDS after the arrival of the peacekeepers.<sup>112</sup> The poignant vignette above of the new mother discovering that she and her entire family are infected because of an act by a U.N. peacekeeper<sup>113</sup> is a dreadful example of this trend, and sadly is not a

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<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See* Kuhlmann, *supra* note 16.

<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *See* FOX NEWS REPORT, *supra* note 12.

<sup>112</sup> Benny Avni, *Monitoring HIV in U.N. Peacekeepers*, THE NEW YORK SUN, at 7 (Jan. 24, 2005).

<sup>113</sup> *See* FOX NEWS REPORT, *supra* note 12.



rare story in the Congo.<sup>114</sup> Given the availability of both the empirical evidence and human tragedies, the U.N. policy of voluntary HIV/AIDS testing is even more disturbing and calls the peacekeeping administration into further question.<sup>115</sup>

Turning to the local pregnancy issue, there are media accounts and internal investigation data to support the conclusion that instances of U.N. peacekeepers fathering children with local women, or girls, and then leaving without assuming any parental role or financial responsibility are far from rare.<sup>116</sup> Not only do these peacekeepers fail to take any responsibility or make any financial accommodations for their children, the U.N. fails to do either of these as well.<sup>117</sup>

To conclude this Part, the abuse allegations have done more than undermine the U.N. administration and the credibility of the peacekeeping mission. These abuses, alleged though they are at present, if true, have taken childhood from countless young girls- and in some instances boys- and replaced it with physical and psychological pain and torment. Many of these young victims face social ostracism both now and in the future as a result of what happened to them.<sup>118</sup> The women who have peacekeeper-fathered children find themselves in much the same predicament, and are forced to struggle even more for survival after the arrival of the peacekeepers than before the peacekeepers arrived in the area.<sup>119</sup> And those who contracted HIV/AIDS from the peacekeepers face myriad consequences and problems as a result of their infection. Some, like the young woman in the vignette, are faced with the knowledge that they and their

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<sup>114</sup> *Id.*

<sup>115</sup> *See Avni, supra* note 112.

<sup>116</sup> *See FOX NEWS REPORT, supra* note 12.

<sup>117</sup> *Id.*

<sup>118</sup> ‘*Exploitation of women by UN peacekeepers in Congo widespread,*’ THE PRESS TRUST OF INDIA (Jan. 8, 2005).

<sup>119</sup> *See id.*

families are condemned to live with, and likely die from, the disease.<sup>120</sup> Others will not know that they are ill until their health deteriorates, and could potentially pass on the disease further. Still others will know their status and have to try to be productive members of their society and hope that they will not be shunned by their families and community because of the disease and the way it was contracted, while at the same time struggling to find medical treatment if available. None of these scenarios arise out of a quest for peace, and all that they do is engender hatred and suffering, undermining the concept of the U.N. in general, as well as peacekeeping, and also undermining the likelihood that U.N. peacekeepers will be allowed in the area again should they be needed. In no way can these abuses be seen as maintaining “international peace and security,” and indeed in many ways these abuses are the same as the atrocities which were deemed to pose a threat to peace and security occasioning the deployment of the peacekeepers in the first place.

#### **IV. INTERNATIONAL LAW AND PEACEKEEPING**

##### **A. CURRENT LAW AFFECTING PEACEKEEPERS**

Just as peacekeeping missions are manned by troops from around the world, so too is the law pertaining to peacekeepers global in its composition. The global quality of applicable law is due to the fact that, in such instances as peacekeeper sexual abuses or other misconduct, peacekeepers are not subject to the laws of an international body, but rather are to be tried, if at all, in their home countries and under the military law of their home country.<sup>121</sup> The most the U.N. administration can do in such a situation is to strip

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<sup>120</sup> See FOX NEWS REPORT, *supra* note 12

<sup>121</sup> See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998).

the peacekeeper of his position and send him back to his home country.<sup>122</sup> Indeed, the U.N. itself does not make it a practice to chastise the member countries which send abusive peacekeepers because of the fear that it will lose a source of volunteer peacekeepers if it offends the sending nation.<sup>123</sup>

Once in the home country, the peacekeeper is then subject to the military laws of his country, which include the use of discretion in the decision of whether to prosecute the peacekeeper.<sup>124</sup> A problem for both the home country in making its decision regarding prosecution and the U.N. administration in evaluating the extensive nature of the abuses, is the local language barrier,<sup>125</sup> as well as the difficulty of trying a case where the victim is in a far away and impoverished nation, and not likely to testify before a court even if she could be brought there due to the potential familial and societal reprisals and ostracism she could face.<sup>126</sup>

The problem with the state of the law as it relates to peacekeepers is not limited solely to the above, however, as there is also a grave and constant possibility of uneven administration of justice against peacekeepers at the same mission, charged with the same crimes, who are from different countries which have different military laws or different propensities for prosecuting peacekeepers.<sup>127</sup> An example from the current Congolese abuse allegations is the difference between the fate of a French peacekeeper implicated in

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<sup>122</sup> See Linton, *supra* note 7.

<sup>123</sup> See *id.*

<sup>124</sup> Following the initial U.N. investigation of the Congo mission, it repatriated three men: a French support staff member and two Moroccan peacekeepers. Turner, *supra* note 8. Due to the differences in law and public policy between the two countries, however, only the Frenchman was put on trial.

<sup>125</sup> The multi-national quality of the peacekeeping missions, as well as the destitution of many areas where peacekeepers are stationed and the very real possibility that the victimized children have not been able to attend school and learn a common language with the peacekeepers due to the hostilities in their country can easily lead to a language issue.

<sup>126</sup> See, e.g., *Editorial: Peacekeepers as Abusers*, VOICE OF AMERICA NEWS (Dec. 24, 2004) (providing, as an example, a twelve year old Congolese girl who is reluctant to tell ever her family what happened to her at the hands of a peacekeeper, stating “I didn’t tell my mother because she would beat me”).

<sup>127</sup> See generally KNOOPS, *supra* note 3 (explaining the applicability of current law to U.N. peacekeepers).

the abuse who went to trial in France when he was returned,<sup>128</sup> and two South African peacekeepers who are still being held, but who have not been tried.<sup>129</sup> In addition, different national legal systems have different concepts of pre-trial rights and procedure, due process and fair trials, and jury use, leading to different outcomes for the same crime.<sup>130</sup> The author would argue that, to those who created and ran the Nuremburg trials as a model of international criminal law, this very fact would be offensive.

Additionally, as soldiers in the national army of their home country prior to their peacekeeping assignment, there is a very strong likelihood that peacekeepers are familiar with the crimes and punishments used in their military courts. The author further submits that this is dangerous in that a peacekeeper from a home country with a nascent military and military law, or one who knows that sentences for sexual abuses are relatively light, or one who knows that there is a precedent of not prosecuting errant peacekeepers, will take comfort in that knowledge and feel less inhibited in his abuses, safe in the knowledge that he will not face serious charges at home. If nothing else, this undermines international peace and security in already troubled areas, and presents the very prescient threat that the local population will be victimized by a peacekeeper with such knowledge.

## **B. PROBLEMS WITH EXTENDING THE ICC STATUTE TO PEACEKEEPERS**

The creation of the current ICC statute has codified many of the serious and yet esoteric crimes created at Nuremburg, such as war crimes and crimes against humanity.<sup>131</sup>

By providing lawyers and litigants with actual definitions of these crimes, including

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<sup>128</sup> See 'Exploitation of women by UN peacekeepers in Congo widespread,' *supra* note 126.

<sup>129</sup> *Id.*

<sup>130</sup> See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 71-137 (2001) (explaining the many substantive and procedural differences in trial rights which had to be reconciled between member states in drafting an ICC statute which the majority could agree on).

<sup>131</sup> See generally PERSICO, *supra* note 57 (describing the criminal charges brought against the Nazi regime by the Nuremburg prosecutorial staff).

elements, the ICC statute has both clarified the state of international crimes on a grand scale and made the ability to prosecute peacekeepers for abuses essentially non-existent.<sup>132</sup> Doubtless there will be calls to subject U.N. peacekeepers to the jurisdiction of the ICC for abuses and do away with the home country military law rule currently in place. However, a closer look at the ICC statute reveals that there is a very small likelihood of successful prosecution of individual peacekeepers under the statute.<sup>133</sup> Further, should a loophole be found, or should the statute be amended to allow for individual prosecutions of peacekeeper abuses, the structure of the ICC procedures<sup>134</sup> is such that the ICC is not the proper place to try the peacekeepers.

As a threshold issue, it is very true that both war crimes and crimes against humanity under the ICC include sexual crimes and abuses such as rape.<sup>135</sup> This is certainly a laudable and appropriate provision, as sexual crimes and abuses are a sad and disturbing part of conflicts past and present; the problem is that as much as these provisions are a prosecutorial resource for such political actors and their underlings who have devised, ordered, and committed such grave crimes as those set forth in the ICC statute, these are not generally applicable to the peacekeepers based on the facts available at the present time. The problem with these provisions is that they require, if not a specific mens rea, at the very least that the actions be part of a larger plan targeted to the

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<sup>132</sup> See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 2 (1998) (defining the crimes which the ICC has the jurisdiction to prosecute).

<sup>133</sup> See *id.* (providing for individual prosecution on crimes which are part of a concerted effort or plan, rather than those which are indiscriminately carried out for personal gratification or other non-concerted reasons).

<sup>134</sup> See *id.* pts. 4 – 8. (providing the framework of the court apparatus, pre-trial procedure, trial procedure, and appellate rights and procedures).

<sup>135</sup> See *id.* pt. 2 art. 8 (b) (xxii) (defining a qualifying offense for a war crime charge as “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Convention”); *id.* pt. 2 art 7 (g) (defining a qualifying offense for a crime against humanity charge as “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”).

population in general rather than individuals in it.<sup>136</sup> This is more akin to a RICO conspiracy charge under U.S. law,<sup>137</sup> with the caveat that those being prosecuted all need the same mens rea and knowledge predicate of targeting a certain population for harm and destruction.<sup>138</sup>

Under such a provision, in order to be prosecuted peacekeepers would have to be found to have been part of a concerted and organized effort to rape or otherwise sexually abuse the local population with the goal of harming the population as a whole.<sup>139</sup> However widespread the abuses are, it is highly unlikely that there was a specific U.N. protocol or plan to perpetrate sexual abuses on the local populations of the mission areas; it is also improbable that there was a specific plan in place at the mission level by U.N. staffers and administrators to do the same thing. The ICC statute is written in such a way that it would appear to turn a blind eye to the abuses because it provides no basis for prosecution of peacekeepers for war crimes or crimes against humanity unless the abuses were committed as an overall part of a plan to target the local population for abuse,<sup>140</sup> and it would appear unlikely that any of the U.N. administrators, commanders, or staffers could be prosecuted for the same reasons.<sup>141</sup>

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<sup>136</sup> *Id.* pt. 2 art. 8 (b) (requiring that a war crime charge occur in a situation of international or, in certain circumstances, national conflicts in which international law provisions and expectations apply); *id.* pt. 2 art. 7 (limiting the application of the crimes against humanity charge to situations where “any of the following acts [including sexual violence]. . . [are] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”).

<sup>137</sup> 18 U.S.C. § 1961 *et seq.* (2000). In contrast with the ICC mens rea and knowledge requirements set out in footnote 146, a person can be charged under RICO for acting in concert with others towards an illegal goal even if the knowledge of the goal and the other participants is not within the person’s possession. *See* 18 U.S.C. § 1962(c).

<sup>138</sup> *Cf. id.* with ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 2 arts. 7, 8.

<sup>139</sup> *See* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 2 arts. 7, 8 (providing the mens rea and concerted action requirements, as well as the elements which comprise various crimes of sexual violence under the ICC statute).

<sup>140</sup> *See id.*

<sup>141</sup> *Id.*

Assuming that there is a way to read the ICC statute to allow the prosecution of U.N. peacekeepers individually for sexual abuses, or that the statute was amended to give the ICC prosecutorial jurisdiction over these cases, there are still several critical procedural flaws in the statute. First, not all U.N. member states are signatories of the ICC statute, and thus there would be an unequal prosecution of peacekeepers, akin to the current situation, if the ICC were used as a venue only for those peacekeepers whose home countries were ICC signatories.<sup>142</sup> Second, the way that the ICC statute is written and construed, the primary power of the court in getting a case to trial lies with the Prosecutor, who has much more power than his prosecutorial counterparts in many other countries, including U.S. civilian and military courts.<sup>143</sup> Such a prosecutorial structure creates a situation which is ripe for over-discretion by the Prosecutor, and is even more dangerous when one considers that the Prosecutor can be from any country, including the home country of the peacekeeper.<sup>144</sup> Third, as mentioned in the above section, the ability to have victims, or eyewitnesses, come forward to testify is hampered by the language, distance, and social gap.<sup>145</sup> A corollary to that is that, unlike some adjudicative bodies

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<sup>142</sup> See RATIFICATION STATUS OF THE ROME STATUTE, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *available at*

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Apr. 22, 2005) (providing a list of countries which have and have not ratified the ICC statute).

<sup>143</sup> See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 2, art. 15 (allowing the Prosecutor ultimate discretion over which cases to bring to the Pre-Trial Chamber). Also, as the Pre-Trial Chamber is implicated in the prosecutorial decisions made, the allowance that the Prosecutor can still receive information a case which the Pre-Trial Chamber has said it cannot officially investigate (which can be argued to be a quasi-investigation in the first place), can be seen to implicate double jeopardy. *See id.* The double jeopardy implication can be seen to arise from the fact that the Pre-Trial Chamber is composed solely of judges, which lends an official judicial element to an opinion issued by the Pre-Trial Chamber which is not of the same low-level implication as judges deciding whether to grant arrest warrants. *See id.* pt. 4 art. 39.

<sup>144</sup> The qualifications for election to the Office of Prosecutor are set forth in the ICC statute, as are prohibitions against certain activities on the part of the Prosecutor and his staff. *Id.* pt. 4 art. 42. While there are provisions requiring the recusal of the Prosecutor in certain cases, these provisions address current and past conflicts, including whether the Prosecutor had dealings with the same case or parties in another court, but are silent on shared nationality, ethnicity, or religion as a disqualifying factor. *See id.*

<sup>145</sup> *See supra* Part III.

such as the U.S. military courts,<sup>146</sup> the ICC statute does not grant the ICC the ability to subpoena or otherwise compel witnesses to testify before the court.<sup>147</sup> While the image of forcing a young victim in front of a foreign court is not particularly attractive, the inability to compel the presence and testimony of witnesses, aide workers, other U.N. officials, and peacekeepers, or those who might have learned of the abuses through pictures or other descriptions, is a flaw to any prosecution and turns the prosecution into a he-said/she-said battle. Add to this the possible inability of young victims to positively identify their attacker beyond a reasonable doubt, and peacekeeper prosecutions at the ICC seem doomed to an uncertain, and inequitable, outcome under the procedural requirements set forth in the ICC statute regardless of their viability under the terms of the current crimes and elements codified in the ICC statute.

Ultimately, the ICC is not the proper jurisdiction for prosecution of peacekeepers on abuse charges of any type, and particularly sexual abuses. The ICC statute was created to codify the tradition of prosecuting those accused of political and military-political atrocities which started with the prosecutions at Nuremberg and evolved from that

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<sup>146</sup> 10 U.S.C. § 847 (2000) (granting U.S. military courts subpoena power and making the failure or refusal to appear in court pursuant to subpoena or other method of requiring personal presence in court “an offense against the United States”).

<sup>147</sup> The ICC statute requires that requests for persons, documents, and other information go through the member state. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 9. There are several problems with this. First, if the accused is a resident of a non-signatory state to the ICC statute, or the pertinent information is located in a non-signatory state, the ICC statute would not appear to have any force or effect to bring the person or thing before the court. *See id.* Second, although the statute repeatedly mentions that the member state “shall” cooperate with requests for the extradition of people and production of documents, there is no penalty provision for failing to comply or withholding information from the ICC. *See id.* Third, and most important for the purposes of this paper, is the fact that NGOs, such as the U.N. and therefore U.N. peacekeepers acting in that capacity, are not signatories to the ICC statute. *See* RATIFICATION STATUS OF THE ROME STATUTE, *supra* note 152. This would mean that, unless the ICC statute were to be amended or revised, the ICC could not ask the U.N. to produce persons, documents, or other information; if the ICC did make such a request, there would be no requirement that the U.N. comply.



point.<sup>148</sup> It was not created to try individuals for their separate crimes, apart from their complicity in a larger plan to harm or destroy a population.<sup>149</sup> Also, it is the author's belief that the ICC was intended to be used as a body for prosecution of internationally condemned ideas and beliefs, such as those which emerged from the conflicts in Yugoslavia and Rwanda, as reflected in the crimes and criminal elements codified in the ICC statute.<sup>150</sup> If this is true, then the prosecution of U.N. peacekeepers at the ICC would be inappropriate because the ideas and beliefs espoused by the U.N. vis a vis peacekeeping as a whole are not likely to be viewed as morally or legally reprehensible, and thus are not within the realm of the intent to try a system, or organization, as well as the individual members of it.

## **V. THE USCMJ AS APPLIED TO ALLEGED PEACEKEEPER OFFENSES**

In contrast to the above description of the ICC statute and jurisdiction, were any implicated peacekeepers to be Americans (at present this is not the case), they would be subject to a well defined and precise trial, both in the elements of the crime itself and the trial and prosecution.<sup>151</sup>

Unlike the ICC, U.S. military courts function to prosecute military personnel in all manner of crimes, from those relating to their commands or actions while on duty<sup>152</sup> to criminal acts involving non-military personnel.<sup>153</sup> The system functions to separate military personnel from standard civilian justice and govern them according to traditional laws regarding combat situations and situations in which U.S. personnel who are

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<sup>148</sup> See SCHARF, *supra* note 2, at 771 – 847 (describing the motivating factors which led to the creation and implementation of the ICC statute and the ICC).

<sup>149</sup> See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 2 arts. 7, 8.

<sup>150</sup> See *id.*

<sup>151</sup> See generally 10 U.S.C § 101 *et seq.* (2000) (providing the text of military law and the USCMJ).

<sup>152</sup> See *id.* § 801 *et seq.* (codifying the USCMJ, which applies to duty-related violations and conduct as well as soldiers' activities when they are not on duty but are still enlisted in U.S. military service).

<sup>153</sup> See *id.*

currently serving in the armed forces find themselves.<sup>154</sup> The prosecution of a soldier for acts amounting to war crimes is not an indictment of the U.S. military, its ideas and goals, but rather of the individual, or, in some occasions of a chain of command.<sup>155</sup>

In terms of prosecuting the alleged sexual abuses by peacekeepers, the USCMJ would allow individual prosecution of soldiers for child abuse,<sup>156</sup> cruelty and maltreatment,<sup>157</sup> rape,<sup>158</sup> sodomy,<sup>159</sup> conduct unbecoming of an officer and a gentleman (a crime which could be applied to the abandonment of children fathered in the course of peacekeeping),<sup>160</sup> and sexual harassment.<sup>161</sup> All of these charges are made against the

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<sup>154</sup> *Id.* § 802 (enumerating the many classes of persons subject to the USCMJ, including active duty officers and military personnel, reservists, cadets and others training to be officers, retired military personnel still receiving some kind of compensation or hospitalization treatment from the U.S. military, those incarcerated after a previous court-martial, staffers of various government agencies and organizations who are working in conjunction with the military, prisoners of war, persons from political entities other than the U.S. who are assigned to U.S. military units abroad (unless these persons are exempted by treaty), to name just a few).

<sup>155</sup> *See generally id.* § 801 *et seq.* (providing the crimes under which persons subject to the USCMJ can be charged, as well as the elements necessary for a conviction on these crimes).

<sup>156</sup> *Id.* § 843 (detailing a “child abuse offense” under the USCMJ as “an act that involves sexual or physical abuse of a person who has not attained the age of 16 years and constitutes” rape, sodomy, aggravated assault, “indecent assault, assault with intent to commit murder, voluntary manslaughter, rape, or indecent acts or liberties with a child).

<sup>157</sup> *Id.* § 893 (“Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.”). The terms of this statute could be applied to peacekeepers on the theory that those in the affected areas to which the peacekeepers have been dispatched are “subject to [their] orders” both because of the need for the locals to cooperate with the peacekeepers to obtain services and protection from the U.N. and because of the ability of the peacekeepers to use force against those who do not follow their orders and are seen as posing a threat to the peacekeepers and the peace in general.

<sup>158</sup> 10 U.S.C. § 920 (2000). The definition of rape provided under the statute is very broad, and the affirmative provided in the statute - mistake as to the age of the victim - would not apply to the peacekeeping allegations in the Congo because there is a reasonability requirement for the belief that the woman involved was of legal age. *Id.* Given the very young age of the accusers, it is highly unlikely that such a defense would be feasible or successful in a court-martial.

<sup>159</sup> *Id.* § 925. Again, this is a very broad statute in terms of the definition of the crime and the degree to which the act must have been carried out before a charge can be brought. *Id.*

<sup>160</sup> *Id.* § 933 (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming of an officer and a gentleman shall be punished as a court-martial may direct.”).

<sup>161</sup> *Id.* § 1561 (2000). This statute is interesting for the purposes of the peacekeeper discussion for two reasons. First, the definition of sexual harassment, while limited to the workplace, could be applied to any local women who might have been employed by or in the peacekeeping mission. *Id.* Second, this statute is equally applicable to military personnel and civilians alike, thus providing double protection for any local women (or indeed any peacekeeping officials or other personnel) against unwanted attention and advances. *Id.*

individual,<sup>162</sup> and the USCMJ also provides the basis for an accessory after the fact prosecution should it be alleged that a member of the peacekeeping staff became aware of the abuse after it was committed and yet did nothing to report it or otherwise stop such abuses from happening.<sup>163</sup> In this way, the USCMJ would allow for fair prosecution of the individual, and hold the rest of the mission accountable for knowledge of abuses after the fact, while not in any way indicting (whether in fact or implication) the mission and idea of the U.S. military as a whole or, by extension, the peacekeeping mission as a whole if applied in that context.

Turning to the more procedural aspects as the USCMJ, the accused has the knowledge that the prosecuting officer is a member of the military as well, and does not have the same all-encompassing powers as an ICC Prosecutor.<sup>164</sup> Additionally, the USCMJ does not require judicial approval of an investigation before it occurs,<sup>165</sup> as is the case with the ICC statutory provisions.<sup>166</sup> The accused also is given the right to counsel who is also a military officer and is versed in the laws of the military itself.<sup>167</sup> In terms of witness production, the USCMJ specifically allows the military courts to legally require

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<sup>162</sup> See *id.* §§ 843, 920, 925, 933, 1561. The only exception to this is a provision in 10 U.S.C. § 1561, the sexual harassment statute, which makes the commanding officer or supervisor guilty of a crime if sexual harassment reports are not investigated or ignored, or such behavior is exhibited in front of the commanding officer or supervisor and no action is taken. *Id.* § 1561. However, the statute does specify the method in which complaints against an individual are to be handled, and makes it clear that sexual harassment is a crime under the USCMJ that is punishable by court-martial. *Id.*

<sup>163</sup> *Id.* § 878 (“Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.”).

<sup>164</sup> See 10 U.S.C. §§ 830-835 (2000) (providing the requirements of pre-trial procedure in cases which are subject to the jurisdiction of a court-martial).

<sup>165</sup> See *id.* Under the USCMJ, a full investigation must be made into the allegations prior to any proceeding in front of a military judge. *Id.* In fact, before a trial can be ordered the investigatory body must clear the charges and the results of the investigation with a staff judge advocate. *Id.* § 834.

<sup>166</sup> See *supra* Part IV B.

<sup>167</sup> 10 U.S.C. § 832 (“The accused shall be advised of the charges against him and of his right to be represented at that investigation [where the determination of whether to proceed with a formal charge and court-martial request is made] by counsel.”).

witnesses to appear before the court and testify,<sup>168</sup> under threat of prosecution if they do not in fact appear.<sup>169</sup>

The USCMJ and military courts have a long history due to their age and continued use throughout U.S. history, and a concise history of cases illustrating the above points is not within the scope of this paper. However, it is important to note such a history, as it allows prosecution for acts such as the alleged peacekeeper abuses, and thus provides both the prosecution and the defense in such a situation with guideposts for trial and appeals, as well as with a standard body of law which can be relied on and which is not in flux due to the volatile nature of the subject matter and political climate, as could be the case with the ICC.<sup>170</sup>

## **VI. SUGGESTED CHANGES TO THE PEACEKEEPING APPARATUS**

The current abuse allegations against U.N. peacekeepers in the Congo present two interrelated yet distinct situations which need to be addressed in order to assure that there is justice for the unwilling victims of abuse and a legitimate and respected body to assist in peacekeeping activities in the future. Each of these situations will be addressed separately.

### **A. SHORT-TERM CHANGES AND SOLUTIONS**

The short term goal of the UNSC, particularly the permanent members who gave rise to the U.N. in the beginning, must be to provide the victims of abuse with counseling and medical assistance, as well as the promise that there will be justice for them. These

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<sup>168</sup> *Id.* § 846 (“Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue.”).

<sup>169</sup> *See id.* § 847 (making it a violation of the USCMJ to fail to appear or produce evidence when the court-martial or other military court has subpoenaed the witness or the evidence).

<sup>170</sup> *See supra* Part IV B.

steps are not only humanitarian gestures, they are indeed necessary to preserve some semblance of credibility for the peacekeeping concept and the U.N. as a larger entity.

The provision of counseling and medical assistance to victims is a weighty task given the fear and reluctance of victims, especially children, to come forward, and should be the task of trained child psychologists and other mental health professionals with documented experience. The author suspects that the best candidates for this job would be female doctors, as the trauma of seeing male doctors who remind the victims of their attackers could be counterproductive to the attempted medical assistance. Counseling and medical assistance must also be made available to the families of the victims so they can understand the trauma suffered by their family member, and, where appropriate, receive medical assistance and treatment themselves. Further, the peacekeepers who fathered children with local women must be found if possible through such measures as mandatory DNA tests, and made to take care of their children and the women with whom they had children. If identification is not possible, lifetime care for these women and children should be provided by the U.N. itself. The author proposes that the counseling, medical treatment, and palimony be funded by the nations which contributed abusive peacekeepers.

It is clear from the evidence that, while the U.N. investigation of the alleged abuses was being conducted, further abuses were being committed by peacekeepers in the very areas under investigation.<sup>171</sup> Not only does this evince both questionable judgment and a sense of being above the law on the part of the abusive peacekeepers and members of the mission administration, it also implicates the faith one can have in reformation of peacekeeping missions without some additional oversight. Therefore, the permanent

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<sup>171</sup> *UN peacekeepers abused women, claims watchdog*, MORNING STAR (Jan. 8, 2005).

members of the UNSC, or at least two of these members, should send envoys from their own military corps to oversee the conduct of the peacekeepers, as well as the creation of secured missions where the comings and goings of the peacekeepers would be heavily monitored. Evidence from victims indicates that a frequent method of enticing women and children to prostitute themselves was with the promise of obtaining payment in food, which they would use to feed their starving families.<sup>172</sup> With this in mind, the peacekeepers should not be allowed to have access to excess food or other supplies, and access to facilities where food and other commodities are stored must be under heavy surveillance at all times.

Legally, the home countries of abusive peacekeepers must actively prosecute the peacekeepers, and the U.N. must repatriate these peacekeepers to their home countries so that the prosecutions can start. Although the victims will still be forced to deal with uneven justice based on the nationality of their abusers, they must still be given the fullest possible justice allowed under the legal system of their abuser. To that end, it is imperative that the U.N. release to the public at large the identities of the home countries of the abusers, and put pressure on these countries to vigorously prosecute the abusive peacekeepers. Indeed, these countries should be subject to economic sanctions and removed from eligibility to send any further peacekeepers (as well as forced to recall all current peacekeepers) should they fail to prosecute the abusers to the fullest extent allowed under their legal systems. While this might sound excessive, countries which are heavily dependent on the U.N. and its subsidiary agencies for commercial, infrastructural, humanitarian, and other aid are not likely to ignore the threat of a sanction, regardless of their past precedents in prosecuting allegedly abusive peacekeepers.

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<sup>172</sup> See *supra* Part III A.

To say that these suggestions are anything more than remedial and stop-gap measures would be clearly erroneous, however in the short-term such measures are a good option because they validate the rights of the victims and the ideal of the preservation of peace and the importance of humanitarian actions and policies upon which the U.N., and later the U.N. peacekeeping missions, was founded.

## **B. LONG TERM APPARATUS CHANGES**

Peacekeeping missions in the abstract are a vital expression of the ideas and goals of the U.N., and the humanitarianism of its members. The key to the future of peacekeeping missions is to re-examine the original provisions of the U.N. Charter before the peacekeeping mandate was inferred into the Chapter VI provisions.<sup>173</sup> In so doing, the theme of a separate military force under the joint command, and ultimate control, of the UNSC emerges as the intent of the framers of the Charter.<sup>174</sup> Certainly it seems unlikely that a separate U.N. military would come to fruition as the fighting force of its member states, especially when these member states are frequently those going to war with each other and/or committing humanitarian atrocities against groups of people.<sup>175</sup> However, it is the author's position that if the concepts of the Charter were combined with the inference of a peacekeeping force, there would be a peacekeeping apparatus which would be effective, structured, and able to punish and prevent abuses like those seen in the Congo.

By creating a joint command premised on the Joint Chiefs of Staff model used by the U.S. military, there would be a greater deal of accountability and coordination

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<sup>173</sup> See *supra* Part II.

<sup>174</sup> See *id.*

<sup>175</sup> For example, Iraq was, and still is, a member state of the U.N. Even were there to be general consensus regarding the need for force, the possibility of having such a force take action against the member state could easily become fractious.

between the mission commands. Under this structure, member states would not volunteer their soldiers for peacekeeping duty, rather the U.N. military force would actively recruit both interested civilians and current military personnel from around the globe to join the force. This would require that the recruits forsake the laws of their home country, whatever it might be, and agree to be subject to the jurisdiction of the military court for the force, thus solving the uneven justice problem and preventing the possibility of legally savvy peacekeepers being more likely to commit abuses knowing that they will not face severe punishments in their home country's military court.

In terms of the military law used, as between the laws of the permanent members of the UNSC the most similar legal systems are those of the U.S. and the U.K., and accordingly, for stability and ease of adapting these laws to the force, those should be used as the code for the U.N. military force. This would reconcile the issues with the current legal status of peacekeepers and the application of the ICC statute to U.N. peacekeepers with the guaranteed prosecutorial abilities and procedural benefits found in the USCMJ.<sup>176</sup> By adopting laws which have cases establishing precedent, the lawyers involved in the prosecutions on both sides would have a better knowledge and understanding of how to argue their cases, and judges would have a far better understanding of how to apply statutory law.

Along with the U.N. military force there would have to be a recruitment and screening process for all civilian staff members, and an office specifically for the oversight of peacekeeper activities and interaction with the local populations must be created and well staffed. This office should be charged with, among other things, educating the local community about the proper and improper actions of peacekeepers,

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<sup>176</sup> See *supra* Part V.



and how and where they should report any instances of inappropriate conduct by the peacekeepers. All of these suggestions would rather obviously require funding, which the author submits should not go directly through the U.N., especially in the wake of the oil-for-food scandal.<sup>177</sup> Rather, the permanent UNSC members alone should fund the U.N. military force with contributions which are commensurate to their contributions as of 2005. As a corollary, the contributions of each of the permanent UNSC members would then be significantly reduced to accommodate the funding of the peacekeeping operation. Since one of the primary tasks assigned to the permanent UNSC members is the maintenance of “international peace and security,” and since this task requires a robust peacekeeping and military force, the permanent members’ first financial responsibility should be the creation and maintenance of an organized, legally accountable, and morally respected U.N. military force.

In terms of the troops themselves, recruits must be carefully screened and vetted before they are allowed to become peacekeepers. Key among the screening processes must be the mandatory taking of an HIV/AIDS test before and during deployment. In the event that any fathering issues should arise, pictures of the peacekeepers must be maintained on file, and all deployed peacekeepers and accompanying personnel must be required to give a DNA sample prior to deployment. Should any peacekeeper alter his appearance while deployed or prior to deployment, he should be required to resubmit a photograph. These measures do tend to go into some of the private realm which civil libertarians, especially in America, tend to hold dear, however, in order to rehabilitate the peacekeeping idea and ensure that it can exist in a functional and helpful way, these steps

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<sup>177</sup> See *Texas businessman indicted in U.N. oil-for-food probe*, CNN.COM (Apr. 15, 2005), available at <http://www.cnn.com/2005/LAW/04/14/oilfood.indictment/index.html> (last visited Apr. 22, 2005).

must be taken. The world, and particularly the victims, must be assured that such allegations of abuse by peacekeepers do not occur again.

## **VII. CONCLUSION**

In sum, the concept of a U.N. peacekeeping force evolved from a somewhat questionable interpretation of the U.N. Charter to both win the Nobel Peace Prize and to become known for truly abominable sexual abuses of those it was charged with protecting. This dichotomy has been in no way helped by the uneven legal fates which await abusive peacekeepers when they return to their home countries. The idea of using the ICC to prosecute these errant peacekeepers does not provide the victims with a real chance at having substantive charges brought against the peacekeeper who abused her, and does not provide either the prosecution or the defense adequate procedural and fairness safeguards before and during the trial. In contrast with these substantive and procedural issues with using the ICC statute stands the USCMJ, a well-established legal system which would allow for prosecution of peacekeepers as individuals and which contains crimes which fit those allegedly committed by the peacekeepers, while guaranteeing procedural adequacy and fairness to the prosecution and the defense in a less politically charged atmosphere than the ICC. The USCMJ does not investigate or prosecute the ideas of the institution which created and deployed the peacekeepers, rather it investigates and prosecutes those peacekeepers who have violated the law. In so doing, the individual is brought to justice, while the institution itself can point to the prosecution of an errant member as evidence that it too condemns the act and that the act is not a part of the value set and goals advanced by the institution. This protects the contributions of those members of the institution who truly believe in its goals and have fought and

sacrificed for the institution, at the same time that it protects future local populations from facing the prospect of allowing in potential predators or not electing to allow in peacekeepers who might otherwise save their society.

The suggestions made in this paper aim to reconcile the two elements present in international peacekeeping missions, especially where there are problems within the mission: humanitarianism and law. One can have humanitarianism and no law and generate a system much like the current U.N. peacekeeping system, which is besmirched by the horrid allegations of abuse made against peacekeepers, and leaves a legacy of uneven justice for victims. One can have law and no humanitarianism and end up with a dusty book of statutes sitting in a library, an ancient relic never used because there was never sufficient societal interest in the concept to create a peacekeeping force to govern. Or, one can combine the two and have a system that benefits humanity not only through its acts but also through its assurances of even and fair justice. That is the combination which will allow the idea of international peacekeeping to flourish.