WHO GUARDS THE GUARDS?

The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa

MAX DU PLESSIS AND STEPHEN PETE

The project has been made possible with the generous funding from the Ministry of Foreign Affairs, the Royal Norwegian Government, through the Training for Peace (TFP) in Africa Programme. The contents of this document represents the views and the findings of the authors alone and not necessarily those of funders or those consulted during its preparation.

ISS MONOGRAPH SERIES ● No 121, FEBRUARY 2006

The vision of the Institute for Security Studies is one of a stable and peaceful Africa characterised by human rights, the rule of law, democracy and collaborative security. As an applied policy research institute with a mission to conceptualise, inform and enhance the security debate in Africa, the Institute supports this vision statement by undertaking independent applied research and analysis; facilitating and supporting policy formulation; raising the awareness of decision makers and the public; monitoring trends and policy implementation; collecting, interpreting and disseminating information; networking on national, regional and international levels; and capacity-building.

ISBN: 1-919913-94-7

First published by the Institute for Security Studies,
P O Box 1787, Brooklyn Square 0075
Tshwane (Pretoria), South Africa
www.issafrica.org

Cover photo: Picture Net
Design, Layout and Printing:
Lesedi Litho Printers, Pretoria
+27 12 321 9375

CONTENTS

ABOUT THE AUTHORS

Max du Plessis is an associate professor in the Faculty of Law, University of KwaZulu-Natal, Durban, South Africa. He is an advocate of the High Court of South Africa and an associate member of the Natal Bar. He holds the degrees BIuris (SA), LLB (Natal) and LLM (Cambridge).

Stephen Peté is an associate Professor in the Faculty of Law, University of KwaZulu-Natal, Durban, South Africa. He is an attorney of the High Court of South Africa and holds the degrees BA LLB (Natal), LLM (UCT) and MPhil (Cambridge).

EXECUTIVE SUMMARY

Increasingly, the abuse of civilians at the hands of peacekeepers on the African continent has been recognised as a problem by the international community. The authors begin by examining the nature and extent of the problem, which is situated in its historical context. The considerable difficulties that arise in prosecuting crimes committed by peacekeepers are discussed in general terms, following which the authors focus on whether or not international criminal law and the newly established International Criminal Court (ICC) may have a role to play in this area. The authors trace the rise of the ICC and discuss the different crimes in its jurisdiction. Thereafter they seek to establish the extent to which the ICC may be expected to play a practical role in the prosecution of peacekeepers in Africa for serious crimes committed while involved in peacekeeping operations.

The authors are driven to the conclusion that, in all probability, the role of the ICC will be limited due to the following principal factors: first, the types of crimes over which the ICC exercises jurisdiction are strictly defined. Secondly, the jurisdiction of the court is limited by the principle of 'complementarity'. Each of these factors is discussed in detail, this followed by an examination of the particular problems related to peacekeepers from the United States of America. The authors conclude with a discussion of further responses to crimes by peacekeepers, which do not involve prosecution in terms of national or international law. The overall conclusion is that the role of the ICC in relation to crimes committed by peacekeepers in Africa will be limited. Although there may be exceptions, serious crimes committed by United Nations (UN) peacekeepers in Africa are isolated, and the perpetrators do not possess the necessary intent to enable such crimes to be classified as genocide or as crimes against humanity. It is more likely that serious crimes committed by peacekeepers may amount to war crimes, although it is clear that the ICC is more concerned with war crimes committed on a wide scale, rather than with isolated incidents.

Furthermore, even if certain crimes committed by UN peacekeepers may be said to fall within the categories of genocide, crimes against humanity or war crimes, the principle of complementarity ensures that most such crimes are investigated and prosecuted by the state of the offending peacekeeper. The authors expect that prosecutions of peacekeepers in Africa will, in the main, continue to be conducted by the national state of the peacekeeper concerned, but conclude that this is not necessarily a bad thing, since: "The ICC will be effective when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian law to investigate and prosecute all those guilty of international crimes, including peacekeepers."

CHAPTER 1
INTRODUCTION

This monograph addresses whether or not international criminal law and the newly established International Criminal Court (ICC) may have a role to play in the effective prosecution of peacekeepers who have committed serious crimes.[2] At a meeting of African leaders in Abuja, Nigeria, on 30 January 2005, Secretary-General of the United Nations, Kofi Annan, expressed concern about the abuse of civilians at the hands of peacekeepers and called for 'the very highest standards of professionalism and conduct from the tens of thousands of United Nations (UN) peacekeepers deployed in different parts of the continent'. Whilst paying tribute to those blue helmets who had lost their lives in the service of peace, and stating that he was proud of the contributions made by the peacekeepers to the promotion of stability in several countries in Africa, the Secretary-General expressed his outrage at revelations that Congolese children had been sexually exploited by UN personnel in the Democratic Republic of Congo (DRC):

> *I am deeply saddened to say… that an ugly stain is left on these heroic efforts by the appalling misconduct of a minority of peacekeepers… This cannot stand. We cannot tolerate even one UN peacekeeper victimising the most vulnerable among us…. The time has come to overhaul our entire training, disciplinary and investigative regimes to ensure that we do not again experience this abomination in any of our missions… I will be counting on the support of member states in the coming months to help bring this about, and to treat this issue with utmost seriousness, as I myself most certainly do.*[2]

Although peacekeeping often follows the commission of serious crimes against helpless civilians, it is usually assumed that the peacekeepers are attempting to prevent further atrocities, as opposed to being involved in the commission of such crimes. As the words of the Secretary-General quoted above indicate, however, this is not always the case, and those appointed to keep the peace sometimes become perpetrators of crimes against those under their protection. The seriousness with which the Secretary-General views the problem of crimes committed by peacekeepers is clearly indicated in a number of his reports to the Security Council of the UN.

For example, in his recent report on the topic of 'women and peace and security' he stated:

> *Sexual exploitation and abuse are forms of gender-based violence that can be perpetrated by anyone in a position of power or trust. The involvement of United Nations personnel, whether civilian or uniformed, in sexual exploitation and*

> *sexual abuse of local populations is particularly abhorrent and unacceptable and a serious impediment to the achievement of the goals of resolution 1325 (2000) on the protection of women and girls. In May 2004, the United Nations Mission in the Democratic Republic of the Congo (MONUC) uncovered allegations of sexual exploitation and abuse, including of minors, by civilian and military personnel in Bunia. Such abuses must be prevented and the perpetrators must be held accountable.*[3]

In his subsequent report to the Security Council on the state of the peacekeeping mission in the DRC, the Secretary-General pointed out that between June and September 2004, the Office of Internal Oversight Services had investigated the allegations of sexual misconduct by UN personnel in Bunia, and found that 'eight of some 72 allegations could be corroborated[4]. According to the report, most of the allegations related to soliciting the services of prostitutes.[5] After detailing further measures that were being taken to investigate allegations against UN personnel, the report states that

> *a number of staff have been placed on suspension, pending the completion of investigations' and that an international civilian staff member was removed from the Mission late in October and is facing judicial hearings in his home country on charges of rape, sexual aggression, corruption of female minors and possession of pornographic pictures of female minors.*[6]

The Secretary-General then states forcefully:

> *As a consequence of these deplorable events, an interdepartmental task force has been established at UN headquarters to coordinate actions and responses to allegations of sexual exploitation and abuse against peacekeeping personnel and to address prevention, advocacy and long-term policy issues. I have made it clear that my attitude to sexual exploitation and abuse is one of zero tolerance, without exception, and I am determined to implement this policy in the most transparent manner.*[7]

It is imperative that peacekeepers be held to account for serious crimes committed during peacekeeping operations. In practice, however, difficulties arise as to who would be responsible for prosecuting such crimes and under which legal system such prosecutions would be conducted. Peacekeeping operations invariably involve sensitive issues of national sovereignty, with troop-contributing states jealously guarding the sovereignty that they exercise over the troops they have deployed on a particular peacekeeping mission. According to Marten Zwanenburg:

> *In any peacekeeping operation… the issue of the entity on which criminal jurisdiction over the troops is conferred is important. States see criminal jurisdiction over their nationals as an aspect of their hallowed sovereignty, especially when those nationals are outside of the state's borders and therefore*

> *more vulnerable to claims of criminal jurisdiction by other states or entities. Considerable national sensitivities are associated with participation in (UN) military operations.*[8]

Usually, in the case of UN peacekeeping operations, status of forces agreements (SOFAs) are concluded between the UN and the host state, whilst contribution agreements (CAs) are concluded between the UN and the troop-contributing states which, to some extent, exempt the members of the peacekeeping force from the criminal jurisdiction of the host state. Such agreements on criminal jurisdiction are in accordance with the convention on the privileges and immunities of the UN, which confers immunity from legal process on officials of the UN.[9] These agreements normally provide that the troop-contributing states will exercise criminal jurisdiction over the troops that they contribute. This means that peacekeepers who commit crimes while on duty in another country are liable to prosecution for those crimes in terms of the (military) criminal law of their own state. The problem, of course, is that different states may have different views on which, if any, crimes committed by their troops they wish to prosecute. Individual states may not be either willing or able to prosecute serious crimes committed by their troops while performing peacekeeping duties. As the Women's International League for Peace and Freedom points out:

> *When such acts are addressed at all in the national system, they are far removed from those most affected. The impacts on communities are devastating when targeted by those who often represent their last hope for security and stability.*[10]

To the extent that there is a lack of accountability on the part of peacekeepers, this problem is compounded by the inherent nature of peacekeeping operations, as well as by the fact that the UN lacks the authority to discipline its peacekeepers:

> *Bringing charges against troops is complicated by the fact that they are posted for six-month terms and are unlikely ever to face a military investigation. Once the military takes over the inquiry, the UN has no legal authority to follow up the investigation and cannot ensure that a repatriated soldier will face prosecution.*[11]

In this respect, the complexity of peacekeeping operations in Africa should be kept in mind. For example, MONUC is the largest peacekeeping mission in the world, composed of 105 nationalities, with 51 troop-contributing countries and 19 countries contributing to the police force.[12]

One way in which to temper the exclusive authority of the contributing state to prosecute its own troops deployed on a peacekeeping mission is to provide, in the peacekeeping agreements, for secondary jurisdiction by the host state in certain situations:

> *The exclusive jurisdiction over military and CivPol [civilian police] personnel awarded to contributing states in the model UN agreements contrasts with the*

> *'primary jurisdiction' awarded in SOFAs concluded between member states of the North Atlantic Treaty Organisation (NATO). The NATO agreements allow host states to exercise secondary jurisdiction over nationals of a contributing state when the contributing state declines to prosecute its own national for an alleged crime.*[13]

This solution is, however, not ideal:

> *Even with a jurisdiction-sharing model, however, those serving in host states might often find it difficult or impossible to proceed with investigations of abuse by Peace Support Operation (PSO) personnel as well as aid workers associated with other international organisations in light of the fact that they are often reluctant to be seen as 'going against' those who are there to help them.*[14]

Given these difficulties, we will consider whether the ICC is a suitable means by which to hold wayward peacekeepers to account. This question is of particular relevance to South Africa, which has recently negotiated a cooperation agreement and signed a memorandum of understanding (MoU) with the ICC.[15] Before dealing with the emergence of international criminal law and the establishment of the ICC, however, it is necessary to sketch the extent of the problem of atrocities committed by UN peacekeepers.

CHAPTER 2
THE EXTENT OF THE PROBLEM

During recent years there have been increasing reports of serious crimes committed by UN peacekeepers engaged in peacekeeping operations. According to the Women's International League for Peace and Freedom:

> *In the past decade, increasing numbers of accounts have surfaced of violations committed by peacekeepers against civilians, in particular women and girls, during UN peacekeeping operations. To date, violations by peacekeepers have been documented in Angola, Bosnia and Herzegovina, Cambodia, the DRC, East Timor, Kosovo, Liberia, Mozambique, Sierra Leone and Somalia (UNIFEM'S independent experts' assessment). Currently, the UN is carrying out investigations of sexual abuse by peacekeepers in the DRC.*[16]

At the very least, allegations of serious atrocities committed by peacekeepers date back to the time of the UN peacekeeping mission to Somalia in 1997. Canadian, Belgian and Italian peacekeeping troops were alleged to have been involved in atrocities. For example, certain Italian peacekeepers were alleged to have pinned a man to the ground and shocked his genitals with wires from a radio generator, whilst other Italian troops were alleged to have bound a woman to an armoured truck and raped her with a flare gun. Belgian peacekeepers were alleged to have roasted a boy over an open fire until his clothes caught alight. Canadian soldiers were alleged to have conducted a 'turkey shoot' by setting out food and water to act as 'bait' to lure hungry Somalis into shooting range. They were also alleged to have beaten a 16-year old Somali boy to death after raping him with a baton. In most of these cases, it was reported that there was 'hard evidence' in the form of photographs taken of the incidents by the offending peacekeepers themselves. Some of the soldiers involved were charged by the military authorities of their countries of origin, and some received short sentences of imprisonment. Others were not charged or were set free after investigation.[17]

Allegations of atrocities committed by peacekeepers are, however, not restricted to the peacekeeping operations in Somalia. In January 2000, it was alleged that a 12-year-old Kosovo-Albanian girl had been raped and murdered by a UN peacekeeper. According to the Women's International League for Peace and Freedom:

> *Subsequent investigations revealed her murder took place in a climate of wanton violence and aggression against the people of Kosovo and that peacekeepers had 'failed basic standards of conduct of human decency'. The Kosovo investigation also yielded information that similar crimes had been committed during an*

> *earlier peacekeeping mission in Haiti.*[18]

As far as atrocities by UN peacekeepers in Africa are concerned, a 1996 study by the UN on the impact of armed conflict on children revealed a rise in sex trafficking of women and children in countries where peacekeeping forces were operating.[19] A recent policy briefing paper by the London-based non-governmental organisation (NGO), International Alert, states that:

> *In 2002, a study conducted by Save the Children Fund UK and UNHCR uncovered and documented allegations of widespread sexual exploitation and abuse by aid workers, including UN agency personnel serving in PSOs in West Africa (Liberia, Sierra Leone and Guinea), which became known as the 'food for sex' scandal.*[20]

In July 2004 disturbing reports appeared in the London Independent concerning serious crimes alleged to have been committed by UN peacekeeping troops involved in MONUC:

> *A total of 68 allegations against soldiers with MONUC have been recorded so far this year, among them a child prostitution ring run out of MONUC airport in Bunia and the rape of minors by Nepalese MONUC soldiers in the Ndromo camp. A senior Tunisian MONUC officer has been accused of soliciting a minor for sexual relations, whilst there have been repeated accusations against Pakistani, Moroccan and Uruguayan UN troops… On June 8, the MONUC office in Kinshasa sent a memo to UN headquarters in New York outlining 50 cases of sexual abuse against minors by MONUC troops in the northeastern DRC town of Bunia. A second memo, one week later, detailed four other allegations and said attention should be paid to South African MONUC troops in Kindu, Moroccan MONUC troops in Kisangani and MONUC troops from Uruguay, Pakistan and Nepal… The memos prompted the deployment of an independent team from the UN Office of Internal Oversight Services (OIOS) to Bunia in mid-June to begin investigations into the alleged widespread sexual abuse of children. The investigation is said to be continuing.*[21]

A senior member of MONUC, speaking on condition of anonymity to Kate Holt of the London Independent, called the OIOS enquiry referred to in the above quotation 'a joke' and stated further:

> *The UN has no authority to follow through any of the investigations currently made. At most, after a lengthy process, it can repatriate an individual, but it cannot see those cases followed through in the country of origin. There is total impunity for MONUC soldiers, and this is a deep cause for concern.*[22]

Kristina Peduto, the head of MONUC child protection in Bunia, told the London Independent that:

> *The OIOS needs to be given the power to prosecute and act as a substitute for national justice… Members of the UN have a strong responsibility to send troops committed to uphold the UN code of conduct, and strong mechanisms have to be enforced on all MONUC staff, military and civilian, to act as a deterrent against sexual abuses, especially with minors.*[23]

The picture painted by these sources is very disturbing to say the least. For South Africa, it is particularly disturbing that this country's troops may have been involved in committing crimes while performing peacekeeping duties in Africa. For instance, in a recent case, a South African colonel in Goma, DRC, was allegedly found during a UN investigation to have sexually molested his young male interpreter. It was alleged that he had requested young male interpreters under the age of 18 since the start of his mission.[24] Another incident involving South African troops was reported in Goma, where a 12-year-old identified only as Anna was alleged to have been raped. This was said to be one of a string of such incidents.[25]

CHAPTER 3
THE RISE OF THE ICC

Given the problems of legal accountability mentioned in the introduction to this paper, we now consider whether peacekeepers could be held to account by the recently established ICC. The question is of obvious relevance to African states that are party to the ICC statute and that currently contribute towards UN or other peacekeeping missions (such as South Africa), and states that have peacekeepers deployed on their territory (such as the DRC).

Before examining the ICC statute in more detail, we will consider the nature of international criminal law that underlies the creation of the world's first permanent international criminal tribunal. The general rule in international law is that states are able to exercise their domestic criminal law jurisdiction over criminal offences that affect their domestic concerns. As such, criminal jurisdiction is exercised over crimes committed within a state's territory (such as murder, theft and rape), and may sometimes be exercised over crimes that are plotted abroad (such as high treason), because they threaten the domestic order. However, some offences affect not only the domestic legal order but the international legal order. The classic example is piracy. The perpetrators of this crime were described as *hostes humanis generis* - enemies of all mankind. Today, certain crimes are of such an egregious nature that their perpetrators are also rightly considered *hostes humanis generis*. The crimes that fall under the jurisdiction of the ICC are drawn from this body of outrageous criminal conduct and include crimes against humanity (torture being the classic example), genocide and war crimes.

Because until recently there has not been a permanent international criminal court with jurisdiction to try these crimes (leaving aside isolated examples such as the international criminal tribunals at Nuremberg and Tokyo and the ad-hoc tribunals for the former Yugoslavia and Rwanda established by the UN Security Council in the 1990s), it was left to national courts to bring international criminals to justice. Where a national court exercised jurisdiction over an international crime with no jurisdictional link (to territory or nationality, for example), it was said to be exercising universal jurisdiction. Perhaps the most famous example in this regard is the trial of Adolf Eichmann. In the Eichmann case, the district court of Jerusalem decided that Israel had jurisdiction over atrocities allegedly committed by Eichmann, a Nazi officer during WWII, on the grounds that the said atrocities were not domestic crimes alone but crimes against the law of nations.[27]

As we shall see, the ICC statute retains an important role for domestic courts that are

said to have a complementary relationship with the ICC in punishing the world's worst criminals. But where such courts are not willing or able to act against the enemies of mankind, the ICC ensures that impunity does not follow their actions.

The ICC is the world's first permanent international criminal tribunal. Its statute was drafted in Rome in 1998, and adopted with the vote of 120 countries in favour of the treaty. Only seven countries voted against it (including China, Israel, Iraq and the United States) and 21 abstained.[26]

The treaty came into force in April 2002, once it had been ratified by 60 of the states that had signed the treaty, and became operative on 1 July 2002, at which time the court's jurisdiction over genocide, war crimes and crimes against humanity took effect. To date, the Rome statute has been signed by 139 states and ratified by 97 states, which constitutes almost half the international community.[27] Of the 97 states that have ratified the treaty, 26 are African, representing 27% of the total. This is a significant proportion of the ratifying states.

South Africa is a party to the statute and has been vocal in its endorsement of the ICC. On 18 July 2002, the South African parliament passed the Implementation of the Rome Statute of the International Criminal Court Act No 27, 2002, which is intended to allow South Africa to comply with its obligations under the statute of the ICC.30 and [28] On 31 January 2005, South Africa entered into a cooperation agreement with the ICC in the form of an MoU.[29]

The court is based in The Hague, Netherlands. The judges of the court were appointed in February 2003, and sworn in on 11 March, 2003, at the inaugural session of the court in The Hague. Of the 18 judges, three are from Africa,[30] including Navi Pillay, who is South African. The president is a Canadian, Philippe Kirsch, and his first deputy is a Ghanaian, Akua Kuenyehia. The chief prosecutor is the highly respected Argentine lawyer Luis Moreno-OCampo The court is expected to hear its first case in the near future

Africa is high on the court's agenda. On 26 January 2005 it was reported that within six months the ICC hoped to start its first war crimes trials related to atrocities committed in Uganda, followed within a year by further trials associated to atrocities committed in the DRC. The first accused to appear before the court are expected to be members of the Lords Resistance Army (a Ugandan rebel group) which is believed to be responsible for kidnapping 3,000 children to act as fighters, porters and slaves, and to have killed 2,000 people over two and a half years. On 7 October 2005 the ICC issued its first arrest warrants against suspects from Uganda. Luis Moreno OCampo pointed out that the first cases dealing with atrocities that had taken place in the DRC would start a little later than the Ugandan cases due to instability and poor communications in the DRC.[31]

On 28 January 2005, it was reported that the ICC would send a team to the Ivory Coast

to prepare for a possible investigation into crimes committed during that country's civil war.[32] It was reported further that the UN had compiled a list of scores of Ivorians implicated in the alleged atrocities, but had not identified them officially. The list was believed to include senior officials on both the government and rebel sides.[33]

On 31 January 2005 a special UN commission, led by the Italian judge Antonio Cassese, which had been investigating violence over a two year period in the region of Darfur in western Sudan, released its findings. According to the report, the commission found that the violence amounted to 'crimes against humanity with ethnic dimensions', and recommended that the war crimes and human rights violations documented should be referred to the ICC.[34] The report went on to point out that the ICC was:

> *An institution backed by Europe and most African countries, but strenuously opposed by the US,*

which meant that

> *the Bush administration is caught in a tug-of-war between its desire to punish those responsible for what it has declared a genocide, and its dislike of the ICC, which it believes will turn into a vehicle for anti-Americanism, and for politically motivated prosecutions of US troops and officials.*[35]

It is clear that Africa will continue to be the focus of attention for the ICC for years to come.

CHAPTER 4
THE ICC AND PEACEKEEPERS

The ICC is intended to prosecute those who are accused of the world's most serious crimes. This brings us to the central question to be addressed in this paper: to what extent is the ICC expected to play a practical role in the prosecution of peacekeepers in Africa for serious crimes committed while involved in peacekeeping operations? Many factors indicate that this role will be limited. First, the types of crimes over which the ICC exercises jurisdiction are strictly defined. Secondly, the jurisdiction of the ICC is limited by the principle of 'complementarity'. Until recently, it was also possible to point to a third significant factor limiting the potential role of the ICC in the prosecution of peacekeepers. Security Resolution 1422 of 2002 (which was renewed in 2003 but not in 2004) provided immunities from prosecution in the ICC for personnel from states that were not party to the Rome statute and that had nationals participating in operations authorised by the UN. The resolution was passed at the insistence of the US (a non-party to the ICC statute) with the aim of securing immunity for US peacekeepers and other personnel from the jurisdiction of the ICC.[36] Whilst our discussion reveals that most of the crimes committed by peacekeepers are akin to standard domestic crimes that are unlikely to fall within the ICC's jurisdiction, we attempt to pinpoint those few examples of reported crimes by peacekeepers that may conceivably serve to attract the attention of the International Criminal Court.[40]

The crimes over which the ICC exercises jurisdiction

The ICC statute confers jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.[37]

The definition of each of these crimes has a form of built-in threshold that limits the discretion of the prosecutor when deciding whether or not to prosecute peacekeepers accused of such crimes.

Genocide

Genocide is the most serious of all crimes. By its very nature, therefore, it is difficult to imagine peacekeepers being implicated in the atrocities that are associated with a campaign of genocide. Genocide involves the intentional mass destruction of an entire group, or members of a group. Genocide has been committed throughout history, with the 20th century no exception. We think especially of the Jews decimated by the Nazis, the Cambodians destroyed by the Khmer Rouge and, more recently, the genocide

inflicted by the Hutus on the Tutsis in Rwanda. The term 'genocide' is a combination of the Latin words genus (kind, type, race) and *cide* (to kill), and was coined first by Raphael Lemkin writing in response to the events of WWII.[38]

The first criminal prosecution for genocide took place at the international military tribunal set up in Nuremberg following WWII. Strictly speaking, however, the accused at the Nuremburg tribunal were being tried for crimes against humanity under the Nuremberg charter, rather than for genocide. There was no reference to genocide in the charter or in the judgment of the tribunal, even though it did appear in the indictment and was referred to by the prosecution from time to time. It took almost half a century, that is, with the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), before genocide again came to be prosecuted at the international level.[39]

Notwithstanding the small incidence of prosecutions for genocide prior to the 1990s, the strengthening of the normative prohibition of genocide, beginning with the Genocide Convention of 1948, has now reached the point at which genocide is now regarded as a crime under customary international law.44 and[40] It is a norm of *jus cogens* (in the sense that the rules prohibiting genocide cannot be derogated from) that imposes *erga omnes* obligations (that is, obligations that are imposed on all member states of the international community to prevent genocide).

The act (the *actus reus* in legal terms) of genocide is derived from Article II of the Genocide Convention of 1948, which defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;

b) Causing serious bodily or mental harm to members of the group;

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group.

What this definition reflects is a preoccupation among the drafters of the Genocide Convention with the Nazi's extermination of the Jews during WWII. Notwithstanding this preoccupation, the definition is not an anachronism (at least not in formal terms) since it has been replicated in Article 4(2) of the ICTY statute, and in Article 2(2) of the ICTR statute.[41] For the purposes of this paper, it is important to note that the definition has been replicated also in Article 6 of the ICC statute, which prohibits genocide.

Genocide is the most serious crime known to humanity, as evidenced in the high threshold set for the mental element required for proof of this crime. Whilst other ICC crimes require the intent to commit the underlying offence (for example murder, torture, rape), together with the knowledge that the offence is being committed within the context of targeting a civilian population as part of a widespread or systematic attack, genocide requires the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group of persons.

The mental element of genocide is the most important element that distinguishes genocide from other crimes, including crimes against humanity. A good example of the difference is provided by the crime of persecution, which is a crime against humanity. What distinguishes persecution from genocide is that the perpetrator of persecution selects his victims by reason of their belonging to a specific community or group of people, but he does not necessarily seek the destruction of the community as such. The mental element required for both persecution and genocide may involve discriminatory targeting of victims, but for this targeting to amount to genocide the perpetrator must hold the additional special intent of targeting the victims so as to destroy a group or community.[42] In the *Jelisic* case the ICTY explained that:

> *it is in fact the mens rea that gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law.*[43]

It is this strict requirement that, in all likelihood, means that peacekeepers will not fall foul of the prohibition on genocide, even if they were to commit one of the underlying acts associated with genocide, such as murder.

As to the type of intention required, both customary and conventional forms of genocide require a prosecutor to establish a form of aggravated criminal intention, or specific intent (*dolus specialis*), in addition to the criminal intent accompanying the underlying offence. The accused (peacekeeper) must commit the underlying offence (killing, causing serious bodily or mental harm, inflicting conditions of life calculated to physically destroy the group, imposing measures designed to prevent births within the group, forcibly transferring children) with the intent to produce the result charged; that is, the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Genocide is, therefore, a crime perpetrated against a 'depersonalised' victim, and carried out for no reason other than that he or she is a member of a specific national, ethnic, racial or religious group. The specific intention to destroy all (exterminate) or part of the group must have been formed by the accused prior to the commission of the acts underlying the genocide. Put differently, the acts underlying the genocide should be done to further the goal of ensuring the destruction of the group.

The mental element required for genocide will be strictly interpreted by a court or tribunal as is evidenced by the ICTY decision in *Jelisic*.[45] In that case, the prosecutor submitted:

> *that an accused need not seek the destruction in whole or in part of a group' and that 'it suffices that he knows that his acts will inevitably, or even only probably, result in the destruction of the group in question.*[46]

The trial chamber rejected this attempt to smuggle in constructive knowledge (*dolus eventualis*) as a form of intention sufficient to establish the mental element of genocide. The chamber stressed that the prosecutor had to prove that the accused had 'specific intention' to commit genocide (to destroy, in whole or in part, a protected group), and that an accused cannot be found guilty of genocide if he himself did not share the goal of destroying in whole or in part a group, even if he knew that he was contributing to, or through his acts might be contributing to, the partial or total destruction of the group. The prosecutor used the same argument in the *Krstic* case, but the trial chamber rejected the argument once again.

The conclusion is inescapable: the accused must have committed the underlying offence against the victims with the goal of destroying all or part of the group to which the victims belong. Other types of intention such as recklessness (*dolus eventualis*) or gross negligence will not suffice to establish genocide.[49]

To prove the specific intent to commit genocide, the ICTY appeals chamber in Jelisic noted that such intent:

> *may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of the atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.55 and*[50]

In summary, the possibility of peacekeepers being charged with genocide is incredibly slim. Apart from the mental element, the very nature of genocide assumes a quantitative dimension such that only in the rarest of cases will it be possible to prosecute this crime when it is not planned or committed on a large scale.[51] It is difficult to imagine peacekeepers being actively involved in perpetrating acts of genocide, let alone being ascribed the type of special intention required for this crime.

Crimes against humanity

Today, customary international law prohibits crimes against humanity whether they are committed in times of war or peace.[52] Article 7(1) of the Rome statute codifies this position, albeit implicitly, stating simply that:

> *For the purpose of this statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*

There is no mention that the attack must take place in an international armed conflict for it to constitute a crime against humanity.[53]

The 'acts' which are referred to in Article 7(1) are set out in Article 7(2), which lists the following crimes:

a) murder;

b) extermination;

c) enslavement;

d) deportation or forcible transfer of population;

e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

f) torture;

g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;

h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law…;

i) enforced disappearances of persons;

j) the crime of apartheid;

k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

It is clear, therefore, that when one speaks of crimes against humanity under the Rome statute, these crimes possess a common set of features:[54]

1) The offences are particularly egregious in that they constitute a serious attack on human dignity or a grave degradation or humiliation of one or more human beings;

2) They are not usually isolated or sporadic events, but are acts that form part of governmental policy, or of a wide spread or systematic practice of atrocities tolerated, condoned or acquiesced in by a government or *de facto* authority;

3) Their prohibition extends regardless of whether they are perpetrated in times

of war or peace;

4) Under the Rome statute (and the statutes of the ICTY and the ICTR) the victims of the crimes are civilians or, in the case of crimes committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities.[55]

The *actus reus* of a crime against humanity involves the commission of an attack that is inhumane in nature, causing great suffering, or serious injury to mental or physical health, and must be committed as part of a widespread or systematic attack against members of a civilian population.[56]

Having set out the different classes of offences that may constitute crimes against humanity, it is important to return to the definition of a crime against humanity in Article 7(1) of the Rome statute. In terms of that definition:

> *For the purpose of this statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*

From this definition it is clear that the Rome statute sets additional, general thresholds that elevate the listed 'acts' to the level of crimes against humanity. The first requirement is that the act must be part of a widespread or systematic attack. As the ICTY appeals chamber made clear in *Tadic*:

> *The trial chamber correctly recognised that crimes unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime.*

Article 7(2) of the Rome statute provides elucidation when it states that an attack is 'a course of conduct involving the multiple commission of acts referred to in [Article 7(1)] against any civilian population, pursuant to or in furtherance of a state or organisational policy to commit such attack'.

The second requirement is that the attack must be directed against a civilian population. This distinguishes it from many war crimes, which may be targeted at both civilians and combatants. This requirement also distinguishes the Rome statute from customary international law, which allows that a crime against humanity may be committed against military personnel as well as civilians.[58]

For the purposes of Article 7(1), it would appear that the term 'civilian' should be given a broad definition so as to refer not only to the general population, but to members of the armed forces of any of the parties to a conflict, who have become hors de combat and have laid down their weapons, perhaps because they have been captured or wounded.

The third requirement imposed by Article 7(1), which must be met before it is possible to secure the successful prosecution of a person accused of a crime against humanity, is that the enumerated acts being committed as part of a widespread or systematic attack directed against any civilian population must be committed 'with knowledge of the attack'. This requirement amounts to a form of specific intent that sets another threshold that must be crossed before a particular offence may be regarded as a crime against humanity.[59]

Clearly each of the underlying acts committed (in terms of the greater event: the attack) requires its own form of intent. The acts must be committed with a specific intention that is associated with the main event - the attack that gives the individual acts their 'crime against humanity' character. In *Kupreškic*, for example, the ICTY trial chamber described the mental element for a crime against humanity thus:

> *[T]he requisite mens rea for crimes against humanity appears to be the intent to commit the underlying offence, combined with the knowledge of the broader context in which that offence occurs.*[60]

'Knowledge of the broader context' means that the perpetrator must *knowingly* commit the crime; that is, he or she must be aware of the broader context in which his or her act occurs. To put it differently, it must be shown that he or she had knowledge that his or her underlying offence is part of a widespread or systematic attack on the civilian population and pursuant to a policy or plan.[61] If this knowledge is not present, the perpetrator would possess the mens rea to commit only an ordinary crime, and not a crime against humanity.[62] Without the requisite 'big-picture' intention, he or she would possess the *mens rea* only for his or her individual act, and would not have formed the overall intention to associate his or her individual act with the widespread or systematic attack.

This requirement will be established, for example, by proof of the perpetrator's participation in the planning, organisation or execution of extensive and vicious acts of inhumanity.[63] The requisite knowledge may be inferred, for example, by the historical or political circumstances in which the acts occurred; the functions of the accused at the time the crimes were committed; the responsibilities of the accused within the political or military hierarchy that carried out the atrocities; the gravity and extent of the acts committed, and the nature and notoriety of the crimes.[64]

As to the extent of the knowledge required, it is not necessary that the accused know all the characteristics of the attack or the precise details of the plan or policy of the state or organisation to which he or she belongs.[65] Where there is an emerging widespread or systematic attack against a civilian population, it is enough if the perpetrator intended to further such an attack.[66] At the very least, the perpetrator needs to be aware of the risk that his or her act is part of the attack, and is prepared to take that risk. As the ICTY trial chamber explained in *Blaskic*:

> *[t]he accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context.*[67]

As far as peacekeeping operations are concerned, we submit that allegations against peacekeepers would not typically involve claims of attacks against civilian populations, involving the widespread and systematic quality characteristic of crimes against humanity.[68] Marten Zwanenburg, for instance, comments:

> *It is difficult to imagine that a peacekeeping force would have as a policy to commit an attack on the civilian population. On the contrary, peacekeeping forces are heavily dependent on the cooperation of the civilian population in the execution of their mandate.*[69]

Zwanenburg is probably correct in the sense that one does not expect to come across a peacekeeping force that has deliberately formulated, and is acting according to, a policy of harming civilians. Therefore, as Zwanenburg proposes, for a crime against humanity to have been committed the peacekeepers themselves must have formulated a policy to attack civilians. Such a suggestion is not consistent with the provisions of the Rome statute. A peacekeeper may be charged legitimately with having committed a crime against humanity as long as that peacekeeper committed the act 'pursuant to or in furtherance of' a policy that was formulated, perhaps, by another person or group. It is not necessary for the peacekeeper to be the originator of the policy to render that peacekeeper guilty of a crime against humanity.[70]

Of course, problems of proof may arise. Referring to the judgment of the ICTY trial chamber in the case of *Tadic*, Zwanenburg points out that for an individual to be held liable for crimes against humanity, 'the perpetrator must know that there is an attack on the civilian population [and] know that his act fits in with the attack'.77 and [71] In the context of peacekeeping, such knowledge will be very difficult to prove in court, particularly in light of the chaotic circumstances within which many peacekeeping operations are conducted. Zwanenburg concludes:

> *Peacekeeping operations, composed of different contingents coming from different military cultures, often have unclear command and control structures and lack of (compatible) communication lines. This advocates for a presumption against individual members of an operation being aware of the general situation. Thus, in case of peacekeeping operations, knowledge might not easily be implied from circumstances. In any case, allegations against peacekeepers typically do not involve large numbers of victims and perpetrators. Investigations routinely underline the isolated nature of peacekeepers' criminal conduct. Crimes committed by peacekeepers will therefore most likely not fall within the jurisdiction of the court as crimes against humanity.*[72]

That being said, recent reports indicate that not all criminal acts of UN peacekeepers are isolated one-off events. According to the OIOS investigation conducted between May and September 2004, in Bunia, DRC, into allegations of sexual exploitation and abuse, interviews with Congolese women and girls confirmed that sexual contact with peacekeepers occurred with regularity, usually in exchange for food or small sums of money. Furthermore, it was found that many of those contacts involved girls under 18 years old, some as young as 13. According to Barbara Dixon, the director of the investigations division of the OIOS, it was believed that the problem had been and continued to be widespread as there were allegations that covered the entire DRC.[73]

These allegations of crimes of sexual violence by peacekeepers are of particular concern. With the advent of the ad hoc tribunals for Rwanda and Yugoslavia, a rapidly developing jurisprudence has arisen around crimes of sexual violence. A range of important jurisprudential leaps has been made, not least by the ICTR in Akayesu, spelling out the broad parameters of the crime of rape under international criminal law as involving:

> *a physical invasion of a sexual nature, committed under circumstances that are coercive; it may or may not involve sexual intercourse.*[74]

Further elaboration of the definition of rape was then attempted by the ICTY. In *Furund□ija*, after drawing on the principles of criminal law common to the major legal systems of the world, trial chamber II of the ICTY concluded that the objective elements of rape were:

> (i) the sexual penetration, however slight: a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator;
>
> (ii) by coercion or force or threat of force against the victim or a third person.[75]

The *Furundzija* definition of rape was not adopted by the appeals chamber of the ICTY in Kunarac. The trial chamber in Kunara? had elaborated on the element of 'coercion, or force, or threat of force' and explained that that element may be set out as follows:

> *Sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of a victim's free will, assessed in the context of the surrounding circumstances.*

The appeals chamber has now clarified that force or threat of force, whilst providing clear evidence of non-consent, is not per se an element of the offence of rape. According to the appeals chamber in *Kunarac* the elements of rape in international law include the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or (b) the mouth of the victim by the penis of the perpetrator, where such sexual penetration

occurs without the consent of the victim.

A further important development, made by the ICTR in *Akayesu*, was the finding that rape can amount to genocide. The tribunal found that the accused had the requisite mens rea to commit genocide and had exhibited that aggravated criminal intention through, *inter alia*, the systematic rape of Tutsi women. According to the ICTR, the systematic rape of Tutsi women was part of the campaign to mobilise the Hutus against the Tutsi, and the sexual violence was aimed at destroying the spirit, will to live, or will to procreate, of the Tutsi group.[76]

Of singular significance, given the repeated use of rape during times of war to extract information or to punish or humiliate, was the recognition by the Yugoslavia and Rwanda tribunals that rape can amount to torture.[77] The severe mental and physical pain and suffering caused by rape and sexual assault led the trial chambers of both ad hoc tribunals to hold that rape and sexual assault can constitute torture. In Akayesu, the Rwanda trial chamber drew upon the Torture Convention to draw comparisons between torture and rape, noting that:

> *Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.85 and* [78]

The same thinking has informed the jurisprudence of the Yugoslavia tribunal. For example, in the notorious *Celebici* case, the ICTY dealt with atrocities committed in early May 1992 when Bosnian Muslims and Croats took control of Bosnian Serb villages in the Konjic municipality.[87] Men and women were taken to a facility that came to be known as the Celibici camp. Aside from other atrocities committed, the deputy commander of the camp, Hazim Delic, was indicted by the Yugoslav tribunal for having tortured by way of rape two Serb female prisoners. The tribunal found that:

> *Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting." In addition, it commented that "it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.*

In the tribunal's view, this purpose, which is classically associated with the crime of torture, "is inherent in situations of armed conflict".[79] In respect of the first victim, for instance, Delic was found guilty of torture by rape inasmuch as he committed the rapes

> *to obtain information about the whereabouts of [the victim's] husband who was considered an armed rebel; to punish her for her inability to provide information about her husband; to coerce or intimidate her into providing such information; and to punish her for the acts of [her] husband.*[80]

In addition, the violence suffered by the victim in the form of rape was inflicted upon her by Delic because she is a woman. To the tribunal:

> *this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.*[81]

These and other developments have come to be reflected in the statute of the ICC. For victims of sexual violence, the ICC statute both exemplifies the progress thus far and hints at the future contribution that the ICC can make to the attainment of justice for women. For example, the ICC statute goes beyond rape by allowing for prosecution of a wide range of sex-based crimes.[82] The statute prohibits sexual violence as a war crime in Article 8, and in Article 7(2)(g) specifically prescribes that the crime against humanity constitutes rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilisation; or any other form of sexual violence of comparable gravity. In respect of rape, the 'elements of crimes' in the ICC statute has drawn on the jurisprudence of the ICTY and ICTR to set out its own (broadly similar) requirements for rape. In terms of the elements of crimes, rape that amounts to a crime against humanity occurs where:

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

2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent (because of natural, induced or age-related incapacity);

3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population, and

4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The ICC statute also directs the court's attention to sexual slavery, a disturbingly prevalent crime in the DRC and Uganda and one that may overlap with the crime against humanity of enslavement. According to the ICC statute, enslavement

> *means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.*[83]

The elements of this crime are best set out in the ICTY trial chamber's decision in *Kunarac and others* where the tribunal held that indications of enslavement include:

- *elements of control and ownership;*
- *the restriction or control of an individual's autonomy, freedom of choice or freedom of movement (often with the accruing of some gain to the perpetrator);*
- *the absence of consent or free will on the part of the victim (usually rendered impossible or irrelevant by, for example, fear of violence, deception or false promises, abuse of power, the victim's position of vulnerability, detention or captivity, psychological oppression or socio-economic conditions).*[93]

Along with these indicators of enslavement are a range of sex-based factors like exploitation, sex, prostitution and human trafficking. Two important points need to be made in respect of this offence. First, the acquisition or disposal of a person for monetary or other compensation, whilst a prime example of the exercise of the right of ownership over a person who has been rendered 'servile', is not a requirement for enslavement.[84] The central element of the crime is the exploitation of one or more persons through the exercise of the right of ownership. From this, a second more general point arises, that enslavement, even if tempered by humane treatment, still constitutes a form of slavery. As the US military tribunal under Control Council Law No 10 in *Pohl and Others* made clear:

> *Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. … There is no such thing as benevolent slavery.*[85]

The statute also prohibits forced pregnancy, a crime specifically defined in Article 7(2)(f) of the ICC statute as

> *the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.*

Situations covered by this definition would include those where women are forcibly impregnated and confined so as to force them to bear children of a conquering ethnic group with a view to affecting the ethnic composition of a population, or so as to serve as a medical experiment.[86] However, the definition is not to be interpreted as 'affecting national laws relating to pregnancy'; with the result that the crime against humanity of forced pregnancy does not restrict the competence of states to regulate birth control and

abortion in line with their own domestic principles.

Torture as a crime against humanity has been given a broad definition under the ICC statute.[88] The perpetrator must have inflicted severe physical or mental pain or suffering upon one or more persons who were in the perpetrator's custody or under his control. Such pain or suffering must have been committed as part of a widespread or systematic attack directed against a civilian population, and the perpetrator must have known or intended that the conduct was part of such an attack. No specific purpose need be proved for the crime of torture as a crime against humanity.[89] So whilst a broad range of sexually violent acts against women have come to be prohibited under the the ICC statute, these acts, singly or in combination, may also amount to torture. Torture will occur either as a crime against humanity insofar as the sexual pain or suffering is inflicted as part of a widespread or systematic attack directed against the civilian population, or as a war crime insofar as the sexual attack is inflicted during a time of international armed conflict for one of the traditional purposes of torture, namely: extracting information or a confession, punishment, intimidation or coercion, or to discriminate.

The prosecutor of the ICC (drawing inspiration from decisions such as those of the ad hoc tribunals in Akayesu and Celibici) will thus, in appropriate circumstances, be able to charge offenders who have committed egregious sexual acts against women with the cumulative offences of torture as a crime against humanity or war crime, and rape or other sexual violence such as enslavement and sexual slavery prohibited under the ICC statute.[90]

Therefore, when acts of sexual violence or trafficking in women are considered widespread or systematic, they may well constitute crimes against humanity. Further to this, a peacekeeper who is involved in committing offences such as raping women and children, or trafficking of women and children for prostitution, and where such acts are repeated or form part of a string of such crimes, these acts may perhaps be found to be taking part in a widespread attack on the civilian population. It should be borne in mind that the requirement that the attack be widespread or systematic in nature does not mean that a crime against humanity cannot be perpetrated by an individual who commits only one or two of the designated acts (murder, extermination, torture, rape, political, racial or religious persecution, or other inhumane acts) and involves only one or a few civilians. So long as the individual's act or acts form part of a consistent pattern of offences by a number of persons linked to that offender, he or she may properly be charged with crimes against humanity. As a good example, Kittichaisaree points out that the act of denouncing a Jewish neighbour to the Nazi authorities committed against the background of widespread persecution against the Jews has been held to be a crime against humanity.[91] Cassese proposes the following test to determine whether the necessary threshold is met when an individual is not accused of planning or carrying out a policy of inhumanity, but simply of committing specific atrocities or vicious acts:

> *One ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity; or whether they instead constitute isolated or sporadic acts of cruelty and wickedness..*

It is not impossible to imagine that certain of the sexual crimes allegedly committed by UN peacekeepers in the DRC and elsewhere in Africa may be found to be crimes committed as part of a 'consistent pattern of inhumanity', thus exposing the peacekeepers to prosecution for crimes against humanity.

War crimes

War crimes have an ancient lineage. Historically, belligerent states took it upon themselves to determine those acts committed in time of war for which they would try the combatants or civilians belonging to the enemy.

Generally speaking, war crimes are crimes committed in violation of international humanitarian law, which is applicable during armed conflicts. The sources of international humanitarian law are vast, and are divided broadly into two categories of substantive rules: 'the law of The Hague' and 'the law of Geneva'. These sets of rules regulate behaviour in the case of armed conflict.

The law of The Hague is made up of the Hague conventions of 1868, 1899 and 1907, which set out rules regarding the various categories of lawful combatants,[93] and which regulate the means and methods of warfare in respect of those combatants. The 'law of Geneva', so called because it comprises the four Geneva conventions of 1949 plus the two additional protocols of 1977, regulates the treatment of persons who do not take part in the armed hostilities (such as civilians, the wounded, the sick) and those who used to take part, but no longer do (such as prisoners of war).[94] An exception here is the third Geneva Convention which, in addition to the focus on treatment of persons no longer involved in the conflict, also regulates the various classes of lawful combatants, and thereby updates the Hague rules. The Hague rules have been further updated by the first additional protocol to the Geneva Convention of 1977, which deals with the means and methods of combat with a particular emphasis on sparing civilians as far as is possible in armed conflict.

Drawing upon these sources of humanitarian law, the drafters of the Rome statute have set out in Article 8 an elaborate 'codification' of the rules concerning behaviour prohibited in situations of armed conflict, and have ensured that the ICC is empowered to punish as 'war crimes' any deviations from these rules. War crimes, as in the case of genocide and crimes against humanity, are similarly narrowed in scope under the Rome statute. This is because of what is termed the 'non-threshold threshold' built into Article 8 of the Rome statute. In terms of that article, the court has jurisdiction over war crimes "in particular when committed as part of a plan or policy or as part of a large-scale

commission of such crimes". It is important to appreciate that the jurisdictional threshold does not amount to a new restriction on the customary definition of war crimes. Rather, it is merely a method used to prevent the ICC from being overburdened with minor or isolated cases,[95] and was specifically derived from a proposal by the US at the Rome conference, designed to safeguard US soldiers from being indicted for isolated cases of war crimes committed while serving abroad. As Scheffer, the head US delegate at Rome himself points out:

> *[t]he US had long sought a high threshold for the court's jurisdiction over war crimes, since individual soldiers often commit isolated war crimes by themselves that should not automatically trigger the massive machinery of the ICC.*[96]

As in the case of crimes against humanity, for war crimes, the court's focus will similarly be on individual actions that form part of a larger process involving the extensive violation of human rights.[97] Accordingly, if it is shown that a peacekeeper committed a war crime (such as murder, torture or rape) as part of a large-scale commission of such crimes, that peacekeeper may be found guilty of a war crime by the ICC without the prosecution having to prove the special intention that would be required in the case of the crime of genocide or crimes against humanity.

Jurisdiction, complementarity and functional immunity

As discussed above, the definitions of the crimes that fall under the jurisdiction of the ICC suggest that the majority of violations committed by peacekeepers will not be admissible before that court. However, even if certain crimes committed by peacekeepers do fall within one of the categories of crimes that may be considered by the court, there are further factors that render it unlikely that the ICC will in fact institute prosecution against such persons. One such factor is a jurisdictional limitation built into the Rome statute itself.

The statute defines the mechanisms for triggering the court's jurisdiction. The conditions that must be met before the court may exercise its competence are set out in Article 12 of the statute. This article provides that the court may exercise jurisdiction if: a) the state where the alleged crime was committed is a party to the statute (territoriality); or b) the state of which the accused is a national is a party to the statute (nationality). In terms of Article 14 of the statute, any state party may refer to the court a situation in which one or more crimes within its jurisdiction appear to have been committed, as long as preconditions to the court's exercise of jurisdiction have been met, namely, that the alleged perpetrators of the crimes are nationals of a state party or the crimes are committed on the territory of a state party.[99] Because many countries in Africa are not currently state parties to the Rome statute (at the time of writing only 27 African states are party), the fact that crimes capable of being heard by the ICC have been committed within those states by their nationals, or by peacekeepers on duty in that state's territory, means that it is not open to the state concerned or another state

party to refer such 'situations' to the court for investigation. 110 and[100] It should be noted that this does not apply in respect of recent events in the DRC. The DRC became a party to the Rome statute by delivery of its instrument of ratification on 11 April 2002. Accordingly, the ICC will have jurisdiction in respect of war crimes and crimes against humanity committed in the DRC after that date, whether by citizens of that country or by peacekeepers stationed there.

The ICC prosecutor is also authorised by Article 15 of the Rome statute to initiate independent investigations on the basis of information received from any reliable source. The granting to the prosecutor of a proprio motu (independent) power to initiate investigations was one of the most debated issues during the negotiations leading up to the drafting of the Rome statute. In the end, the drafters of the statute determined that, for the prosecutor to exercise this power, the alleged crimes must have been committed by nationals of a state party or have taken place in the territory of a state party - the preconditions set out in terms of Article 12.[101] For African states, the implications of this jurisdictional limitation are clear. Notwithstanding the fact that nationals have allegedly committed serious human rights violations in their respective countries, where those countries are not state parties to the statute the prosecutor has no power, of his or her own accord, to initiate an investigation into the crimes concerned.[102]

A further point must be made in relation to the two 'trigger mechanisms' discussed above. If, under their current government or through the efforts of a new government, African states that are not yet parties choose in future to become party to the Rome statute, the statute provides that for states that become parties to the statute after 1 July 2001, the ICC has jurisdiction over crimes committed only after the entry into force of the statute with respect to that state.[103] In respect of the DRC, however, the statute of the ICC came into effect on 11 April 2002 and, as suggested above, that court will have jurisdiction in respect of core crimes committed in that country after that date, whether such crimes were committed by peacekeepers or by nationals of that country.

Aside from the intricacies of the court's jurisdiction regarding state parties and non-state parties, there is an additional factor that renders it unlikely that peacekeepers accused of committing serious violations of human rights will find themselves being prosecuted before the ICC, rather than before a national court. The ICC is expected to act in what is described as a 'complementary' relationship with domestic states that are party to the Rome statute. The principle of 'complementarity' ensures that the ICC operates as a buttress in support of the criminal justice systems of state parties at national level, and as part of a broader system of international criminal justice. The principle stems from the belief that national courts should be the first to act; it is only if a state party is 'unwilling or unable' to investigate and prosecute international crimes committed by its nationals or on its territory that the ICC is seized with jurisdiction.[104] To enforce this principle of complementarity, Article 18 of the Rome statute requires that the ICC prosecutor notify all state parties and states with jurisdiction over a particular case before beginning an investigation.[105] The prosecutor cannot initiate an investigation on

his own initiative without first receiving approval from a chamber of three judges.[106] At this stage, states that are party to the statute can insist that they will investigate allegations against their own nationals themselves. Whether or not this national is a peacekeeper (for example, a South African peacekeeper alleged to be guilty of a war crime in the DRC), the ICC would be obliged to suspend its investigation.[107] The ICC will deal with a matter only if the national system is unable or unwilling to investigate.[108] If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the ICC may proceed only if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned.[109]

Certain media and NGO reports suggest that there are cases in which national authorities have failed vigorously to prosecute peacekeepers who have committed crimes. For instance, John Hillen, a senior fellow at the Centre for Strategic and International Studies, has commented in relation to the crimes allegedly committed in Somalia that prosecution of peacekeepers was rare:

> *We may think that an egregious offence has been committed and the soldier may just get slapped on the wrist by national authorities and sent home, if that…."*[110]

Of course, extensive research would be required to ascertain the true extent of the problem of lack of accountability in relation to crimes allegedly committed by peacekeepers in Somalia and other areas of the world. What is clear, is that in the unlikely event that a peacekeeper's conduct meets the requirements of a crime falling within the jurisdiction of the ICC, and assuming that the peacekeeper's state is a party to the Rome statute, such state will in theory be obliged to act promptly to prosecute the peacekeeper concerned so as to avoid the potential triggering of the jurisdiction of the ICC.

The important point is that the complementarity principle affirms, rather than weakens, the existing prosecutorial arrangements regarding peacekeepers. The direct involvement of the ICC in relation to crimes committed by peacekeepers will, in all likelihood, be muffled by existing SOFAs and CAs by which the troop-contributing states usually retain criminal jurisdiction over their troops. Of course, that does not mean that the ICC has no role to play. As this section has demonstrated, should the facts indicate that peacekeepers are implicated in the commission of crimes falling within the jurisdiction of the ICC, the principle of complementarity places a burden on states to prosecute such crimes committed by their nationals or on their territory, as such states will usually be empowered to do in terms of the relevant SOFA or CA. As noted previously, South Africa has entered into an MoU with the ICC, thereby committing itself to ensuring that the work of the court is successful. It is only if South Africa or another state party were to fail to fulfil its obligations in a meaningful manner, or without good reason, that the jurisdiction of the ICC will be triggered on the basis that the state concerned is 'unwilling' properly to investigate or prosecute pursuant to its duty under the Rome statute.

It is difficult to imagine that a state committed to fulfilling its international obligations under the Rome statute would fail to investigate and prosecute when faced with allegations that one of its peacekeepers has committed a crime falling within the jurisdiction of the ICC. Accordingly, were a peacekeeper to commit such a crime, the complementarity principle in most cases would ensure the offender was prosecuted at the national level rather than by the ICC. To reiterate, the effect of complementarity will be that the case will not be admissible before the ICC because the peacekeeper's home state would take it upon itself to prosecute the offender.

In addition to issues of jurisdiction and complementarity discussed above, there is a further technical reason why it is unlikely that peacekeepers will ever find themselves standing before the ICC. The principle of functional immunity under the general principles of international law is recognised in Article 98(1) of the Rome statute. Since foreign servicepeople serving as peacekeepers are acting as organs of their sending states, they enjoy such functional immunity under the general principles of international law. Dieter Fleck points out that:

> *Where persons enjoying such immunities ratione materiae commit crimes they may not be prosecuted by a foreign state, except under agreed rules or with the consent of their sending state.*[111]

The result is that any act of detention or physical control by the receiving state requires the cooperation of the sending state, which must waive its immunity before the receiving state is able to surrender the alleged offender to a body such as the ICC.[112]

CHAPTER 5
AMERICAN PEACEKEEPERS

It is useful at this point to introduce readers to the problem regarding peacekeepers from the US. As discussed above, the ICC may exercise jurisdiction over an accused only if he or she is a national of a country that has ratified the treaty, or if the crime is committed on the territory of a state party to the treaty. The US has chosen not to become party to the Rome statute, and has made its intentions clear that it will do everything in its power to ensure that US peacekeepers are not brought before the ICC.

Until quite recently, the US was a vocal supporter of the idea of an international criminal court, with former president Bill Clinton issuing calls for a permanent war crimes tribunal when addressing genocide survivors in Rwanda, shortly before the Rome conference that led to the creation of the ICC.[113] At the Rome conference, the US first opposed the ICC during the drafting process. By the end of the conference, this opposition had hardened. [The ICC statute was adopted on 19 July 1998, in Rome by a non-recorded vote of 120 in favour, seven against, and 21 abstentions. Although the vote was non-recorded at the US's suggestion, the US, China, Israel and India made explicit that they had voted against the adoption of the statute. The other three states voting against the adoption of the statute were presumably Libya, Iraq and either Algeria, Qatar or Yemen].[114] During his last days in office, however, President Clinton ensured that the US signed the statute of the ICC.

Once in government, the administration of President George Bush quickly took steps to oppose the ICC, and on 6 May 2002 lodged with the Secretary- General of the United Nations a letter giving formal notice that the US had no intention of becoming a party to the Rome statute. The letter also requested that the US's intention be reflected in the official list of the Rome treaty. This effectively cancelled the signature of the treaty by the US by the Clinton administration on 31 December 2001. This measure - referred to as 'unsigning' - set the US in outright opposition to the ICC. The action of withdrawing from a treaty prior to ratification is explicitly sanctioned by international law. Under Article 18 of the 1969 Vienna Convention on the law of treaties, a state that has signed but not ratified a treaty is obliged to 'refrain from acts which would defeat the object and purpose of the treaty ... until it shall have made its intention clear not to become a party to the treaty'. Having made its intentions clear, the US was then free to use diplomatic means to oppose the ICC.

The US has adopted three principal strategies for this. The first measure, and one that lays the groundwork for the other two, is the passing of the American Servicemembers Protection Act 2001.[115] The act restricts participation by the US in any

peacekeeping mission in, and prohibits military assistance to, nations that ratify the Rome statute, with the exception of NATO member countries and other major allies (Australia, Egypt, Israel, Japan, the Republic of Korea and New Zealand have been cited as members of this category). As it currently stands, the act displays various features that militate against the ICC. Among its most striking provisions are the following:

- The US may not participate in any peacekeeping mission unless the president certifies to congress that the Security Council has exempted members of the US armed forces from prosecution and each country in which US personnel will be present is either not a party to the ICC or has an agreement with the US exempting US armed forces members from prosecution;[116]

- Any governmental entity in the US, including state and local governments or any court, are prohibited from cooperating with the ICC in matters such as arrest and extradition of suspects, execution of searches and seizures, taking of evidence and seizure of assets.[117]

Perhaps the most alarming provision of the act, however, is the section which authorises the president of the US to use 'all necessary and appropriate means' to free US or allied personnel detained by or on behalf of the ICC.

Taking into account the provisions of the American Servicemembers Act, the two further steps that the US has taken in opposing the ICC are more easily understood. The first is that the US has insisted on the signing of bilateral immunity agreements with other states, whereby each of those states agrees not to send citizens of the US for trial to the ICC (or anywhere else, for that matter). Under the act, military assistance by the US is prohibited to states that are parties to the Rome treaty, unless such states sign bilateral immunity agreements with the US in which they pledge not to hand over US nationals to the ICC. The US has reportedly extracted these agreements from more than 60 countries. South Africa was pressurised by the US, but refused to sign an agreement. The US asserted a deadline of 31 June 2003, for the conclusion of such an agreement between the two states, backed up by the threat that South Africa's failure to sign would result in the suspension of US military aid to the country. Having refused to succumb to US advances by 31 June 2003, South Africa then found itself among 35 states blacklisted by the US on 1 July 2003.[118]

In response to this blacklisting and the resultant suspension of military aid by the US, South Africa's foreign ministry spokesperson, Ronnie Mamoepa, said that the government would study 'the implications of that decision'.[119] Having done so, the South African cabinet announced on 24 July 2003 that it 'will maintain its decision not to sign an agreement with Washington giving US nationals immunity from prosecution by the ICC'.[120] According to the US embassy in Pretoria, South Africa's decision would cost it some $7.2 million in military aid.[121] The South African cabinet explained that the South African department of defence 'will address the funding shortfalls through the normal budgeting and adjustment processes'.[122]

The cabinet's reasons for maintaining its position were said to be premised on South Africa's 'commitment to the humanitarian objectives of the ICC and the country's international obligations'.[123] Just prior to cabinet's announcement, on 20 July 2003, at a meeting for the formation of a South Africa-Kenya binational commission in Nairobi, Kenya, officials of both governments expressed their concern at the diplomatic intimidation displayed by the US in relation to immunity agreements.[124] As a measure of challenge, Abdul Minty, acting director general in the South African Foreign Ministry, suggested that a joint effort with European countries was required to counter US advances.[125]

These immunity agreements are a direct attack on a court that is meant to be the world's first permanent 'international' criminal court since Nuremberg. Many legal experts have concluded that the bilateral agreements being sought by the US government are contrary to the principles of international law.

The third step of opposition by the US is one that has played itself out within the UN itself. The US demanded that the Security Council provide express immunity from prosecution to any US nationals who may be brought before the ICC, or it threatened to veto several peacekeeping resolutions in the Security Council. In 2002 the council succumbed to US pressure when it passed Resolution 1422 (committing peacekeepers back to Bosnia), which allowed for one year of immunity for peacekeepers from countries not party to the ICC statute. The resolution was renewed in June 2003 by Resolution 1487, but, due to pressure from other permanent members of the Security Council, was not renewed in June 2004.

What is clear is that the US regards its peacekeepers as *primus inter pares* (*first among equals*). The position taken by the US is regrettable since, for the reasons already argued in this paper, the inherent threshold of the core crimes that fall within the jurisdiction of the ICC, along with the complementarity principle, make it highly unlikely that peacekeepers will be dragged before the ICC for political reasons. In any event, were the unthinkable to happen and peacekeepers were found to be implicated in genocide, crimes against humanity or war crimes, then of course the states involved ought to be held to the highest standards of justice as implied by the ICC regime, whether they be in Africa or America. Judge Goldstone, in his capacity as the former prosecutor of the ICTY, has pointed out that the US, by raising its concerns about its peacekeepers, appears to be saying that 'in order to be peacekeepers ... we have to commit war crimes'.[126] As Marcella David points out, who else should be subject to the jurisdiction of the criminal court for international crimes but the 'world's policeman': the state that has the most troops serving abroad as peacekeepers.[127]

For the time being at least, the US will continue to oppose vigorously any attempts by the ICC to exercise jurisdiction over American peacekeepers for international crimes for which they may be accused of committing in other parts of the world.

CHAPTER 6
FURTHER RESPONSES TO CRIMES BY PEACEKEEPERS

Not all responses to crimes by peacekeepers involve prosecution in terms of national or international law. Before concluding, it is important to note several welcome institutional responses (relating specifically to sexual exploitation and abuse) that have been outlined by the Secretary-General in his recent report to the Security Council on the topic of 'Women and peace and security'.[128] Initiatives taken by certain member states to address sexual exploitation and abuse by peacekeepers include a code of conduct for peacekeeping missions developed by Finland. This code of conduct includes information on sexual exploitation and forbids the use of prostitutes by peacekeepers. The code is monitored, and any violation gives rise to immediate action against those guilty.[129] As far as the UN itself is concerned, a number of measures have been instituted to address sexual exploitation and abuse by personnel, which are described in the report as follows:

> *The inter-agency standing committee created the task force on protection from sexual exploitation and abuse in humanitarian crises, co-chaired by the Office for the Coordination of Humanitarian Affairs and UNICEF, which led to the issuance of a secretary-general's bulletin on special measures for protection from sexual exploitation and sexual abuse. The task force developed a number of tools to facilitate the implementation of the bulletin, such as implementation guidelines, model information sheets on sexual exploitation and abuse for local communities and model complaints forms. In addition, focal points on sexual exploitation and sexual abuse are to be appointed in each UN entity and NGO at country level, creating a network to ensure the full implementation of the bulletin in both emergency and development contexts.*[130]

In particular, the UN regards effective monitoring and early identification of possible abuse by peacekeeping personnel as vital in combating such abuse. To overcome reported shortcomings in its monitoring mechanisms, the UN has set up system-wide focal points responsible for dealing with charges of gender-based violence. For example, in peacekeeping missions, personnel conduct officers are appointed as focal points on sexual exploitation, charged with monitoring incidents and identifying patterns at the outset. In turn, an information sheet has been developed for local populations, informing them of the codes of conduct that bind peacekeeping troops. At the international level, in July 2004 the Secretary-General requested the permanent representative of Jordan, Prince Zeid Ra'ad Zeid Al-Hussein, to serve as his adviser in addressing sexual exploitation and abuse committed by all categories of personnel in peacekeeping contexts.[132]

Naturally such responses are not a substitute for the prosecution in the relevant forum of a peacekeeper who is guilty of a crime, let alone a crime falling under the jurisdiction of the ICC. However, it is heartening to note that the UN has acknowledged that there is a problem, and is looking to establish strong mechanisms to both prevent and respond to acts of misconduct and ultimately deter such acts from occurring in the first place. Accountability for serious crimes may be instilled through prosecution, but this ought to be regarded as an extreme measure that signals the distressing failure of peacekeepers to fulfil their guardian role. Ideally, the need should never arise for the prosecution of a peacekeeper for any crime, but if that ideal is to be achieved, it must start undoubtedly with the monitoring and setting of standards described in the Secretary-General's report.

CHAPTER 7
CONCLUSION

Juvenal's ancient question *"Sed quis custodiet ipsos custodies?"* remains as relevant today as when it was written approximately 2,000 years ago.[133] In this occasional paper, we have attempted to address in a brief fashion the issue of whether or not the newly established ICC has a practical role to play in the prosecution of UN peacekeepers for serious crimes committed while engaged in peacekeeping operations. Our conclusion is that the ICC may have a role to play, but that this role is strictly limited by the nature of the crimes over which this court exercises jurisdiction, as well as by the doctrine of complementarity that restricts the jurisdiction of the court to a great extent. There may be exceptions, but it is to be expected that in most cases, serious crimes committed by UN peacekeepers in Africa will be isolated in nature and that the perpetrators of these crimes will not possess the necessary intent to enable such crimes to be classified as genocide or crimes against humanity.145 It is somewhat more likely that certain serious crimes committed by peacekeepers may amount to war crimes, although it is clear that the ICC is more concerned with war crimes committed on a wide scale than with isolated incidents. Furthermore, even if certain crimes committed by UN peacekeepers may be said to fall within the categories of genocide, crimes against humanity or war crimes, the principle of complementarity will ensure that most such crimes are investigated and prosecuted by the state of the offending peacekeeper.

Accordingly, we expect that prosecutions of peacekeepers will remain under the jurisdiction of the national state of the peacekeeper concerned, and that prosecutions of such soldiers by the ICC will remain a very distant exception to that norm. That is not necessarily a bad thing: the ICC is a call to responsibility for persons guilty of "the most serious crimes of concern to the international community as a whole".[134] It is not intended as a court for any and every type of crime. Where it is not clear that a peacekeeper has committed a crime falling within the jurisdiction of the ICC, it is in any event incumbent upon the peacekeeper's state to take action against him or her in terms of that state's commitment to justice more generally, leaving the ICC free to deal with the more serious crimes that plague the world. And even if the evidence shows that the peacekeeper is guilty of a crime falling within the jurisdiction of the ICC, an effective domestic prosecution of the peacekeeper by his/her home state ought to be regarded as a victory for international criminal justice, not a failure thereof. The ICC's system of complementarity entitles us to expect that national criminal justice systems will play an important role in assisting it to provide 'exemplary punishments', which will serve to restore the international legal order. As Anne-Marie Slaughter, has pointed out:

> *One of the most powerful arguments for the ICC is not that it will be a global*

> *instrument of justice itself - arresting and trying tyrants and torturers worldwide - but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice - either a nation tries its own or they will be tried in The Hague - it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle.*[135]

The ICC will be effective when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian law to investigate and prosecute all those guilty of international crimes, including peacekeepers. In the words of the ICC prosecutor:

> *As a consequence of complementarity, the number of cases that reach the court should not be a measure of its efficiency. On the contrary, the absence of trials before this court, as a consequence of regular functioning of national institutions, would be a major success.*[136]

NOTES

1 *Sed quis custodiet ipsos custodies?* (But who is to guard the guards themselves?) Juvenal: Satires, VI. 347.

2 See the Rome Statute of the International Criminal Court, 1998. In this monograph we use the terms 'Rome statute', 'ICC statute' and 'International Criminal Court statute' interchangeably.

3 UN News Centre 31 January 2005 at web page: www.un.org/apps/news/story.asp?NewsID=13179&Cr=peacekeeping&Cr1=

4 Security Council document S/2004/814, distributed 13 October 2004, at paragraph 99. Security Council document S/2004/814 was a follow-up report on the full implementation of resolution 1325 (2000) on women and peace and security.

5 Security Council document S/2004/1034, Sixteenth report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo, 31 December 2004, at paragraph 65.

6 Ibid.

7 Ibid at paragraph 67.

8 Ibid at paragraph 68.

9 Marten Zwanenburg (1999) The statute for an International Criminal Court and the United States: peacekeepers under fire' *European Journal of International Law* 10 (1999), 124-143 at 127.

10 See Martin Zwanenburg op cit at 127.

11 PeaceWomen - Women's International League for Peace and Freedom, About peacekeeping watch" www.peacewomen.org/un/pkwatch/aboutpkwatch.html

12 UN wire, Abuse by UN troops in DRC may go unpunished, report says, 12 July 2004. See United Nations press briefing of 7 January 2005 at web page: http://www.un.org/News/briefings/docs/2005/drcbrf050107.doc.htm

13 For further information on MONUC see http://www.monuc.org.

14 Pam Spees (February 2004), Gender justice and accountability in peace support operations - closing the gaps, a policy briefing paper by International Alert at page 23. See website http://www.international-alert.org

15 Pam Spees (February 2004), Gender justice and accountability in peace support operations - closing the gaps, a policy briefing paper by International Alert at page 23. See website http://www.international-alert.org

16 See The Citizen Live, 31 January 2005 at web page: www.citizen.co.za/10.11.2.28/CitizenLive/article.aspx%3FpDesc=161,1,22.html See also The Sunday Times 27 January 2005 at web page: http://www.suntimes.co.za/zones/sundaytimesNEW/topstories/topstories1106831114.aspx

17 PeaceWomen - Women's International League for Peace and Freedom, *About peacekeeping watch* www.peacewomen.org/un/pkwatch/aboutpkwatch.html

18 Report by Dateline NBC correspondent Lea Thompson dated 11 January entitled *Disturbing the peace* at website: http://www.freedomdomain.com/un/disturbpeace.html

19 PeaceWomen - Women's International League for Peace and Freedom, *About peacekeeping watch* www.peacewomen.org/un/pkwatch/aboutpkwatch.html

20 UN Secretary General 1996a. Promotion and protection of the rights of children: impact of armed conflict on children. Note by the Secretary General UN doc A/51/306/ 26 August 1996. (Graça Machel report)

21 Pam Spees (February 2004) Gender justice and accountability in peace support operations - closing the gaps, a policy briefing paper by International Alert at page 21. See website http://www.international-alert.org

22 UN *wire, Abuse by UN troops in DRC may go unpunished, report says*, 12 July 2004.

23 UN w*ire Abuse by UN troops in DRC may go unpunished, report says*, 12 July 2004.

24 UN *wire Abuse by UN troops in DRC may go unpunished, report says*, 12 July 2004.

25 Kate Holt and Sarah Hughes, SA troops 'raped kids in DRC', Pretoria News, July 12, 2004.

26 Ibid.

27 *A-G of Israel v Eichmann* (1961) 36 ILR 5.

28 The United States continues to be vigorously opposed to the court and has refused to ratify the Rome statute. This is discussed in more detail towards the end of this paper.

29 For latest ratification status see www.iccnow.org

30 Government Gazette, Vol 445, 18 July 2002, No 23642. The full text of the act is available at http://www.info.gov.za/acts/2002/a27-02/

31 For further information on the act see Max du Plessis, "Bringing the International Criminal Court home: the implementation of the Rome statute of the International Criminal Court Act", (2003) No 1, vol. 16, *South African Journal of Criminal Justice*, 1.

32 The Citizen Live, 31 January 2005 at Web Page: www.citizen.co.za/10.11.2.28/CitizenLive/article.aspx%3FpDesc=161,1,22.html

33 Navanethem Pillay (South Africa), Akua Kuenyehia (Ghana), Fatoumata Dembele Diarra (Mali).

34 Peter Apps, ICC hopes for Uganda trial in six months, then Congo, Reuters, 26 January 2005, at web page: www.alertnet.org/thenews/newsdesk/L26481668.htm

35 John Chiahemen, ICC could probe Ivory Coast abuses - prosecutor, Reuters, 28 January 2005 at web page: www.reuters.com/newsArticle.jhtml?type=worldNews&storyID=7467592

36. Ibid.

37 See Report of the International Commission on Inquiry for Darfur to the United Nations, available at: http://secap174.un.org/search?q=darfur+Commission&ie=utf8&site=un_org&output=xml_no_dtd&client=un_org&num=10&proxstylesheet=http%3A%2F%2Fwww.un.org%2Fsearch%2Fun_org_stylesheet.xslt&oe=utf8.

38 The Independent (London), Rupert Cornwell, Darfur killings not genocide, says UN group, 31 January 2005, at web page: http://news.independent.co.uk/world/politics/story.jsp?story=606212

39 For further discussion see section V below: American peacekeepers.

40 It is interesting to note the following statement made on 3 July 2002 by the Secretary-General of the United Nations, Kofi Annan: "I think that I can state confidently that in the history of the United Nations, and certainly during the period that I have worked for the Organization, no peacekeeper or any other mission personnel have been anywhere near the kind of crimes that fall under the jurisdiction of the ICC." Quoted in Dieter Fleck "Are foreign military personnel exempt from international criminal jurisdiction under status of forces agreements?" Journal of International Criminal Justice, December 2003, pages 651 to 670 at page 661.

41 See Rome statute, Article 5. In future the court will also have jurisdiction over the crime of aggression, but only once the crime has been defined and conditions for jurisdiction set out in accordance with the statute by the states parties (see Article 5(2)).

42 See Ralph Lemkin, *Axis Rule in Occupied Europe* (1944), at 79-95, cited in Cassese, Genocide, 335, in Cassese et al, *The Rome statute of the International Criminal Court: a commentary*, Vol I, (2002). Ralph Lemkin, Genocide as a crime under international law (1947) 41 AJIL 145; see also Kittichaisaree, *International Criminal Law* (2001) at 67.

43 See Kittichaisaree ibid 67. There was at least one national prosecution of genocide prior to the ICTY and ICTR's existence; namely, the prosecution of *Eichmann* before the district court of Jerusalem (1968). Eichmann was tried for crimes against the Jewish people, an offence under Israeli law which incorporated all the elements of the definition of genocide - Cassese, *International Criminal Law*, 2003, 97.

44 UN Convention on the Prevention and Punishment of the Crime of Genocide 1948 - Art I provides that "genocide, whether committed in time of peace or time of war, is a crime under international law".

45 See the International Court of Justice's advisory 0pinion on Reservations to the Convention on Genocide 28 May 1951, ICJ Reports, 1951, 15, where the Court found that "the principles underlying the Convention are principles which are recognised by civilized nations as binding on States, even without any conventional obligation" (at 24).

46 The International Criminal Tribunals for Yugoslavia and Rwanda will be referred to as the ICTY/ICTR, or as the Yugoslav/Rwandan tribunals.

47 See Kittichaisaree note 41 above at 72.

48 *Jelisic* para. 66.

49 *Kayishema and Ruzindana*, ICTR trial chamber, case no 96-1-T, judgment of 21 May 1999, para 91.

50 *Jelisic*, Trial chamber, sentencing judgment, 14 December 1999, case no IT-95-10-A.

51 At para 85.

52 At para. 86.

53 See Krstic, para. 571.

54 Cassese, *International Criminal Law*, 2003, 103.

55 Jelisic (Appeal), ICTY Appeals Chamber, judgment of 5 July 2001, case no IT-95-10-A.

56 Ibid. para. 47. In *Jelisic*, the trial chamber of the ICTY (judgment of 19 Oct 1999, case no IT-95-10) held that the requisite intent was found to be lacking, even though the accused had killed Muslim detainees at a detention camp and boasted that he would sterilise Muslim women and prevent Muslim men from procreating. On the facts, Jelisic killed people at the camp randomly, allowed some Muslims (on one occasion an eminent Muslim) to leave the camp, and arranged travel passes for others. On the facts, therefore, it could not be shown that he had "an affirmed resolve to destroy in whole or in part a group as such". (para. 58).

57 See Schabas, *An Introduction to the International Criminal Court*, 2000, at 24.

58 At Nuremberg the notion of 'crime against humanity' had an important rider attached to it: a crime against humanity was committed if it was associated or linked with one of the other crimes under the tribunal's jurisdiction, being war crimes and crimes against the peace (aggression). What this meant was that there had to be a link between crimes against humanity and international armed conflict. This nexus has disappeared with time. Regarding the developments that gradually led to the link between crimes against humanity and war being dropped, see Antonio Cassese, Crimes against humanity at 73 in Cassese et al (eds), *The International Criminal Court: a commentary*, vol I, 2002 Cassese *ibid*. The most recent developments relate to the ICTR and ICTY. The establishment of the ICTR - to punish those guilty of crimes committed in an internal conflict - itself reiterates the point that crimes against humanity do not have to be attendant to an international armed conflict. See too the ICTY appeals chamber in its decision in *Prosecutor v Tadic* (1997) 105 ILR 453 at para 141.

59 Note, however, as Schabas points out, that the argument could be made,

conceivably, that at customary international law a nexus is still required, given the number of delegations at the Rome Conference for the drafting of the International Criminal Court statute who argued vigorously that crimes against humanity could be committed only in times of armed conflict (see Schabas op cit at 36).

60 Cassese *International Criminal Law* 2003 64.

61 The position under customary international law is that the victims of crimes against humanity may also be enemy combatants. (See Cassese International Criminal Law 2003, at 64).

62 Kittichaisaree op *cit* 90 and 91.

63 Cassese op *cit* at 93.

64 Cassese, *ibid*.

65 Schabas, op *cit*, 37.

66 *Kupreški? and others*, ICTY, trial chamber, judgment on 14 January 2000 (case no IT-95-16-T), para. 556.

67 *Tadic* (appeal) ICTY appeals chamber, judgment of 15 July 1999 (case no. IT-94-1-A), para. 248.

68 Kittichaisaree op *cit* 91.

69 Cassese op *cit* 363 - 364. .

70 Kittichaisaree op *cit* 92, citing *Blaskic* ICTY trial chamber, judgment 3 March 2000, (case no IT-95-14), at para 259. See also the recent decision of the ICTY appeals chamber in *Prosecutor v Kunarac, Kovac and Vukovic*, Judgment, case nos IT-96-23-A and IT-96-23/1-A, 12 June 2002 where it was affirmed that accused need not be aware of the details of the attack (para 102).

71 Schabas op *cit* at 37; Elements of crimes, Article 7, para 2.

72 Elements of crimes, Article 7, para 2.

73 *Blaskic* ICTY trial chamber, judgment 3 March 2000, (case no IT-95-14), para 251.

74 See Zwanenburg op *cit* 135 and fn 61 where it is pointed out that the investigations against peacekeepers (for instance, the investigation into the behaviour of Italian peacekeeping troops in Somalia) routinely underline the isolated nature of peacekeepers' criminal conduct.

75 Marten Zwanenburg op *cit* at 134.

76 In this respect see also Jennifer Murray, Who will police the peace-builders? the failure to establish accountability for the participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina", 34 *Columbia Human Rights Law Review*, 2003, 475, at p 512, drawing on Barbara Bedont, Canadian Department of Foreign Affairs and International Trade, *International criminal justice: implications for peacekeeping*, 2001.

77 *Prosecutor v Dusko Tadic´ a/k/a 'Dule'*, Opinion and judgment, case no IT-94-1-T, T. Ch II, 7 May 1997. (Tadic´ Judgment).

78 *Ibid* at para 659.

79 Marten Zwanenburg op *cit* 134 and 135.

80 United Nations press briefing of 7 January 2005 on OIOS investigation in the Democratic Republic of Congo at web page: http://www.un.org/News/briefings/docs/2005/Dixonbrf050107.doc.htm

81 *Prosecutor v Jean Paul Akayesu,* ICTR, trial chamber I, judgment of 2 September 1998, case no. ICTR-96-4-T, para 597.

82 *Furundžija*, ICTY, trial chamber II, judgment of 10 December 1998 (case no IT-95-17/1-T), para 185. See *Kunarac and others*, ICTY trial chamber III, judgment of 22 February 2001 (case no. IT-96-23-T) para 460). This

83 Akayesu, para 732.

84 Under human rights law the pain and suffering caused by rape and sexual assault had for some time already been regarded as constituting torture. See for example the decisions of the European Court of Human Rights in *Aksoy v Turkey* 23 EHRR (1997) paras 63-64 and *Aydin v Turkey* 25 EHRR (1998) paras 80-87.

85 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment.

86 *Prosecutor v Jean Paul Akayesu* judgment ICTR-96-4-T of September 2, 1998, para 687.

87 *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Judgment ICTY-96-21-T of November 16, 1998, para 495.

88 *Celibici supra* para 495.

89 *Celibici supra* para 963. For similar reasons Delic was also found guilty of torture

by rape of the second victim.

90 *Celibici supra* para 963.

91 This is significant: both statutes of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda include 'rape' as the only specific sexual offence that may constitute a crime against humanity.

92 ICC statute Article 7(2)(c).

93 *Kunarac and others*, ICTY trial chamber III, judgment of 22 February 2001 (case no IT-96-23-T), paras 542-543, confirmed by the ICTY appeals chamber in *Prosecutor v Kunarac, Kovac and Vukovic*, judgment, case nos IT-96-23-A and IT-96-23/1-A, 12 June 2002, at para 119.

94 *Kunarac* para. 542.

95 *Trial of Oswald Pohl and others*, US military tribunal, Nuremberg, Germany, 3 Nov 1947, TWC, v, (195), 958, cited in Kittichaisaree op *cit* at 107.

96 Kittichaisaree, 114, citing Robinson (1999) 93 AJIL 53, n 63.

97 Kittichaisaree 114.

98 See Elements of crimes, Article 7(1)(f) - Crime against humanity of torture.

99 If a person is to be convicted of torture as a war crime under the ICC statute, then it will be necessary to prove that the pain inflicted was for the traditional purposes of: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. See Elements of crimes, Article 8(2)(a)(II)-1 - War crime of torture.

100 On cumulation of offences generally, see Susanne Walther, Cumulation of offences, pp 475- 495 in Antonio Cassese et al (eds), *The Rome statute of the International Criminal Court: a commentary* - Volume 1, 2002.

101 See Kittichaisaree op cit 97, citing *Kupreškic and others*, ICTY, trial chamber, judgment on 14 January 2000 (case no. IT-95-16-T), para 550.

102 Cassese, Crimes against humanity, p 361, in Cassese et al, *The Rome statute of the International Criminal Court: a commentary*, Vol I, 2002.

103 The Hague rules also deal with the treatment of persons who do not take part in armed hostilities or who no longer take part in them, but in this respect The Hague rules have been supplanted by the Geneva rules which cover this aspect of

humanitarian law in more detail.

104 Cassese *International Criminal Law*, 2003, 48.

105 See Kittichaisaree op *cit* 133.

106 Kittichaisaree op *cit* 133.

107 Marten Zwanenburg op *cit* at 134 and 136.

108 See Article 12(2)(a) of the Rome statute: '[T]he court may exercise its jurisdiction if one or more of the following states are parties to this statute or have accepted the jurisdiction of the Court [on an ad hoc basis]:

The state on the territory of which the conduct in question occurred …
The state of which the person accused of the crime is a national.

109 See press release of the prosecutor of the International Criminal Court, No pids.008.2003-EN, 15 July 2003, available at http://www.icc.int. See also Kirsch P (QC) & D Robinson, Trigger mechanisms, in Cassesse A, *et al, The Rome statute of the International Criminal Court: a commentary*, 1, (2002), Oxford University Press, Oxford, pp 623-625.

110 For information on ratification status see http://www.iccnow.org/countryinfo/worldsigsandratifications.html.

111 Additionally, any country, state party or non-state party may in terms of Article 12(3) of the Rome statute make an ad hoc acceptance of the exercise of jurisdiction by the court over its nationals or crimes committed on its territory. See Kaul H-P, Preconditions to the exercise of jurisdiction' in Cassesse A, *et al, ibid*, p 611. This may be one way in which a non-state party might argue that the ICC should be accorded jurisdiction in relation to a crime committed by peacekeepers on its territory.

112 See press release of the prosecutor of the International Criminal Court, No pids.008.2003-EN, 15 July 2003, available at http://www.icc.int. See also Kirsch P (QC) Y D Robinson, op. cit., pp 661-663.

113 The ICC statute - under Article 13(b) also empowers the UN Security Council to refer to the court 'situations' in which crimes within the jurisdiction of the court appear to have been committed. Such a referral power allows the court jurisdiction over an offender, regardless of where the offence took place and by whom it was committed, and regardless of whether the state concerned has ratified the statute or accepted the court's jurisdiction. The Security Council has recently made such a referral to the court in respect of the human rights atrocities

committed in the Darfur region of the Sudan. The statute provides that the council may make such a referral only by acting under Chapter VII of the United Nations Charter, which is to say it must regard the events in a particular country as a threat to the peace, a breach of the peace, or an act of aggression. Of course, should any peacekeepers be involved in the atrocities associated with a Security Council referral, then they too may be investigated and prosecuted by the ICC pursuant to the referral.

114 Article 11(2) of the Rome statute.

115 Article 17 of the Rome statute.

116 See Article 18(1) of the Rome statute.

117 See Article 15(3).

118 See Article 18(2).

119 See Article 18(3).

120 See Article 17(1)(b).

121 Report by Dateline NBC correspondent Lea Thompson dated 11 January entitled Disturbing the Peace at website: http://www.freedomdomain.com/un/disturb-peace.html

122 Dieter Fleck, Are foreign military personnel exempt from international criminal jurisdiction under status of forces agreements? Journal of International Criminal Justice, December 2003, pages 651 to 670 at page 658.

123 For a detailed discussion of this point see the article by Dieter Fleck cited at footnote 107 above.

124 During March 1998, at Kigali. See Lawrence Weschler, Exceptional cases in Rome: The United States and the struggle for an ICC, in Sarah Sewall and Carl Kaysen (eds) *The United States and the International Criminal Court* (2000) at 91.

125 See Jonathan Charney, Progress in international criminal law (1999) 93 *American Journal of International Law* 452 at 452 and fn 17. Mexico, Singapore, Sri Lanka, Trinidad, Tobago, and Turkey explained that they had abstained. See generally in this regard Kittichaisaree op cit at 36-37.

126 The act has been adopted by the US Senate and the House of Representatives.

127 Section 5.

128 Section 4. These and other provisions in the act are in addition to existing US law (the 2000-2001 Foreign Relations Act) which prohibits any US funds to the ICC once it has been established (see the Global Policy Forum Document, The American Servicemembers' Protection Act: an overview', available at http://www.globalpolicy.org/intljustice/icc/2001/0621usbl.htm).

129 US suspends all military aid to South Africa, Cape Times 2 July 2003.

130 US slaps military funding embargo on SA, Mail and Guardian 2 July 2003.

131 South Africa will not sign agreement with US on international court, statement by the cabinet of the government of the Republic of South Africa, Pretoria, 24 July 2003.

132 Agence France Press, 24 July 2003.

133 Agence France Press, 24 July 2003.

134 Agence France Press, 24 July 2003.

135 Panafrican News Agency (PANA) daily newswire, Kenya, South Africa oppose US stand on UN court", 20 July 2003.

136 Panafrican News Agency (PANA) daily newswire, Kenya, South Africa oppose US stand on UN court", 20 July 2003.

137 See International Press Service, US stance contradictory, former UN prosecutor says', 17 June 1998, quoted in Zwanenburg op cit 142.

138 See David op *cit* 409.

139 Security Council document S/2004/814 distributed 13 October 2004. This was a follow-up report on the full implementation of resolution 1325 (2000) on women and peace and security and was presented to the Security Council in October 2004.

140 Security Council document S/2004/814 distributed 13 October 2004 at para 100.

141 Security Council document S/2004/814 distributed 13 October 2004 at para 101.

142 Integrated Regional Information Networks (UN humanitarian information unit) web special on violence against women and girls during and after conflict (September 2004), Our bodies - their battle ground: gender-based violence in conflict zones: UN peacekeeping - working towards a no-tolerance environment, at website http://www.irinnews.org/webspecials/GBV/print/p-feaUNp.asp

143 Security Council document S/2004/1034: Sixteenth report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo, dated 31 December 2004 at para 68.

144 "Who is to guard the guards themselves?" Juvenal: Satires, VI 347

145 Such as crimes involving child prostitution rings and sex trafficking, discussed supra.

146 See the Preamble to the statute of the International Criminal Court.

147 Not the court of first resort, 21 December 2003, The Washington Post.

148 Quoted in McGoldrick et al, *The permanent International Criminal Court: legal and policy issues*, (2004), 477.