

Sexual Violence And Sex Trafficking: An Observation Of Developing International Law And Its Implementation

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ABSTRACT: Margot Walström, Special Representative of the UN Secretary-General on Sexual Violence defines sexual violence as a "way of demonstrating power and control. It inflicts fear on the whole community. And it is unfortunately a very effective, cheap and silent weapon with a long-lasting effect on every society." Despite the universal damage of sexual violence throughout history, international law did not begin to develop a response to such crimes until the 1990s. Worldwide fear and shame associated with atrocities of sexual violence, difficulty defining it across cultures, challenges to accurate data collection, and lack of collective action all contribute to the international community's silence. This paper analyzes how sexual violence has been defined in international law through its integration into the international justice system: first, as torture by the International Criminal Tribunal for the Former Yugoslavia, and second, as genocide by the International Criminal Tribunals for Rwanda, and third, how the Rome Statute criminalized sexual violence in its establishment of the International Criminal Court. Additionally, this paper discusses how sex trafficking has been acknowledged by international law, primarily through the United Nations' development of soft law. Finally, this essay examines how United Nations peacekeeping missions and other international institutions continually undermine the international community's efforts to tackle sexual violence and trafficking.

Introduction

Margot Walström, Special Representative of the UN Secretary-General on Sexual Violence in Conflict, defines it best: "[Sexual violence] is a way of demonstrating power and control. It inflicts fear on the whole community. And it is unfortunately a very effective, cheap and silent weapon with a long-lasting effect on every society."¹ Despite the universal damage of sexual violence throughout history, international law did not begin to develop a response to such crimes until the 1990s. Worldwide fear and shame associated with atrocities of sexual violence, difficulty defining it across cultures, challenges to accurate data collection, and lack of collective action all contribute to the international community's silence. Nevertheless, state actors and international organizations have taken steps to acknowledge sexual violence as a crime against humanity through meticulous integration into case law of *ad hoc* tribunals, soft law, and foundations for enforcement mechanisms. All the while, the number of victims from developing and developed nations alike continues to rise.

This paper analyzes how sexual violence has been defined in international law through its integration into the international justice system: first, as torture by the International Criminal

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Tribunal for the Former Yugoslavia, and second, as genocide by the International Criminal Tribunals for Rwanda, and third, how the Rome Statute criminalized sexual violence in its establishment of the International Criminal Court. Additionally, this paper discusses how sex trafficking has been acknowledged by international law, primarily through the United Nations' development of soft law. Finally, this essay examines how United Nations peacekeeping missions and other international institutions continually undermine the international community's efforts to tackle sexual violence and trafficking.

International law generally refers to the public law which governs relations between independent states, the operations of international institutions, and how states treat individuals, corporations, or other private entities. Although international law recognizes states as sovereign actors, international institutions and international tribunals can create "binding" law, although individual states accept a large portion of international law as self-enforcing norms. These norms shift over time if the majority of states change their views on a certain issue. For example, over the course of several centuries, states shifted from accepting slavery to considering it a serious violation of international law. The primary source of enforcement for international law comes from the pressure independent states place on one another to maintain international stability. Although states often break international law, states recognize the benefits they receive from a coherent international system. The international institutions that make up this system provide global solutions by creating a common standard, minimizing the incentive to free riding, providing international cooperation, and establishing enforcement mechanisms. For this reason, states accept enforcement from bodies such as the UN Security Council and the International Criminal Court because these institutions provide a source of the international cooperation and stability independent states otherwise cannot accomplish.

Due to a long cumulation of feminist pressure, in 2000, the UN Security Council adopted the landmark Resolution 1325, formally recognizing gender-based violence, especially sexual violence, in the context of war.² A later resolution adopted in 2008, UNSC Resolution 1820, went even further to clarify "rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide."³ which made the additional request of the Security General, "to develop and implement appropriate training programs for all peacekeeping and humanitarian personnel deployed by the United Nations." This transition shows clear progress in the acknowledgement of sexual violence as a war crime and efforts by the UN to self-regulate its own perpetration of such crimes; nevertheless, the war against sexual violence and trafficking is far from won. The recognition of these crimes, while substantial, does not translate easily into enforceable mechanisms, so countless victims have yet to reap the benefits of the progress the international community has made.

Defining Sexual Violence in International Law

Victims and their advocates have demanded increased attention to sexual violence as a war crime for the last three decades, yet the international community has been traditionally apathetic to these crimes. The international community responded with silence to crimes of a sexual nature before the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.⁴ Furthermore, the creation of the Geneva Conventions and their Additional Protocols gave little consideration to these crimes.⁵ The case law of these tribunals and subsequent *ad hoc* tribunals of a similar nature continue to establish the characterization of sexual violence as a legitimate human rights violation. The primary influence of these tribunals in relation to sexual

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violence has been through a process of establishing precedent which results in treaty-making, affecting later decisions.

Although this process has been a relatively slow one, in general, the few norms, that are accepted by the international community and that have graduated to the status of *jus cogens*, become legally binding and enforceable under international law. For example, the decisions of the ICTY and ICTR resulted in provisions to the Rome Statute and decisions made in the Special Court for Sierra Leone.⁶ This accumulation of international prosecution establishes a “norms cascade” which builds the foundation for the illegality of rape and sex trafficking.⁷ Crimes of *jus cogens* status don’t require ratification of a treaty, but rather crimes can be prosecuted by any state on the basis of universal jurisdiction.⁸ With the codification of the Rome Statute in 1998, the international community groundbreakingly criminalized the acts of sex trafficking, sexual violence, and forced pregnancy clearly advancing this “norms cascade.”⁹ With continued attention and acceptance of sexual violence as an international crime, these crimes receive the same status as violations such as genocide, crimes against humanity, slavery and torture.

Rape Prosecuted as Torture

Historically not recognized as a war crime, opposing sides often viewed sexual violence as simply a misfortunate consequence of war. Therefore, to achieve recognition in international law, sexual violence was first attached to pre-established international crimes. As of now, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, as well as the International Criminal Court have successfully integrated sexual violence into the definition of war crimes, officially establishing *jus cogens* status.¹⁰ Yet, the first acknowledgment of sexual violence by the ICTY had to be made by characterizing it as a mechanism of torture. The Tribunal relied primarily on the UN Torture Convention and its definition:

The 1984 UN Torture Convention defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹¹

The ICTY emphasized the importance of specifying what qualified as torture and the definition was revised to include the following:

(i) This act or omission must be intentional; (ii) It must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iii) It must be linked to an armed conflict; and (iv) At least one of the persons involved must be a public official or must at any rate act in non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.¹²

This revision clarifies the act of torture as first, intentional and second, linked to the will of a public official or perpetrated on account of non-private persons. This clarification allows the crime to

supersede domestic jurisdiction and be viewed as an international crime committed by or in association with a state, thus providing ICTY jurisdiction. At that time, the Tribunal realized the prosecution of rape as torture had far more basis in international law, thus it expanded the definition of torture to include rape rather than prosecute it independently.

The ICTY notably considered rape as torture during the *Čelebići Trial Judgment*.¹³ In the prosecution of one of the deputy commanders of the Čelebići prison camp, Delalic was charged under Articles 2(b) and 3.¹⁴ The Trial Chamber found that Delalic raped his victim in an effort to intimidate her into revealing information about her husband, to punish her on account of her husband's actions, and to instill fear and helplessness.¹⁵ In this case, the ICTY relied specifically on the 1992 Report by the Special Rapporteur on Torture presented to the Commission on Human Rights where the Trial Chamber described “the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.”¹⁶ With these conclusions the Trial Chamber finally attested to the serious repercussions of rape and sexual violence, solidifying its validity in the international law. Additionally, the Tribunal referred to the case law of its counterpart in Rwanda and its *Akayesu decision* discussed further later on.¹⁷ The prosecution of this particular rape as torture, relied on proof that the defendant’s sexual violence against the victim was fully motivated by “obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.”¹⁸ In addition, the Tribunal found in under the United Nations Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, “the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture.”¹⁹ Further, the “violence inflicted upon her (namely rape) was due to the fact that she was a woman;” this form of discrimination comprises a prohibited purpose for the offense of torture.²⁰ Thus, the Trial Chamber accounts for Delalic’s rape as torture by intimidation, punishment, and discrimination among other reasons. At the time of the case, no official “checklist” for offenses of rape existed, so the ICTY relied on the UN Special Rapporteur on Torture to establish what acts might qualify.²¹ In this way, the Court constructed its own basis to judge the prosecution of rape as torture by “special procedures,” provided by the UN Torture Statute, the UN Special Rapporteur on Torture, and the UN Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, and other case precedent.

Rape Prosecuted as Genocide

More recently international criminal law has also prosecuted rape as genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. The international community took note of ICTR’s unique approach to incorporating international human rights provisions in criminal trials, especially in the *Prosecutor v. Jean-Paul Akayesu* case.²² This case represented the first conviction of sexual violence in the history of international law as a crime against humanity or genocide.²³ Although the original indictments did not include rape charges, prosecutors amended the complaint due to criticism from the New York-based International Women’s Human Rights Law Clinic; the Center for Constitutional Rights; and Navanethem Pillay, a female judge from South Africa; among other activists.²⁴ Witness accounts of horrific widespread sexual violence, including rape with foreign objects, gang rape, forced miscarriage, and forced prostitution strongly backed these efforts.²⁵

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Lacking previous relevant provisions, the ICTR relied primarily on the UN Genocide Convention of 1948 and its *travaux préparatoires*. Enumerated in Article 2 of the Statute, the Tribunal decided that the *actus reus* of the crime comprised offenses relevant to this case.²⁶

According to the 1948 Genocide Convention, Article II, genocide is:

...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 harm 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.²⁷

“The *mens rea* of the crime, which makes the crime especially difficult to prove, is a specific intent to ‘wholly or partly destroy a national, ethnical, racial, or religious group.’”²⁸ Consequently, similar to the ICTY in the *Čelebići* case, the proof of intent presents a roadblock for the prosecution in Rwanda.²⁹

After the application of genocide to the case, the Court focused on defining sexual violence within genocidal activity specifically in regard to the *Akayesu* case.³⁰

The ICTR found that acts of sexual violence constitute genocide:

in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such...Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole...This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.³¹

The court emphasizes the destructive nature of this sexual violence against Tutsi women as being the pure motive of the sexual violence perpetrated and therefore within the definition of genocide as “a specific intent to destroy, in whole or in part.”³² Marochkin notes that when the ICTR decided what constitutes “serious bodily harm,” the emphasized acts of sexual violence and rape fully qualified.³³ This officially included rape and sexual violence afflicted against Tutsi women by Akayesu on account of the intent behind the systematic rape, the constitution of rape as “serious bodily harm,” and the rape’s “destructive” nature.

In *Prosecutor v. Musema*, the Chamber discussed offenses of sexual violence that prevented births of a victimized group.³⁴ For example, sexual mutilation, forced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages, all sought to limit new births of the victims’ ethnicity and therefore fell within the crime of genocide. The Court clarified that in a patriarchal Rwandan society, the identity of the father determines group membership.³⁵ An example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.”³⁶ Hence, in the case of the atrocities committed against the Tutsis, Hutu rapists,

such as Musema or Akayesu, could be motivated by the fact that consequential births would result in more children identified as Hutu, at least within the context of Rwanda culture.

Thus, both Tribunals creatively addressed issues of sexual violence and rape by categorizing these offenses under the more explicit and widely recognized crimes that were easily as prosecuted war crimes of torture and genocide. Both the ICTY and the ICTR found themselves incredibly limited by outdated, abstract, or nonexistent sources of international law. After interpreting the limited number of relevant Statutes, the Tribunals referred to a range of pre-existing soft law, such as treaties on human rights, conclusions from previous human rights cases, and other human rights bodies. From which, the Tribunals creatively filled the gaps in the present international law to adequately address rape as a distinguishable and punishable international crime.

While the Rome Statute adopts similar language of sexual violence and trafficking from both the ITCY and ICTR Statutes, its efforts to criminalize gender-based violence supersedes its predecessors.³⁷ The original purpose behind the creation of the ICC was to simply codify existing international law, but nearly exclusive male participation in the establishment of international law up to that point resulted in a lack of adequate attention to women's issues.³⁸ Due to pressure from international feminist non-profit organizations, female-friendly language was added to the draft of the Rome Statute to include specific forms of gender-based violence, prosecutive and investigative mechanisms, and fair representation of women within ICC staff.³⁹ This pressure resulted in the specific recognition of gender-based violence as crime against humanity in Article 7 and as war crimes under Article 8.⁴⁰ The Rome Statute listed rape as both a crime against humanity and a war crime, allowing the prosecution more flexibility.⁴¹ A war crime is easier to prove than a crime against humanity, my considering the prosecution only need to prove the rape was part of a "plan or policy," rather than a "widespread or systematic attack."⁴² Unfortunately, while the inclusion of these articles is monumental, the ICC has had limited success in the investigation and prosecution of these crimes.⁴³ The ICC's first conviction of sexual slavery incredibly did not occur until July 2019.⁴⁴ As the Court's fourth conviction overall, Ntaganda was unanimously sentenced to 30 years in prison.⁴⁵

Defining Sex Trafficking in International Law

Modern slavery works similarly to other forms of trafficking of drugs or arms, except these traffickers transport individuals. Such individuals, in search of better opportunities especially when they hope to cross into better developed countries such as the United States, may be ensnared by trafficking institutions.⁴⁶ Involuntary trafficking on the other hand, entails the abduction of individuals transported to a foreign country and forced into various forms of servitude including sex work.⁴⁷ The overlap between issues of migration, modern slavery, and smuggling consequently complicate both the identifying and criminalizing of sex trafficking on the whole.⁴⁸ Although apparent discrepancies exist in how different governments, academics, and activists characterize sex trafficking, both voluntary and involuntary modes entail transportation of individuals across borders for the purpose of exploiting their labor and therefore, encompass trafficking.

Although sex trafficking was widely recognized as an issue well before the 21st century, the lack of a formal definition hindered any effort of the international community to combat it.

This definition was finally established in 2000 with the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) in Article 3, Section (a):

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(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;"⁴⁹

Later reinforced in Article 6, the Protocol obligates states to criminalize trafficking as defined.⁵⁰

The Palermo Protocol represented the first contemporary initiative to combat sex trafficking at the international level.⁵¹ Of the 192 states of the UN, 172 have signed and ratified the Protocol, none of which included reservations specifically regarding the definition provided in Article 3.⁵² Article 5 obligates states to "adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of this Protocol."⁵³ Yet despite this mandatory measure, states failed to criminalize sex trafficking by defining it to a limited scope of conduct.⁵⁴ For example, the US State Department's narrow definition exemplifies this failure, decisively ignoring extra-legal migration.⁵⁵ In this way, although many states were quick to adopt the Protocol into domestic law, the resulting domestic law applied to more limited circumstances than what the international law had originally called for. States additionally lacked the readiness to actually enforce even the inadequate law they adopted.⁵⁶

This absence of a clear definition in domestic criminal law exists in multiple states, despite their being obligated to incorporate such under Article 5.⁵⁷ For this reason, the United Nations has installed several mechanisms: under the UN Transnational Organized Crime Convention and its Protocols, the Conference of the Parties of the United Nations Convention on Transnational Organized Crime (Conference of the Parties) to monitor states' compliance.⁵⁸ In 2006, the Conference of Parties underwent a survey of definitions provided by obligated states.⁵⁹ The survey asked how states defined trafficking in persons in their domestic law in accordance with Article 3.⁶⁰ Many states' responses claimed to be in full compliance with the definition provided in Article 3 and obligations in Article 5, but basic analysis of their domestic laws' definition of human trafficking showed clear noncompliance.⁶¹ Nonetheless, some states, such as Turkey, copied the definition of human trafficking from Article 3 verbatim into their own domestic law, but these states are in the minority.⁶² According to Dempsey, Hoyle, and Bosworth, gaps could be due to a state's lack of technical expertise in drafting effective criminal codes, the absence of a competent international enforcement mechanism, pressure from economic crisis, or possibly, the inherent vagueness of the Article 3 definition.⁶³ Whatever cause creates gaps in the states' definitions, other actors can interfere, effectively making change more likely. In this case, as the authoritative regulatory party, the Conference of Parties has the responsibility for holding noncompliant states accountable.⁶⁴ If the Conference of Parties drew enough attention to states' neglect of human trafficking, states would eventually adapt in order to protect their reputations.⁶⁵

Aside from narrowing the definition of human trafficking, states hesitate to collect data on sex trafficking within their territories.⁶⁶ Due to the intimate and traumatic nature of the crime, sex trafficking, already extremely underreported, results in often inaccurate data. Due to public appearances, states want to keep hidden even those underreported numbers.⁶⁷ Still aside from

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acknowledgement of United Nations Convention against Transnational Organized Crime and the Protocols Thereto, the US made additional efforts to regulate foreign states' efforts to combat human trafficking.⁶⁸ The US Trafficking Victims Protection Act mandated that the US State Department report efforts of foreign states to regulate trafficking.⁶⁹ This mandate has influence over states who rely on US foreign aid, and for this reason, has proven in some ways more effective than international law established by the UN.⁷⁰ Although representing significant progress in providing accountability, the US TVPA encourages dependent states to underreport the severity of trafficking within their borders to preserve humanitarian and military aid from the US.⁷¹ Ironically, the US did not evaluate its own practices until a decade after the US TVPA was passed.⁷² When it did finally perform self-evaluation, the US concluded itself a leading crusader against human trafficking on the world stage.⁷³ This contradiction presents a conflict of interest: how can the international community avoid global super powers, such as the US, from acting as an international police force and producing biased promotions of their own efforts? This conflict only further shows the politicized nature of human trafficking reporting and the ensuing possibility of corruption. Therefore, while both international law and domestic law have made notable efforts to respond to human trafficking, both ultimately fall short of collecting dependable data and painting a representative portrait of illegal trafficking practices abroad. Thus, despite the clear establishment of laws against trafficking, these laws largely lack enforcement priorities.

Subsequently, the lack of protection and assistance of victims of trafficking weakens international law.⁷⁴ In the rare instances of successful prosecution, human traffickers are usually prosecuted under immigration violations, not under human rights abuse, resulting in little to no acknowledgement of victims.⁷⁵ Because hard international law encroaches on state sovereignty, the international sphere has primarily implemented soft law to aid victims.⁷⁶ For example, the Palermo Protocol and other efforts by the UN largely support this prosecution-focused approach, but use vague language regarding assistance and pathways for justice of victims.⁷⁷ In addition, in 2002, the UN High Commissioner for Human Rights adopted the Recommended Principles and Guidelines on Human Rights and Human Trafficking.⁷⁸ Although soft law, the Recommended Principles and Guidelines deter policies that unfairly prosecute trafficking victims as illegal migrants.⁷⁹ Even if successful, scholars and policy makers understand that focusing on punishment would not effectively deter sex trafficking, thus activists favor a more proactive human rights approach centered on protecting victims.⁸⁰

Activists in the drafting of the Rome Statute played a key role in establishing protection for witnesses and victims of sexual violence and trafficking, primarily in Article 65.⁸¹ The first case in the ICTY, *Prosecutor v. Tadic*, should have been easily won.⁸² Unfortunately, the prosecution was forced to drop rape charges against Tadic because the last witness refused to testify under threats to herself and family.⁸³ Lehr-Lehnardt argues that this case likely influenced the drafters of the Rome Statute to include witness anonymity and protection until a witness protection plan can be enacted.⁸⁴ The Rome Statute also created a Victims and Witnesses Unit specifically tasked to provide protection, counseling for trauma caused by sexual violence, and other necessary assistance.⁸⁵ In summary, the Rome Statute takes progressive steps to recognize the needs of witnesses and victims in the ICC that previously caused prosecution failure in the ICTY. Furthermore, the Rome Statute took specific caution to identify the trafficking of women and children as a crime against humanity and therefore highly prosecutable in the ICC.⁸⁶

Development of International Law with Regard to Peacekeeping Operations

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Although the international community has made a notable effort to address sex trafficking through the development of law, its institutions simultaneously escalate human trafficking issues as exemplified by UN peacekeeping missions. For the past three decades, victims continually bring allegations against peacekeepers for sexual misconduct against the people they were sent to protect. Dating back to the early 1990s, the first accusations to gain international attention originated from Cambodia and Somalia, shortly followed by similar allegations in Sierra Leone in 2003 and the Democratic Republic of the Congo in 2004. Many more allegations of sexual abuse of humanitarian aid workers have surfaced since the early 2000s. This year sex scandals erupted in the Democratic Republic of Congo where humanitarian workers were sent in response to the Ebola crisis and in Uganda where aid workers respond to food shortages due to extreme drought throughout the region. Aside from allegations brought specifically against UN peacekeepers, in general, peacekeeping missions have been instrumental in reinforcing local trafficking systems. Shortly after the Cold War, the United Nations took on more ambitious peacekeeping missions, enlisting forces of less experienced and less capable states; ergo, questions arose of mission effectiveness and, all too often, the conduct of the peacekeepers involved.⁸⁷ Peacekeeping mission units are assembled from a wide range of cultures and ideologies. This reality alone makes managing and communicating accurately within units challenging but preventing misconduct even more difficult.

Therefore, as state governments and UN bureaucrats fight for the legitimacy of global anti-trafficking policy, such as the Palermo Protocol, corrupt UN peacekeepers in crisis zones around the globe undermine their efforts.⁸⁸ The first specific effort made by the UN to recognize the misconduct of peacekeepers didn't occur until 2005 with the release of the Zeid Report.⁸⁹ The report found that in the DRC "typical forms of sexual exploitation and abuse...included the exchange of sex for money, food, or jobs; what some young girls interviewed by the commission described as 'rape disguised as prostitution.'"⁹⁰ Similar reports "from missions in Bosnia and Herzegovina, Cambodia, Kosovo, and Timor-Leste in the 1990s and in West Africa in the early 2000s, and called for uniform, binding standards of conduct for peacekeepers."⁹¹

Trafficking crime thrives within well-developed states, such as the US, despite genuine preventative measures taken to stamp out its existence. In less-developed states, human trafficking has substantially fewer hoops to jump through, already embedded into local communities in crisis well before the arrival of peacekeeping operations. Nevertheless, the mere presence of a large number of male peacekeepers further drives the local sex industry.⁹² Unchecked, operations heighten demand for women, resulting in the increased establishment of brothels, strip clubs, and bars.⁹³ Furthermore, through their inherent authority, peacekeepers contribute to systematic "transactional sex," trading much-needed resources for sex with locals.⁹⁴ Since peacekeeping missions were first introduced in 1957, demand for humanitarian intervention has increased, leading to less vetting. When forces became increasingly diversified, accountability decreased, driving up illegal activity.

Slowed by collective action problems, the development of international law in response to these atrocities has rendered little progress in the realistic prevention of misconduct by UN peacekeepers. With the Zeid Report in 2005, the UN made an official effort to combat the sexual misconduct of peacekeepers.⁹⁵ Prior to the release of the Zeid Report, the UN Department of Peacekeeping Operations acknowledged there was strong evidence of peacekeeper missions involvement in trafficking, with the release of a policy paper in 2004.⁹⁶ This paper, "Human Trafficking and United Nations Peacekeeping," outlined two main objectives: (a) in support of the Secretary General's "zero-tolerance" policy proposal, the UN will establish a system by which

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peacekeeping forces will be monitored, investigated, and punished on account of involvement in trafficking practices, and (b) upon request, have the mechanisms capable of supporting national efforts made by international member states in curbing human trafficking, especially within post-conflict states.⁹⁷ Since this proposal, limited advances have been made in terms of enacting these proposals, but the UN successfully created the Conduct and Discipline Unit within the Department of Peace Operations in 2005 and the deployment of Conduct and Discipline Teams to DPKO's beginning in 2007.⁹⁸ Such measures secured the UN's responsibility to conduct training, spread awareness, and collect allegations of misconduct.⁹⁹ Additionally, other operations, such as the UN Office of Internal Oversight Services, have offices in a few of the most abuse-prone PKO host countries, which facilitate investigations into peacekeeping operations independent of the DPKO.¹⁰⁰ Yet, these regulatory mechanisms lack effectiveness without the additional action to vet peacekeepers.¹⁰¹ The source of peacekeepers' misconduct is their functional immunity, which protects individuals when currently engaging in mission efforts.¹⁰² The Memorandum of Understanding (MoU), an agreement between a troop-contributing country (TCC) and the UN, essentially dictates only TCCs have the power to prosecute military members of its nationality for crimes committed in the context of a peacekeeping mission (usually internally, within the TCC's military justice system). These peacekeepers are never subject to the host state's jurisdiction, but rather the military justice systems of the TCC, even for serious allegations.¹⁰³ Automatically, peacekeepers' cases fall within the jurisdiction of the domestic court from which they originate. On the other hand, the UN Security Council Resolution 2272 (2016) gives the Secretary-General the power to repatriate military and form police units "when there is credible evidence of widespread or systematic sexual exploitation and abuse by that unit," and "requests the Secretary-General to repatriate all military or formed police units of TCCs that systematically fail their accountability obligations, from the country where the allegations have arisen."¹⁰⁴ Jennings clarifies that immunity is not waived in these cases, but even if the Secretary-General exercises authority to repatriate units, the peacekeepers involved are still only subject to the authority of their home country, not the host country.¹⁰⁵

While the Rome Statute takes a clear stance on trafficking and sexual violence by an perpetrator, due to its "complementary" jurisdiction, the ICC faces similar blocks to the UN.¹⁰⁶ In order for ICC jurisdiction to apply, a peacekeeper must first commit an international war crime, genocide, or crime against humanity.¹⁰⁷ Second, the TCC must be determined "unwilling" to adequately investigate and prosecute this crime in a "meaningful manner and without good reason."¹⁰⁸ Ultimately, the ICC was created to prosecute those guilty of "the most serious crimes of concern to the international community as a whole."¹⁰⁹ Arguably, the ICC should be reserved for large scale international crime of which the transgressions of peacekeepers would not usually qualify, except in extreme cases.¹¹⁰ Thus, the ICC may not represent the path to prosecution of these crimes. Since the states in which these crimes occur usually have ineffective or polluted justice systems, prosecution becomes the responsibility of the domestic courts of criminal peacekeepers.

As a preventative measure, the counterintuitive activities available to peacekeepers where they are stationed could be replaced by extracurriculars that are beneficial to community development.¹¹¹ The UN outlined multiple crime prevention strategies in crisis zones: the social development approach which promotes prosocial behavior through social, economic, health and educational measures; community-based prevention, which focuses on altering the conditions in communities that encourage victimization; situational crime prevention aimed at reducing crime opportunity; and reintegration and assistance programs.¹¹² All of these indirectly reduce the sex

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trafficking systems built into the societies before the peacekeepers arrive. Cumulatively, these mechanisms work to not only hold peacekeepers accountable, but prevent misconduct before it occurs`.

Before any opposition from conflict-ridden states would be unheard of, but with a growing transnational advocacy network, this opposition has a much louder voice. This voice continues to draw attention to allegations against peacekeepers, especially when they detail the atrocities of sexual violence and trafficking. This rising pressure undoubtedly forces the international community to turn inward and deal with the sexual violence its institutions protect and promote.

Conclusion

Throughout this paper, one can observe that although ad hoc tribunals, such as the ICTY and ICTR, have successfully integrated the prosecution of sexual violence as a war crime, the international community refrained from establishing hard law on the issue of sexual violence and sex trafficking. While the language of the Rome Statute has allowed the prosecution of sexual violence and human trafficking a much clearer path to conviction, both of these crimes have already been largely recognized under customary international law, resulting in little to no implementation in the ICC.¹¹³ The established soft law can be easily manipulated by perpetrators, such as UN peacekeepers who commit sexual misconduct in crisis zones. Although genuine efforts have been made by policymakers to combat sexual violence and sex trafficking, the lack of hard law and adequate enforcement mechanisms limit real change both externally across the globe and internally by their own peacekeeping operations and humanitarian personnel.

Reports made by the UN Secretary General on women, peace, and security, first started in 2002, upon request of the UNSC resolution 1325.¹¹⁴ This resolution marked a formal recognition by the UNSC to assess the impact of war conflict on gender-based violence, especially in regard to sexual violence.¹¹⁵ In 2002, the Secretary General reported that in times of war, “women and girls are vulnerable to all forms of violence, in particular sexual violence and exploitation, including torture, rape, mass rape, forced pregnancy, sexual slavery, enforced prostitution and trafficking.”¹¹⁶ Since 2002, the Secretary General has published 34 reports, establishing a steady increase in measures taken by the UN to combat sexual violence.¹¹⁷ The report from November 24, 2010, showed progress implemented over a 2-year span through Resolutions 1820 and 1888 with “measures to improve the collection of information and recommendations aimed at enhanced response.”¹¹⁸ In the latest report, issued June 3, the Secretary General recognizes the year of 2020 as a pivotal moment in the fight against sexual violence, marking the 25th anniversary of the adoption of the resolution 1325.¹¹⁹

As summarized by the Secretary General:

Despite important progress on the policy and operational fronts, we face an increasingly complex global security environment in which sexual violence remains a cruel tactic of war, torture, terror and political repression, and a brutally effective tool of displacement and dehumanization. We have yet to adequately invest in tackling the structural root causes that drive and perpetuate this violence, including gender inequality, which is exacerbated by conflict and militarization. Survivor-centred, rights-based response aims to create a safe and participatory environment, including through contextualized solutions that build resilience and address the diverse experiences of all survivors. This approach is critical to ensuring that no one is left behind or excluded from the dividends of peace and development.¹²⁰

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This statement indicates both the difficult path ahead, and the adoption of a new approach: the proactive, victims-centered method advocated by Dinan and other activists.¹²¹ This paper gives an account of the development of policy in regard to sexual violence and the failure of the international community to adequately report and prosecute such crimes. Yet, as the Secretary General notes, to adequately solve the issue of sexual violence and sex trafficking, the international community must attack the root from which these crimes stem, gender inequality. This inequality has orchestrated every transgression taken against women on account of their gender and continues to influence even the most well-developed nations where women continue to fight for their rights. In reality, international law developed in regard to sexual violence cannot function fully until gender inequality is truly eradicated, a development that could take centuries. In the meantime, the international community can take advantage of its influence, prosecuting the few cases of sexual violence within its jurisdiction, and establishing enforcement mechanisms which effectively apply pressure to the entrenched systems of rape and sex trafficking.

Endnotes

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