FEATURE

WHO GUARDS THE GUARDS?[1]

The ICC and serious crimes committed by United Nations peacekeepers in Africa

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In recent years there have been growing reports of UN peacekeepers committing severe crimes against the people they are meant to protect, while on peacekeeping duties. These crimes often take the form of gender-based violence and abuse. This paper examines the nature and extent of the problem, the accountability of the peacekeeping troops, the role and the extent of the involvement of International Criminal Law, and the newly introduced International Criminal Court as well as the role of the national criminal courts. Can the ICC prosecute bad elements among the UN peacekeepers or is this the responsibility of the national criminal court of the peacekeeper concerned? Should the ICC be prosecuting such cases in the first place? How far does the principle of 'complementarity' limit the ICC in its attempts to prosecute those who commit crimes against humanity? In other words, 'Who guards the guards?'

Introduction

Although peacekeeping is often associated with serious crimes against helpless civilians, it is usually assumed that the peacekeepers are those attempting to prevent further atrocities, as opposed to being involved in the commission of such crimes. Sadly, this is not always the case, and those who are meant to keep the peace themselves become perpetrators of crimes against those under their protection. This is illustrated in a recent report to the Security Council of the United Nations (UN) by the Secretary-General of that organisation on the topic of 'Women and peace and security'.[2] In this report, the Secretary-General states:

> 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]

Clearly, it is imperative that peacekeepers should be held accountable for serious crimes committed by them during peacekeeping operations. In practice, however, difficulties arise in relation to the issue of who is to be responsible for prosecuting such crimes and under which legal system such prosecutions are to be conducted. Peace-

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keeping operations invariably involve sensitive issues of national sovereignty, with troop-contributing states jealously guarding the sovereignty, which 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.[4]

Usually, in UN peacekeeping operations, status-of-forces agreements (SOFAs) are concluded between the UN and the host state, and 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.[5] 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.[6]

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 to ever face a military investigation. Once the military takes over the inquiry, the United Nations has no legal authority to follow up the investigation and cannot ensure that a repatriated soldier will face prosecution.[7]

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 their own national for an alleged crime.[8]

This solution, however, is 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 PSO [Peace Support Operation] 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.[9]

Given the difficulties we have just described, the question to be addressed in this article is whether international criminal law and the newly established International Criminal

Court (ICC) may have a role to play in the effective prosecution of UN peacekeepers. 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.

The extent of the problem

In 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 Democratic Republic of Congo, 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 Democratic Republic of the Congo.[10]

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, while 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.[11] In most of these cases 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 even received short sentences of imprisonment. Others were not charged or were set free after investigation.[12]

Allegations of atrocities committed by peacekeepers were not restricted to the peacekeeping operation in Somalia. In January 2000, for example, it was alleged that a 12-year-old Kosovan-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 Kosovan people 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.[13]

As far as atrocities by United Nations peacekeepers in Africa are concerned, a 1996 study by Graca Machel[14] on the impact of armed conflict on children revealed a rise in sex trafficking of women and children in places where peacekeeping forces were operating. A recent policy briefing paper by the London-based 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 [Peace Support Operations] in West Africa (Liberia, Sierra Leone and Guinea), which became known as the 'food for sex' scandal.[15]

In July 2004 disturbing reports appeared in the London Independent concerning serious crimes alleged to have been committed by UN peacekeeping troops involved in the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC):

> A total of 68 allegations against soldiers with the UN Organization Mission in the

> DRC (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, while 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 north-eastern 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.[16]

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 further stated:

> The UN has no authority to follow through any of the investigations currently made. At most, after a lengthy process, they can repatriate an individual, but they 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.[17]

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.[18]

The picture painted by these sources reveals a disturbing reality. It is, furthermore, a reality which appears to involve South African troops committing crimes while performing peacekeeping duties in Africa. For instance, in a recent case a South African colonel in Goma was allegedly found during a UN investigation to have sexually molested his young male interpreter. It emerged he had requested young male interpreters under the age of 18 since the start of his mission.[19] Another incident involving South African troops was uncovered in Goma. They allegedly raped a 12 year old, identified only as Anna. It was reportedly one of a string of such incidents.[20]

The rise of the International Criminal Court

Given the problems of legal accountability mentioned in the introduction to this paper, we now consider whether peacekeepers might be held accountable by the recently established International Criminal Court for the crimes reported.

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 usually exercised over crimes that are 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 also the international legal order. The classic example of such a crime is piracy and its perpetrators were described as hostes humanis generis – enemies of all humankind. 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 outra-

geous 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, and leaving aside isolated examples such as the international criminal tribunals at Nuremberg and Tokyo, it was left to national courts to do the job. Where the national court exercised jurisdiction over an international crime with no jurisdictional link on the basis of, for example, territoriality or nationality, it was said to be exercising universal jurisdiction. Perhaps the most famous example is the trial of Adolf Eichmann. In A-G of Israel v Eichmann (1961) 36 ILR 5, 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.

As we shall see, an important role has been retained for domestic courts which are said to act in 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 humankind, the ICC ensures that impunity does not follow their actions.

The ICC is the world's first permanent international criminal tribunal. The statute for the court 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. The treaty was to come into force upon 60 ratifications. This number was reached by April 2002. To date, the Rome Statute has been signed by 139 states and 97 states have ratified it.[21] The statute entered into force on 1 July 2002, at which time the court's jurisdiction over genocide, war crimes and crimes against humanity took effect. The court is situated in The Hague, the Netherlands. The judges for the court were chosen in February 2003 and were sworn in on 11 March 2003 at the inaugural session of the court in The Hague. The president is the Canadian Philippe Kirsch. The prosecutor has been chosen – the highly respected Argentine lawyer Luis Moreno Ocampo – and the court is expected to hear its first case soon. In all likelihood it will be an African affair, being either a prosecution of Ugandan rebel leaders of the Lord's Resistance Army (LRA), who have kidnapped thousands of children as soldiers or sex slaves,[22] or targeting recent crimes committed in the territory of the Democratic Republic of Congo.[23]

The ICC and peacekeepers

It is clear that the court is intended to prosecute those who are guilty of the world's most serious crimes. This brings us to the central question to be addressed in this article - that is, the extent to which the newly formed International Criminal Court may be expected to play a practical role in the prosecution of UN peacekeepers for serious crimes committed while involved in peacekeeping operations. Various factors lead to the conclusion that, in all probability, this role will be limited.[24] First, the types of crime over which the ICC exercises jurisdiction are strictly limited. Second, the jurisdiction of the court is limited by the principle of 'complementarity'. Each of these factors will be discussed in turn.

The crimes over which the ICC exercises jurisdiction

The ICC Statute creates a system of jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.[25]

Each of the definitions of these crimes has some form of built-in threshold which will help to limit the discretion of the prosecutor.

Genocide

For genocide, this threshold is achieved by setting the bar particularly high for the dolus requirement that is part of the definition of the crime. Genocide involves the intentional mass destruction of entire groups, or members of a group. The crime of genocide has been committed throughout history, the 20th century being no exception; we think in particular 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 and the genocidal aims of Serbs against Kosovan Albanians in the former Yugoslavia. The term 'genocide' is a combination of the Latin words genus (kind, type, race) and cide (to kill), and was coined by Raphael Lemkin writing in response to the events of World War II.[26]

The gravity of the crime of genocide is reflected in the Rome Statute through the prosecutor having to prove that the offender had specific intent (dolus specialis) for the crime of genocide to have been committed. In simple terms the offender must have the intent to produce the result charged; that is, intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Therefore, many of those who participate in a genocide may well fall outside this definition, since, although they are actively involved, they may lack the requisite intent to destroy, in whole or in part, the targeted group. In addition, genocide by its very nature has a quantitative dimension such that it will be prosecuted only when planned or committed on a large scale.[27] It goes almost without saying that it is difficult to imagine peacekeepers being actively involved in perpetrating genocidal acts, let alone being ascribed this type of special intention.

Crimes against humanity

The notion of 'crimes against humanity' in international law is sweeping and captures many concerns traditionally associated with international human rights law (the protection of life, the right not to be tortured, the rights to liberty and bodily integrity, etc). When it comes to crimes against humanity under the Rome Statute, the threshold for prosecution is raised by the nature of the actus reus that is a requirement of the definition. Article 7 of the Rome Statute provides 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.

Article 7(2) sets out the acts in question which include murder, rape, torture and enslavement.[28] It is interesting to note that, apart from rape, several other acts of gender-based violence are stipulated, including sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence of comparable gravity.[29] From the definition it is clear that 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 body, or to mental or physical health. The act must be committed as part of a widespread or systematic attack against members of a civilian population.

The first discernible limitation for the prosecutor is that the act must be part of a widespread or systematic attack. Article 7(2) of the statute provides elucidation when it says that 'attack' is defined as '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 attack is therefore the event in which the enumerated acts must form part and there may be a combination of acts (for example murder, rape, deportation) within a single attack as event. The attack has both widespread and systematic aspects. A widespread attack is an attack directed against a multiplicity of victims, while a systematic attack is an attack carried out pursuant to a preconceived policy or plan.[30]Another limitation is that the specific acts must be carried out 'pursuant to or in furtherance of a State or organizational policy to commit such attack'. The aggressor's act of murder, etc, must be pursuant to a policy. It is the existence of this policy that endows the criminal act with the character of a crime against humanity and excludes isolated acts of murder and so on from the court's jurisdiction.[31] Again, it seems clear that allegations against peacekeepers typically would not involve attacks against civilian populations involving such a widespread and systematic quality.[32] Marten Zwanenburg comments:

> It is difficult to imagine that a peacekeep-

> ing 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.[33]

Referring to the judgment of the ICTY Trial Chamber in the case of Tadic[34] Zwanenburg further points out that in order 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'.[35] 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.[36]

That being said, the recent accounts of UN peacekeepers' involvement in 'sex trafficking' and 'child prostitution rings' suggests that not all criminal acts of these soldiers are isolated, one-off events. What must be confronted is that these acts could be described as widespread. It must be remembered that Article 7(2)(g) of the Rome Statute specifically prohibits 'rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilization; or any other form of sexual violence of comparable gravity'. Where such acts bear a widespread or systematic quality they constitute crimes against humanity. A peacekeeper that is involved in committing an offence, such as raping women and children or trafficking of women and children for sex, and which act is a repetition of similar crimes or part of a string of such crimes, makes himself liable to a charge that his act is part of a widespread practice. In this respect it must be borne in mind that the requirement that the attack have a widespread or systematic 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 and other inhumane acts), or who engages in only one such offence against only one or a few civilians. So long as the individual's act or acts are part of a consistent pattern of offences by a number of persons linked to that offender, he or she may be properly charged with crimes against humanity.[37] 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.[38]

In their context, it is not impossible to imagine that some of the sexual crimes allegedly committed by UN peacekeepers in the DRC and elsewhere in Africa are crimes that are 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, and 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 applicable during armed conflicts. The sources of international humanitarian law are vast, and are broadly divided into two categories of substantive rules: 'the law of the Hague' and 'the law of Geneva' – which constitute the rules concerning behaviour which is prohibited in an armed conflict.

The 'law of the Hague' is made up of the Hague conventions of 1868, 1899 and 1907, which, generally speaking, set out rules regarding the various categories of lawful combatants and regulate the means and methods of warfare in respect of those combatants.[39] The 'law of Geneva', so called because it comprises the four Geneva conventions of 1949 plus the two additional protocols thereto of 1977, regulates the treatment of persons who do not take part in the armed hostilities (such as the civilians, the wounded, the sick) and those who used to take part, but no longer do (such as prisoners of war).[40] An exception here is the Third Geneva Convention which, in addition to the focus on treatment of persons no longer involved in the conflict, 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 means and methods of combat with a particular emphasis on sparing civilians as far as is possible in an armed conflict.

War crimes, like genocide and crimes against humanity, are similarly narrowed in scope under the Rome Statute. This is because of what is called the 'non-threshold threshold' built into Article 8 of the statute. Article 8 reads that 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[41] and was specifically derived from the US proposal at Rome to safeguard US soldiers from being indicted for isolated cases of war crimes while serving abroad.[42] As with crimes against humanity, so too with war crimes, it is clear that the court's focus will be on individual actions which form part of a larger process of human rights violations.

Nonetheless, of all the crimes falling within the jurisdiction of the International Criminal Court, dolus specialis is not required for such crimes.[43] Accordingly, if it can be shown that a peacekeeper committed a war crime (such as murder, torture, or rape) as part of a large-scale commission of such a crime, that peacekeeper may be guilty of a war crime without any need to prove the special intention that would be required for genocide and crimes against humanity.

The jurisdiction of the ICC and the principle of complementarity

We see therefore that the definitions of the crimes under the jurisdiction of the ICC suggest that most violations committed by peacekeepers will not be admissible before the ICC. But even for those crimes of peacekeepers that arguably do trigger the court's jurisdiction, there is a second factor which will undermine the likelihood of the ICC instituting a prosecution against such wayward soldiers, namely, a jurisdictional limitation built into the very statute of the 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 system of international criminal justice which buttresses the national justice systems of states parties. The principle proceeds from the belief that national courts should be the first to act: it is only if the state party is 'unwilling or unable' to investigate and prosecute international crimes committed by its nationals or on its territory that the ICC is then seized with jurisdiction.[44] To enforce this complementarity principle, Article 18 of the Rome Statute requires that the prosecutor of the ICC must notify all states parties and states with jurisdiction over the case before beginning an ICC investigation[45] and cannot begin an investigation on his own initiative without first receiving the approval of a chamber of three judges.[46] At this stage, it would be open to states that are

party to the statute to insist that they will investigate allegations against their own nationals themselves. Should this national be a peacekeeper (for example a South African peacekeeper alleged to be guilty of an ICC crime in the DRC), in such a situation the ICC must then suspend its investigation.[47] The court will take over only if the national system is unable to investigate, for example because of a breakdown in its judicial systems; or because it had refused to investigate without appropriate justification.[48] If it had investigated and subsequently refused to prosecute, the court could only proceed if it concluded that that decision was motivated purely by a desire to shield the individual concerned.[49]

Certain media and NGO reports suggest that there are selected examples where there has not been a vigorous prosecution by national authorities of 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 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 …[50]

Of course extensive research would be required to ascertain the true extent of the problem of non-accountability in relation to crimes committed by peacekeepers in Somalia and other areas of the world. What is clear, we submit, is that in the unlikely event that a peacekeeper's act meets the requirements of an ICC crime, the peacekeeper's state, if it is a party to the Rome Statute, will need to act promptly to prosecute the soldier concerned so as to avoid the potential triggering of the ICC's jurisdiction.

The important point flowing from the above is this. The complementarity principle affirms, rather than weakens, existing prosecutorial arrangements regarding peacekeepers. That is, the ICC's bark will in all likelihood be muffled by existing status-of-forces agreements (SOFAs) and contributing agreements (CAs) in terms of which the troop-contributing states retain criminal jurisdiction over the troops that they contribute. Of course, that does not mean that the ICC has no bearing on the issue. As this section has demonstrated, should the facts indicate that a peacekeeper is implicated in the commission of an ICC crime, the principle of complementarity places the burden on states to prosecute such acts by their nationals or committed on their territory as they are empowered to do under the relevant SOFA or CA. It is only if they fail to do so in a meaningful manner or without good reason that the ICC's jurisdiction will be triggered on the basis that the state concerned is 'unwilling' to properly investigate or prosecute pursuant to its duty under the Rome Statute. While certain reports indicate that some, arguably non-ICC, crimes by peacekeepers might, for a variety of reasons, not be vigilantly investigated and prosecuted, it nonetheless seems difficult to imagine that a state committed to its international obligations under the Rome Statute would fail to investigate and prosecute when faced with allegations that one of its peacekeepers has committed an ICC crime. Accordingly, were the unthinkable to happen, and a peacekeeper were to commit an ICC crime, the complementarity principle would most probably ensure that the chances are slim of seeing the ICC involved in the prosecution of such a peacekeeper. To reiterate, the effect of complementarity will be that the case will not be admissible before the ICC.

Further responses to crimes by peacekeepers

Not all responses to crimes by peacekeepers involve prosecution in terms of national or international law. Before we conclude we therefore note that certain welcome institutional responses (relating specifically to sexual exploitation and abuse) have been outlined by the Secretary-General of the UN in his recent report to the Security Council on the topic of 'Women and peace and security'.[51] 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 of conduct is monitored, and any violation gives rise to immediate action against those guilty of the violation.[52] 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 United Nations entity and NGO at country level, creating a network to ensure the full implementation of the bulletin in both emergency and development contexts.[53]

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.[54]

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 an ICC crime. But it is heartening to see the UN acknowledging that there is a problem . Accountability for serious crimes might be instilled through a prosecution, but that measure ought to be regarded as an extreme measure which signals the distressing failure of peacekeepers to fulfil their guardian role. There should, ideally, never be a need to prosecute a UN peacekeeper for an ICC or lesser crime. But if that ideal is to be achieved, it must undoubtedly start with the monitoring and standard setting described in the Secretary-General's report.

Conclusion

Juvenal's ancient question 'Sed quis custodiet ipsos custodies?' remains as relevant today as when it was written approximately two thousand years ago.[55] In this article we have attempted to address in a brief fashion the issue of whether the newly established International Criminal Court has a practical role to play in the prosecution of UN peacekeepers for serious crimes committed by them while engaged in peacekeeping operations. Our conclusion is that the ICC may have a role to play, but this role is strictly limited by the nature of the crimes over which this court exercises jurisdiction, and by the doctrine of complementarity which restricts the jurisdiction of the court to a great extent. There may be exceptions,[56] but it is to be expected that in most cases, serious crimes committed by UN peacekeepers in Africa will be isolated in nature and the perpetrators of these crimes will not possess the necessary intent to enable such crimes to be classified as genocide or crimes against humanity. 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, and 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 continue to be conducted

largely by the national state of the peacekeeper concerned, and 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'.[57]

The ICC is not intended as a court for every type of crime. Where it is not clear that a peacekeeper has committed an ICC crime, 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 an ICC crime, an effective domestic prosecution of the soldier concerned by a state acting in complement with the ICC 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 the ICC to provide 'exemplary punishments' which will serve to restore the international legal order. As Anne-Marie Slaughter, dean of the Woodrow Wilson School of Public and International Affairs at Princeton, has pointed out:

> One of the most powerful arguments for the International Criminal Court 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.[58]

The ICC will be effective when its 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.[59]

Notes

1 '*Quis custodiet ipsos custodes*?' Juvenal: Satires, VI. 347.
2 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.
3 Security Council Document S/2004/814, distributed 13 October 2004, at paragraph 99.
4 Marten Zwanenburg, The statute for an International Criminal Court and the United States: peacekeepers under fire, EJIL,10 1999, pp 124-143 at 127.
5 Such agreements as to criminal jurisdiction are in accordance with the Convention on the Privileges and Immunities of the United Nations, which confers immunity from legal process on officials of the United Nations. See Marten Zwanenburg, The statute for an International Criminal Court, p127.
6 PeaceWomen – Women's International League for Peace and Freedom, 'About Peacekeeping Watch': <www.peacewomen.org/un/pkwatch/aboutpkwatch.html>.
7 UN Wire, 'Abuse by UN troops in DRC may go unpunished, report says',12 July 2004.
8 Pam Spees, 'Gender justice and accountability in peace support operations – closing the gaps: a policy briefing paper by International Alert', February 2004, p 23: <www.international-alert.org>.
9 Spees, 'Gender justice and accountability', p 23.
10 PeaceWomen – Women's International League for Peace and Freedom, 'About Peacekeeping Watch'.
11 Report by Dateline NBC correspondent Lea Thompson dated 11 January entitled 'Disturbing the peace': <www.freedomdomain.com/un/disturbpeace.html>.
12 Thompson, 'Disturbing the peace'.
13 PeaceWomen – Women's International League for Peace and Freedom, 'About Peacekeeping Watch'.
14 UN Secretary General, '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).

15 Spees, 'Gender justice and accountability', p 21.
16 UN Wire, 'Abuse by UN troops in DRC may go unpunished'.
17 UN Wire, 'Abuse by UN troops in DRC may go unpunished'.
18 UN Wire, 'Abuse by UN troops in DRC may go unpunished'.
19 Kate Holt and Sarah Hughes, 'SA troops "raped kids in DRC"', *Pretoria News*, 12 July 2004.
20 Ibid.
21 For latest ratification status see <www.iccnow.org>.
22 See UN Wire, 'First International Criminal Court case targets Uganda's rebels, 30 January 2004.
23 See press release of the Office of the Prosecutor of the International Criminal Court, 'Prosecutor receives referral of the situation in the Democratic Republic of the Congo',19 April 2004.
24 It is interesting to note that, until recently, it was possible to point to a third significant factor limiting the potential role of the International Criminal Court 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 United Nations.
25 See Rome Statute, Article 5. The court will also have jurisdiction in future 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)).
26 See Ralph Lemkin, *Axis rule in Occupied Europe,1944*,, pp 79-95, cited in Cassese, 'Genocide', p 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*', AJIL, 41 1947, p 145; see also Kittichaisaree, International Criminal Law, 2001, p 67.
27 See Schabas, *An introduction to the International Criminal Court,* 2000, p 24.
28 The full list of acts in Article 7(2) is as follows: (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 sterilization; 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.
29 Article 7(1)(g).
30 Kittichaisaree, *International Criminal Law*, p 96.
31 See Schabas, *An introduction to the International Criminal Court*, pp 24-25.
32 See Zwanenburg, The statute for an International Criminal Court, p 135 and footnote 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.
33 Zwanenburg, The statute for an International Criminal Court, p 134.
34 *Prosecutor v Dusiko Tadić a/k/a* 'Dule', Opinion and Judgment, Case No IT-94-1-T, T. Ch II, 7 May 1997. (Tadic' Judgment).
35 Ibid at para 659.
36 Zwanenburg, The statute for an International Criminal Court, pp 134 and 135.
37 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. See Kittichaisaree, International Criminal Law, p 97, *citing Kupre_ki_ and others*, ICTY, Trial Chamber, judgment on 14 January 2000, Case No IT-95-16-T, para 550.
38 Cassese, 'Crimes against humanity, p 361, in Cassese et al, *The Rome Statute of the International Criminal Court*.
39 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.
40 *Cassese, International Criminal Law, 2003*, p 48.
41 See Kittichaisaree, International Criminal Law, p 133.
42 Kittichaisaree, *International Criminal Law*, p 133. As Scheffer, the head US delegate at Rome, himself points out, '[t]he United States 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'.
43 Zwanenburg, The statute for an *International Criminal Court*, pp 134 and 136.
44 Article 17 of the Rome Statute.
45 See Article 18(1) of the Rome Statute.
46 See Article 15(3).
47 See Article 18(2).
48 See Article 18(3).
49 See Article 17(1)(b).
50 Thompson, 'Disturbing the peace'.
51 Security Council Document S/2004/814 distrib-

uted 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.

52 Security Council Document S/2004/814, para 100.

53 Security Council Document S/2004/814, para 101.

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

55 'Who is to guard the guards themselves?' Juvenal: Satires, VI. 347.

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

57 See the preamble to the Statute of the International Criminal Court.

58 'Not the court of first resort', Washington Post, 21 December 2003.

59 Quoted in McGoldrick et al, *The Permanent International Criminal Court: legal and policy issues,* 2004, p 477.