HUMAN TRAFFICKING AND RELATED CRIMES IN THE CONTEXT OF PEACEKEEPING

STATE, ORGANISATION, AND INDIVIDUAL RESPONSIBILITIES AND ACCOUNTABILITIES

REPORT OF CONFERENCE HELD NOV 15-16 2012
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OUTCOME OF A CONFERENCE HELD NOVEMBER 15-16, 2012

Report date: December 2012

Prepared By

The Women’s International League for Peace and Freedom
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WILPF would also like to thank the Swiss Ministry of Foreign Affairs and Carmela Bühler in particular, not only for the their financial support but also for the commitment shown to this important issue.
Authors: Madeleine Rees, Emma Bürgisser, and Leila Chaker

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EXECUTIVE SUMMARY

Introduction to the Problem

In post-conflict Bosnia and Herzegovina, one of the major causes of human rights violations and serious criminal acts was the pervasive trafficking of women, predominantly from Eastern Europe, to BiH for the purpose of sexual exploitation. The market lay predominantly with the international community, including military, police, diplomats and humanitarian workers. The ‘trade’ generated millions into the black market, strengthened and increased the influence of organised crime, and destroyed lives, in some cases literally. The film, The Whistleblower, by Larysa Kondracki has drawn the events into the public domain with appalling clarity.

Some, though very few, of the men who engaged in these crimes were ever repatriated. None were prosecuted or faced any sanction. None of the international agencies or officials responsible for supervising, monitoring and disciplining offenders were called to account.

Since then, the UN has made attempts to address the issue. For example, it adopted a zero tolerance policy and created conduct and disciplinary units. There is no explanation in the policy, however, as to its basis in law, and research to date indicates that there has been little fundamental change in the culture that allows for the continued sexual exploitation and abuse, the trafficking of women, girls, and, on occasion, men and boys.

Why the United Nations Must Address this Issue

It is sometimes forgotten that the UN is the largest ‘peace’ organisation in the world. When peacekeepers are sent to other countries it is as representatives of the ideals embedded in the UN Charter and the subsequent Universal Declaration of Human Rights. As a matter of institutional obligation there can be no debate as to the meaning of ‘To serve with pride’. Failure to comply has enormous consequences: it undermines the integrity of the United Nations and the success of the mission. When international personnel provide a market for illegal goods and services, they foster a black economy and organised crime. This undermines the growth of legitimate economic activity, which leads to a reduction in income to the State. Any democratic transition is therefore inevitably prejudiced. In cases where the ‘services’ are the provision of sex, then the illegality of the activity is compounded by the suffering of those forced into sexual servitude. The impact on gender relations in the State is also affected and power structures inimical to equality and real participatory democracy are institutionalised.

For these reasons, the UN must take action.

Legal Basis for Policy Development

In order to assist the UN and other international organisations to address these issues using Law as the bedrock of policy development, WILPF organized two consultations with experts from a range of different legal disciplines. The objective was to ascertain and identify the nature and range of offences that were being committed, the applicable areas of law, the legal basis for redress, with particular reference to responsibility and accountability, and to make recommendations to the applicable bodies as to how to affect change.
Issues to Which the Law Should Be Applied

The major areas of legal concern in regard to the issue are, inter alia:

- The range and nature of offences that are committed as part of the crime of trafficking, related crimes and the potential defendants.
- The application of the law relating to immunities of UN and diplomatic personnel, in particular the nature of functional immunity.
- The legal liability of private contractors.
- The application of extra territorial jurisdiction.
- The role of the International Criminal Court and the application of international humanitarian law.
- The locus of prosecution.
- Discrimination within the application of legal frameworks.
- Obstacles to effective prosecution.
- Remedies for victims.
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1. INTRODUCTION

This paper is a summary of the discussions and findings of the expert meetings. Whilst primarily concerned with misconduct relating to trafficking, SEA, and related crimes, the recommendations made with a view to effectively prosecuting offenders will be similarly applicable where alleged misconduct is of a different type, such as acquisitive crime or corruption.

The first section references the Human Rights obligations and the nature of State responsibility. Section two sets out the nature of the offences that are committed in the course of trafficking and the sources of law for their prosecution; ranging from the Protocol to the Transnational Organised Crime Convention, through International Humanitarian Law, the applicability of Jus Cogens, and the Rome statute, with reference to the Human Rights framework.

Having set out the theoretical framework for accountability, there is then a section on the Challenges and Obstacles i.e. the realities of prosecutions in the context of weak national systems, obstacles to prosecution in troop contributing States, issues of functional immunity, and status of forces agreements. There are then suggestions from a legal perspective as to how these obstacles could be practically overcome, including an analysis of the jurisdictional structure. This is followed by a series of recommendations to the relevant bodies and States.
2. HUMAN RIGHTS OBLIGATIONS AND THE NATURE OF STATE RESPONSIBILITY

2.1 Human Rights as Fundamental to an Appropriate Response

It is almost otiose to remark that Human Rights are the vital element in addressing the issue of trafficking. From the protection and assistance, which must be provided for the individual caught in the trafficking cycle to the effective prosecution of offenders, the legislation, measures, policies and practice must be based on human rights law.

Hence it falls to States to respect, protect and fulfil their obligations under the various international human rights Conventions and Covenants. These treaties have both territorial and extraterritorial application relating to acts or omissions by the State party vis in its own territory and where it exercises jurisdiction, as in when it has power or effective control over a territory or persons outside of its sovereign territory. The obligation applies therefore to States as members of international organizations (e.g., as part of an international peace-keeping force) where it is involved in occupation and other forms of administration of foreign territory (e.g., U.N. administration of territory); to national contingents that form part of an international peace-keeping or peace-enforcement operation; to persons detained by agents of a State (e.g., the military or mercenaries) outside its territory; to lawful or unlawful military actions in another State. Human Rights law also requires States parties to regulate the activities of domestic non-State actors that operate extraterritorially, such as national corporations. The extraterritorial application of Article 2(e) of CEDAW, for example, also includes an obligation to protect women from gender-based violence by armed groups as well as from the State party’s forces and peacekeeping troops.

In the context of peace keeping, there are a large number of non state actors whose conduct must be regulated under human rights norms by States parties: armed groups, paramilitaries, corporations, private military contractors, organized criminal groups, and vigilantes. In conflict and post-conflict contexts, State institutions are often weakened or certain government functions may be performed by other governments, inter-governmental organizations, or even non-State groups. In such cases, there may be simultaneous and complementary sets of obligations on a range of involved actors, the fulfilment of all of which are relevant in the context of trafficking.

When a State party is acting as a member of an international organization it not only remains responsible for its obligations within its territory and extraterritorially but also has a

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1 Human Rights Committee, General Comment No. 31 Para. 10 (2004); Committee against Torture, General
2 Human Rights Committee, General Comment No. 31 Para. 10; Committee Against Torture, General Comment No. 2, Para. 16.
3 CEDAW, General Recommendation No. 28, Para. 36.
responsibility to adopt measures to ensure that policies and decisions of these organizations conform to its Convention obligations.4

State responsibility also arises if a non-State actor’s acts or omission may be attributed to the State under international law.5 This means that a State Party will be responsible for violations of international human rights and humanitarian law committed by a non-State actor if that non-State actor is empowered by the State to exercise elements of governmental authority; is acting on the instruction of or under the direction or control of a State; where the State acknowledges and adopts such acts as its own conduct6 or when the State has failed to exercise due diligence to prevent, investigate, punish and ensure redress for the acts of private individuals or entities that breach human rights.7

There is particular relevance to trafficking in the context of peace-keeping regarding the obligation to protect, combined with the provisions of Articles 2(f) and 5(a) of CEDAW, which oblige States parties to modify and abolish social attitudes and cultural practices and patterns that are based on the inferiority or superiority of either sex and that hinder equality for women.8 In the highly masculine, and gendered conflict and post conflict environment, this is obviously significant.

The conduct of Non State actors is similarly regulated by international humanitarian law which contains obligations for non-State actors as parties to an armed conflict (e.g., insurgents, rebel groups) specifically under common article 3 of the Geneva Conventions and Additional Protocol II and customary international humanitarian law on non-international armed conflicts.9 In addition, the Committee emphasizes that gross violations of human rights and serious violations of humanitarian law could entail individual criminal responsibility, including for members and leaders of non-State actors.

2.2 Understanding the Range of Offences Committed in the Course of Trafficking and Sexual Exploitation

A key inhibitor of progress is a lack of understanding of what constitutes misconduct both in law and in practice. Depending on the facts of an individual case, ‘misconduct’ may result in convictions for offences ranging from common assault to war crimes.

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4 See e.g., CESCR, General Comment No. 14, Para. 39 (2000); CESCR, General Comment No. 21, Para. 65 (2009).
5 CEDAW, General Recommendation No. 28, Para. 13.
7 CEDAW, General Recommendation No. 28, Para. 13; see also Human Rights Committee, General Comment No. 31 Para. 8.
8 CEDAW, General Recommendation No. 28.
3. THE NATURE OF TRAFFICKING: OFFENCES AND JURISDICTIONS

3.1 The Palermo Protocol

Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (commonly referred to as the Palermo Protocol) sets forth a frequently cited definition of trafficking.10

Discussants referenced the three elements that must be established in order to make out the offence:

a. The Acts: “the recruitment, transportation, transfer, harbouring or receipt of persons”.

b. The Means: “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”.

c. The Purposes: “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.11

It was noted that the Protocol enjoys widespread international support12 and should offer guidance to those involved in crafting a working definition of trafficking within their respective legal regimes. However, certain limitations of the Protocol prompted the discussants/experts to take account of a broader set of the tools available in international law to establish accountability.

10 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, Article 3(a); “Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs... The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used.” http://www2.ohchr.org/english/law/protocoltraffic.htm

11 In order for trafficking to be made out it must be proven that the accused did (1) by way of (2) in order to achieve (3)

12 For example, the preamble of the EU Framework Decision on combating trafficking in human beings (Decision of 19 July 2002 (2002/629/JBZ), OJ 1.8.2002 L 203) lauds Palermo as decisive progress towards international cooperation, and adopts a definition that draws heavily on it. The OSCE Action Plan also adopts the Protocols definition (Decision No. 557, OSCE Action Plan to Combat Trafficking in Human Beings (PC.DEC/557, 24 July 2003).
3.2 Limitations of Palermo Application

The Protocol is an obvious starting point, but the crime as defined in Article 3 fails to adequately capture the scope and nature of the offence in practice. This is particularly so in the context of United Nations peacekeeping operations (UNPKOs). Take, for example, the allegations involving the United Nations Stabilization Mission in Haiti (MINUSTAH).\(^\text{13}\) The available facts involving MINUSTAH personnel led discussants to conclude that the Protocol definition of trafficking as a transnational crime is not appropriate in the circumstances.\(^\text{14}\)

3.3 Criticisms of the Palermo Protocol

a. **Consent:** Attention was drawn to the effect of Article 3(b) of the Protocol, which stipulates that the consent of the victim to the intended exploitation shall be irrelevant where any of the means listed in the definition are used (see 1.2(2) above). The consequence of this restriction is that insofar as the listed means are concerned, each will give rise to an irrebuttable presumption that the trafficked person did not give his or her consent.\(^\text{15}\) However, where a means other than those specified is used, the consent of the victim becomes relevant. It was recognized that this would not be the case where the trafficked person is a child pursuant to Article 3(c). Notwithstanding scenarios in which specified means are used or the victim is a child, the issue of consent midwifed by Article 3(b) is problematic and unhelpful.

i. Discussants cited a number of hypothetical examples in which this issue would present difficulty. These included situations in which a victim has worked as a prostitute in non-coercive conditions prior to being trafficked by non-specified means. It was also noted that the Protocol does not particularise the ways in which a victim’s consent could be relevant to establishing the offence.

b. **Function of the Protocol:** Discussants recognised that the Protocol must be regarded as a treaty to promote international co-operation; indeed this is one of its three stated aims.\(^\text{16}\) As with most, if not all, suppression

**Sine qua non delineation of exploitation:** It was commented that it is unrealistic to expect that the Protocol, which, ‘at a minimum’, will cover the exploitative conduct in question, is wide-ranging enough to provide meaningful protection on its own.


\(^\text{15}\) This would not limit any defense the accused may have available to him or her ([Travaux preparatoires, Para 68](http://www.un.org/apps/news/story.asp?NewsID=41008&Cr=haiti&Cr1=#.UPVM_goYWg)) (A/55/383/Add.3)

\(^\text{16}\) Article 2(c) Palermo Protocol
3.4 Alternatives to the Palermo Protocol

There was general discussion as to alternative legal avenues to the Palermo Protocol in conceptualizing and prosecuting the offences under discussion.

Focus: Prohibition of Slavery

Attention was drawn to Article 7(1)(c) of the Rome Statute, which proscribes enslavement as a crime against humanity. Article 7(2)(c) makes clear that enslavement involves “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”. That trafficking may constitute enslavement as a crime against humanity is reaffirmed in the Elements of the Crimes.

It was noted that whilst every case involving trafficking will be fact-specific and demand forensic attention to the specific features of the victim’s experiences and context, prosecutors have at their disposal a wide range of legal instruments including slavery and slavery-related offences which may offer a more effective route to ensure accountability.

Article 1 of the Slavery Convention 1926 (as amended by the 1953 Protocol) defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” The same Article further defines the slave-trade as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and in general, every act of trade or transport in slaves.”

It was noted that this apparently expansive definition does not require that all powers of ownership or acts of acquisition or disposal are exercised over a victim before the definition of slavery or the slave-trade is engaged. Nor does it require that a perpetrator completes both elements of enslavement and trade. In contrast, the Protocol bifurcates the processes of trade in persons and exercise of control over them. This already unhelpful distinction is further problematised by considerations relating to consent and it was further posited that if one transposes Palermo onto the 1926 Convention, it would appear that there are certain circumstances in which a person could consent to be enslaved. This is plainly inappropriate

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17 “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” Rome Statute, Article 7(1).
18 “It is understood that such deprivations of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children” Elements of Crimes, Article 7(1)(c), n.11.
19 http://www2.ohchr.org/english/law/slavery.htm
20 See also para 3.4 above
and highlights well the difficulties faced by activist lawyers if they seek to make use of the Protocol.

Importantly, unlike the Protocol, the Convention does not delineate any *sine qua non*, or specific task or purpose for which a person may be enslaved.

It was acknowledged that the 1926 Convention is widely regarded as targeting chattel slavery as understood from practices in the Americas and Caribbean in the eighteenth and nineteenth centuries. As such, use of the Convention is generally limited to the ‘classic’ view of slavery. This is exacerbated by the fact that subsequent international instruments have adopted the Convention’s definition as a model.

Notwithstanding this, it was suggested that the 1926 Convention’s view of enslavement and trade in persons conceivably offers full protection where the Protocol may not.

It was further noted that the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices similar to Slavery, has broadened the definition of slavery to include slavery-like practices such as debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents. State parties must take all necessary measures to abolish these practices, whether or not they are covered by the definition of slavery in the 1926 Convention. Helpfully, it was noted, slavery-like practices are generally understood in international praxis to refer to circumstances in which the victim is not literally ‘owned’ in the sense as set out at paragraph 12 above (that is, in the sense of losing one’s legal personality). Instead, slavery-like practices refer to conduct which amounts, or equates, to slavery as a result of the effect of that conduct upon a victim.

Discusants recognized that such practices are expressly prohibited in a very wide range of instruments. Specific examples include Article 8 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and regional instruments such as the European Convention on Human Rights European Convention on Human Rights, the American Convention on Human Rights, and African Charter on Human and People's Rights. It is enunciated in various forms as an international crime under the Rome Statute, as well as being a *jus cogens* offence.

States Parties have non-derogable obligations to take positive steps to ensure the realization of these prohibitions.

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21 [http://www2.ohchr.org/english/law/slavetrade.htm](http://www2.ohchr.org/english/law/slavetrade.htm)
22 [http://www2.ohchr.org/english/law/ccpr.htm](http://www2.ohchr.org/english/law/ccpr.htm)
23 Article 4
24 Article 6
25 Article 5
Discussants were referred to the 2005 judgment of the ECtHR in Siliadin v France\textsuperscript{26} as an example of regional judgement concerned with the prohibition on slavery. The Court unanimously found France to be in violation of its obligations under the ECHR, for having failed to criminalize and enforce the prohibition of slavery and forced labour as set forth in Article 4 of the Convention, i.e. “to criminalise and suppress every act aimed at keeping a person in a situation which is in violation with Art. 4”. The Court defined ‘servitude’ for the purposes of Article 4 as “an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked to the concept of slavery”.\textsuperscript{27} Coercion was established by the fact that the applicant had no independent financial means and her documentation had been taken from her whilst her ‘employers’ failed to regularize her immigration status.

The discussants also observed that the Siliadin case serves as an important reminder of the reluctance on the part of courts to reach a finding that the full offence of enslavement is made out. Thus, although the ECtHR found that the applicant had been held in a situation of forced labour and servitude, the evidence, it concluded, did not suggest that she was held “in slavery in the proper sense”; This was because, the Court reasoned, the claimant’s ‘employers’ had not “exercised a genuine right of legal ownership over her...reducing her to the status of an ‘object’”.\textsuperscript{28} One participant commented that comparable reluctance has been observed where genocide has been alleged and so utilizing the full scale of related offences in order to hold perpetrators to account was a valuable strategy. It was also posited that these concepts are much broader than conventionally perceived.

Related to this, it was suggested that the rubric of the 1926 Convention and subsequent treaties and other instruments, which proscribe slavery, slavery-like practices, and servitude may assist where a victim is coerced in circumstances of extreme poverty or other economic deprivation leading to his or her exploitation or abuse. One participant was able to draw upon her field experience in Haiti and suggested that this may more adequately address the kind of abuse being alleged there. Whilst participants acknowledged that this issue would require its own study, it was noted that the suggested approach may puncture new entry points of accountability in the spectrum of trafficking and related crimes.

Discussants considered the indictment of Charles Taylor at the Special Court for Sierra Leone. It was noted that the indictment included separate counts of sexual slavery and enslavement as crimes against humanity. It was submitted that such an approach should be treated with caution. In short, sexual slavery becomes feminized and enslavement masculinised. It was posited that such distinction risks inhibiting victims’ confidence in coming forward, particularly where men have been victims of sexual exploitation. If sexual slavery is recognized as a separate offence, it must clearly be understood as a subset of the general offence of enslavement.

\textsuperscript{26} \url{http://ec.europa.eu/anti-trafficking/entity.action?id=f1df4fc1-b311-45ed-b0e6-69ad9fc2f7cf}

\textsuperscript{27} Para 124

\textsuperscript{28} Para 122
3.5 Offences in the International Criminal Court

Trafficking is not listed as a distinct international crime under the Rome Statute. However, that does not preclude the possibility of prosecuting individuals under the rubric of other related or analogous offences on the basis of the facts underpinning the offence.

Discussants suggested a number of possible charges. These are summarized and categorized in the tables below:

<table>
<thead>
<tr>
<th>Crimes Against Humanity</th>
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<tbody>
<tr>
<td><strong>Enslavement</strong>- Exercising the power attaching to the right of ownership over one or more persons or imposing similar deprivations of liberty as part of a widespread or systematic attack against a civilian population.</td>
</tr>
<tr>
<td><strong>Deportation or Forcible Transfer of Population</strong>- Deporting or forcibly transferring, without grounds permitted under international law, one or more persons lawfully present in the area to another location by expulsion or other coercive acts as part of a widespread or systematic attack against a civilian population.</td>
</tr>
<tr>
<td><strong>Imprisonment or Other Severe Deprivation of Physical Liberty</strong>- Imprisoning or otherwise depriving one or more persons of physical liberty under circumstance where the gravity of the conduct is in violation of fundamental rules of international law and committed as part of a widespread or systematic attack against a civilian population.</td>
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<tr>
<td><strong>Torture</strong>- Inflicting severe physical or mental pain or suffering without lawful sanctions upon one or more person under the control of the perpetrator as part of a widespread or systematic attack directed against a civilian population</td>
</tr>
<tr>
<td><strong>Rape</strong>- Penetrating the body of the victim or the perpetrator, however slight, with a sexual organ, or of the anal or genital opening of the victim with any object or body part, by force or threat of force or coercion, or against a person incapable of giving consent, as part of a widespread or systematic attack directed against a civilian population.</td>
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<tr>
<td><strong>Sexual Slavery</strong>- Exercising the power attaching to the right of ownership over one or more persons or imposing similar deprivations of liberty, and causing such person or person to engage in one or more acts of a sexual nature as part of a widespread or systematic attack against a civilian population.</td>
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</tbody>
</table>
| **Enforced Prostitution**- Causing one or more persons to engage in one or more acts of a sexual nature by force, threat of force, coercion, or by taking advantage of the inability to give genuine consent, with an expectation of obtaining a financial or other advantage in exchange for the acts of a sexual nature and conducted as part of a widespread or systematic attack against a civilian population.
<table>
<thead>
<tr>
<th>War Crimes</th>
<th>Serious violations of the laws and customs of war applicable in a conflict not of an international character</th>
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<tbody>
<tr>
<td><strong>War crime of rape.</strong> Penetrating the body of the victim or the perpetrator, however slight, with a sexual organ, or of the anal or genital opening of the victim with any object or body part, by force or threat of force or coercion, or against a person incapable of giving consent.</td>
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</tr>
<tr>
<td><strong>War crime of sexual slavery.</strong> Exercising the power attaching to the right of ownership over one or more persons or imposing similar deprivations of liberty, and causing such person or person to engage in one or more acts of a sexual nature.</td>
<td></td>
</tr>
<tr>
<td><strong>War crime of enforced prostitution.</strong> Causing one or more persons to engage in one or more acts of a sexual nature by force, threat of force, coercion, or by taking advantage of the inability to give genuine consent, with an expectation of obtaining a financial or other advantage in exchange for the acts of a sexual nature.</td>
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</tr>
<tr>
<td><strong>War crime of sexual violence.</strong> Committing a grave act of a sexual nature against one or more persons, or causing such person or persons to engage in an act of a sexual nature by force, threat of forces, coercion, or incapacity to give consent.</td>
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<tr>
<td><strong>War crime of cruel treatment.</strong> Inflicting severe physical or mental pain or suffering upon one or more persons either hors de combat or civilians, medical personnel, or religious personnel taking no active part in hostilities.</td>
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<tr>
<td><strong>War crime of torture.</strong> Inflicting severe physical or mental pain or suffering upon one or more persons either hors de combat or civilians, medical personnel or religious personnel taking no active part in the hostilities for purposes of obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination.</td>
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<tr>
<td><strong>War crime of outrages upon personal dignity.</strong> Humiliating, degrading, or otherwise violating the dignity of one or more persons either hors de combat or civilians, medical personnel or religious personnel taking no active part in the hostilities to a degree generally recognized as an outrage on personal dignity.</td>
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<tr>
<td>War Crimes</td>
<td>Serious violations of the laws and customs of war applicable in an international armed conflict</td>
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<tr>
<td><strong>War crime of outrages upon personal dignity.</strong> Humiliating, degrading, or otherwise violating the dignity of one or more persons to a degree generally recognized as an outrage on personal dignity.</td>
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<tr>
<td><strong>War crime of rape.</strong> Penetrating the body of the victim or the perpetrator, however slight, with a sexual organ, or of the anal or genital opening of the victim with any object or body part, by force or threat of force or coercion, or against a person incapable of giving consent.</td>
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<td><strong>War crime of enforced prostitution.</strong> Causing one or more persons to engage in one or more acts of a sexual nature by force, threat of force, coercion, or by taking advantage of the inability to give genuine consent, with an expectation of obtaining a financial or other advantage in exchange for the acts of a sexual nature.</td>
<td></td>
</tr>
<tr>
<td><strong>War crime of sexual violence.</strong> Committing a grave act of a sexual nature against one or more persons, or causing such person or persons to engage in an act of a sexual nature by force, threat of forces, coercion, or incapacity to give consent.</td>
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| Grave breaches of the Geneva Conventions | War crime of torture. Inflicting severe physical or mental pain or suffering upon one or more persons protected under one or more of the Geneva Conventions of 1949 for purposes of obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination, such conduct taking place in the context of an international armed conflict. |
### War Crimes

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</tr>
</thead>
<tbody>
<tr>
<td>War crime of inhuman treatment.</td>
<td>Inflicting severe physical or mental pain or suffering upon one or more persons protected under one or more of the Geneva Conventions of 1949, such conduct taking place in the context of an international armed conflict.</td>
<td>Deporting or transferring one or more persons protected under one or more of the Geneva Conventions of 1949 to another State or location, such conduct taking place in the context of an international armed conflict.</td>
<td>Confining one or more persons protected less than one or more of the Geneva Conventions of 1949, such conduct-taking place in the context of an international armed conflict in one or more acts of a sexual nature.</td>
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A number of specific offences, whilst theoretically viable, were ultimately rejected as inappropriate charges. For example, one participant drew attention to the difficulty of establishing the required *men’s rea* of intent with regard to a charge of torture, although noting that in this context, the language of the Convention Against Torture does offer the possibility of examining it as a violation based on discrimination.

Prior to determining what offences are relevant in light of the particular set of allegations, it would be necessary to establish that:

a. The ICC’s bases of jurisdiction have been met:
   i. the offence must be alleged to have taken place since 1 July 2002; and
   ii. the offences must be alleged to have taken place within the territory of a State Party to the Rome Statute or a state which has accepted the Court’s jurisdiction, or be perpetrated by nationals of a State Party or state which has accepted jurisdiction; and
   iii. either the situation in the country in question is referred to the Prosecutor by a State Party, or by the UN Security Council acting pursuant to its Chapter VII powers, or the Prosecutor opens an investigation under her own initiative.

b. The *chapeau* requirements are met with regard to the category of offence:

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29 Rome Statute, Article 11.
30 Rome Statute, Article 12.
31 Rome Statute, Article 13.
i. crimes against humanity - offences committed ‘as part of a widespread or systematic attack against a civilian population and with knowledge of the attack’, and/or

ii. war crimes - the offences took place in the context of and was associated with an international or non-international armed conflict

Participants discussed the applicability in the Haitian context where the relevant charge would necessarily be confined to an offence as a crime against humanity, but given the evidential basis, there was a potential for its application. Participants’ field experience suggested strongly, however, that the circumstances in which such a prosecution would be possible were very limited. Bosnia and Herzegovina was seen as perhaps the most poignant case where application of IHL could have been considered.

It was suggested that concepts of what constitutes an on-going armed conflict may need to be re-evaluated so as to more effectively describe realities on the ground. In particular, actors should challenge what is understood to be ‘post-conflict’ since temporal distinctions have become increasingly arbitrary and dissociated with situational context. This may provide some assistance, in relevant circumstances, to establish continuing ICC jurisdiction.

Aside from the considerable jurisdictional challenges, a number of practical considerations were raised:

a. It is likely that attempts to bring such prosecutions would be met with political roadblocks;

b. It is extremely unlikely that allegations made against peacekeepers would be subject to referral to the ICC;

c. In the event that there were such a referral it is unlikely that the ICC’s already stretched resources would allow for an adjudication of the case with any degree of urgency, if at all, given all of the Court’s other priorities;

d. As the Court’s jurisdiction does not supersede domestic criminal prosecutions, the host country would either have to consent to the ICC’s jurisdiction or the Office of the Prosecutor will have to prove that the country in question is unwilling or unable to investigate and prosecute themselves.

3.6 Conclusions on the Use of International Law

In general, for a successful prosecution it is easier to charge the simplest most fact-appropriate offence. However, Law should describe as accurately as possible, the experience of those who should enjoy its protection. Hence, where possible on the facts, argumentation should include the offences, which meet criteria for slavery and slavery like offences, and to do so within human rights law since it poses the fewest jurisdictional challenges. This can be supplemented by IHL in conflict situations and in very specific contexts, the ICC.
3. ACCOUNTABILITY IN THE CONTEXT OF PEACEKEEPING: CHALLENGES AND SOLUTIONS

In the period January 2004- December 2012 the number of personnel deployed on United Nations’ peacekeeping missions (UN PKOs) has more than doubled yet significant numbers of these deployed persons fall outside the ambit of any effective criminal justice system. As a result, offenders enjoy de facto impunity whilst victims go without justice and the Organization’s credibility and integrity is severely undermined. Discussants sought to establish how to address this deficit and proposed a number of recommendations to this end.

4.1 Identifying the Challenges

A number of obstacles stand in the path of addressing accountability deficits in the context of UN PKOs. Participants identified these challenges and proposed targeted solutions.

a. Limitations of criminal justice systems in receiving states: Receiving states often have weak, dysfunctional, or entirely failed systems for the administration of criminal justice. Beyond the limitations of practical capacities to investigate and prosecute crime, where these systems do not meet basic international human rights standards they will not be acceptable tribunals for the prosecution of UN PKO personnel. This was a point acknowledged in the Zeid Report; host state prosecutions will be difficult or impossible where the Secretary-General will be required to waive immunity or determine that it does not apply in order for charges to be brought. Even where capacity and standards are met, discussants anticipated that the prosecution of foreign offenders would not take precedence over other priorities in post-conflict and post-emergency situations.

i. Discussants acknowledged that capacity building in post-conflict situations is already an important objective. The United Nations must engage more fully with this specific area of law enforcement and criminal justice and specifically address limitations in capacity and standards for the purpose of ensuring that the host state is able to investigate and prosecute offences committed by UN PKO personnel within its territory. One participant suggested that the UN could act in partnership with the host-state to investigate and prosecute offences based on preliminary investigations conducted by the Office of Internal Oversight (OIOS), which already take

32 January 2004, total military and civilian personnel = 48,503- December 2012, total number of personnel
115,374
33 A/59/710, para. 67(b)
place. The Status of Mission Agreement and UN Security Council mandate would specifically address this point. Discussants were referred to the examples of the transitional administrative authorities in Kosovo (UNMIK) and East Timor (UNTAET) where the United Nations heavily involved itself in the administration of criminal justice. This international involvement ranged from advising on sentencing and training court officers, to sitting on the bench of mixed tribunals of national and international judges. The Organization should adopt this more active role in criminal justice rather than rely on administrative disciplinary powers through the OIOS and other internal offices.

b. **Limitations in sending states:** Participants noted that troop-contributing countries are often reluctant to publicly condemn and act against their own nationals where allegations are made. It was commented that all too often sending states appear more concerned to repatriate their nationals than to investigate them where crimes are alleged. This is inappropriately justified with the suggestion that potential offenders must be removed from the mission as quickly as possible so as to prevent others being influenced and a culture of misconduct being established, and also to prevent a deterioration of morale. Examples from a number of missions where individuals have been removed by way of repatriation or rotation from the host country following allegations of serious crimes were cited.  

i. Discussants stressed that these states are under *erga omnes* obligations to investigate, adjudicate, and prosecute offences. The *Siliadin* case provides a helpful example of how a state will accrue liability for failure to take such steps in violation of their international human rights obligations (and in that case, regional obligations). Of paramount importance, where sending states fail to satisfy these obligations they must ultimately be prevented from contributing to UN PKOs. It was noted that many *sending states* rely on the revenue derived from their peacekeeping contributions. The loss of prestige and funding associated with such ‘blacklisting’ would be a significant incentive to ensure compliance with these aforementioned obligations.

c. **Functional immunity of UN PSO personnel:** There are very few positions within the UN system that carry absolute immunity from legal processes. Most have functional immunity that allows for host state prosecutions where crimes are

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35 In particular, see the case of the Romanian FPU accused of killing Kosovar protesters: EUR 70/001/2009, 9 February 2009.
36 [http://ec.europa.eu/anti-trafficking/entity.action?id=f1df4fc1-b311-45ed-b0e6-69ad9fc2f7cf](http://ec.europa.eu/anti-trafficking/entity.action?id=f1df4fc1-b311-45ed-b0e6-69ad9fc2f7cf)
committed by an individual acting in his or her personal capacity. The Secretary-General (‘S-G’) has the “right and the duty” to waive immunity “in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations”. It was noted that the S-G has a conflict of interest here since he has an ever-increasing need for more personnel from sending states. It must be stressed that in the long-term the Organization’s credibility, integrity, and standing will be severely undermined if he fails to waive immunity where circumstances demand it. In sum, participants concluded that the challenge presented by functional immunity is overcome (at least in theory) since either (i) the offences are not committed by offenders acting in their official capacity and so their immunity is not engaged, or (ii) the Secretary General would be under a duty to waive immunity in the event that it applied. It was noted that in practice, it is far from certain how this would be effected but discussants were confident that either one of these decisions would result in prosecutions being possible.  

**d. Immunities Arising from Status of Forces Agreements (SOFAs) and Memoranda of Understanding (MOUs):** The 1946 Convention on the Privileges and Immunities of the United Nations does not apply to military personnel serving as peacekeepers. Instead, these individuals receive immunity from host-state jurisdiction under the SOFA that the UN enters into with the host state. Under these SOFAs, troops remain exclusively under their sending state’s jurisdiction. At the same time, the UN will enter into a Memorandum of Understanding with the sending-state enunciating the same. Status of Missions Agreements will similar afford primacy of jurisdiction to the sending-state. Unfortunately, as hitherto alluded, there is no guarantee that that state will have either the capacity or the will to investigate and prosecute. Even where these are present, the SOFA/MOU will generally not be sufficient under the sending states’ domestic law to establish extraterritorial criminal jurisdiction. As a result there is a substantial risk that when allegations arise there will be a jurisdictional vacuum. Participants criticized this inherent incoherence, commenting that it is painfully ironic that terms intended to set out jurisdictional authority may in fact serve to disapply them. It is accepted however, that these agreements will not prevent prosecutions for war crimes and crimes against humanity.

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38 Section 18, Art. V, of the Convention on the Privileges and Immunities of the United Nations 1946, provides that all UN officials are “immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.”


40 Compare, for example, three separate rape charges against UNPOL officers serving in East Timor and Kosovo. In the first of these missions, one charge resulted in waiver and one in a decision that immunity did not apply. In Kosovo the charge resulted in waiver. It is unclear as to how decisions will be taken on this point.

41 See Revised draft model memorandum of understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation], A/61/497.
i. The solution to this potential gap in jurisdictions is very simple. SOFAs and MOUs must address the issue of jurisdiction for investigation and prosecution and identify the processes of accountabilities in the event of violations. If the sending state is unwilling to agree this, or lacks the capacity to give effect to its investigative/prosecutorial jurisdiction, or lacks relevant domestic legislation relating to extra-territorial criminal jurisdiction, it cannot contribute personnel to the UN PKO. Again the UN SG’s conflict of interest in relation to the need for more personnel is relevant here, but the long-term consequences for the mission, the Organization, and the sending and receiving states are so serious as to be sufficient to persuade him of the need to take such a strong position.

ii. It was suggested that in order to ensure that cases were dealt with effectively and expeditiously, jurisdictional questions could be settled by the OIOS and/or OLA. Taking into consideration all of the above points, in particular, the possible severance of any term in the relevant SOFA, which created a jurisdictional vacuum, the case could then be referred to either the host or sending-state.

e. Impediments to Investigating Allegations: Discussants identified a number of barriers to effective investigation of alleged offences and submitted a number of proposals for how they may be overcome:

i. Once the accused has been rotated at the end of (or even prior to) the end of his/her tour, the United Nations no longer has jurisdiction to investigate. The lack of geographic and temporal proximity will give rise to not insignificant concerns as to the fairness of any resulting trial. To address this UN investigators must be given the power to pursue allegations once the potential defendant has left the mission. At the same time, it is essential that preliminary OIOS investigations are carried out quickly and efficiently and that the OLA comes to a timely decision regarding immunity waiver/non-application. Where there are advanced investigations or proceedings, prosecutors must demand that the accused remains in-country or that s/he be extradited. Again, the relevant mission agreements (SOFA/SOMA/MOU) must address this. Sending-states must facilitate investigations (if not conducting them themselves) and ensure that potential defendants are not rotated elsewhere on duty beyond the reach of investigators. It was posited that investigators should make full use of available modern technology to pursue their inquiries. Examples were provided of British courts allowing the use of teleconference programs to facilitate the giving and cross-examination of evidence from custody and

even from other parts of the world. In the very least, such technology should be used to gather and confirm information at the investigation stage.

ii. Even where abuses and crimes are suspected, investigators and prosecutors depend on the willingness of victims to report such incidents and, later, to give evidence at trial. Unfortunately such willingness is rarely forthcoming, for a number of reasons. Local communities often mistrust authorities, whether domestic or foreign. There is a general lack of information made available to communities as to what are the roles and responsibilities of PKO personnel, or what they should do if they are victims of or witnesses to misconduct and crime. There are also strong cultural norms that often prevail to inhibit willingness to come forward and report crime. This is particularly so amongst survivors of sexual abuse and exploitation, and especially where the individual has ‘gained’ something through transactional exploitation. It is essential that personnel engage with their host communities. More information and community support must be made available to encourage relationships of trust and mutual respect to develop. It must be absolutely clear to whom reports of misconduct should be made, and all steps taken to ensure that complainants feel safe in doing so. Personnel must receive in-country sensitivity training to ensure that they are able to identify and manage any particular vulnerability.

iii. UN PSO personnel are often not willing to report others in their mission for fear of consequences for themselves. Whistleblowers are insufficiently protected and encouraged from reporting misconduct. The most infamous incident of this kind took place within the International Police Task Force (IPTF) in the Bosnia and Herzegovina mission (UNMIBH). Discussants suggested that given what we know about the frequency of incidents of misconduct, low numbers of reports should be a ‘trigger’ indicator, which attracts attention from OIOS and monitors. The ostensible Whistleblower protection that has been set up in the UN is ineffective and must be reformed if there is to be any real progress. It must also be applicable to all who serve in the United Nations, including civilian police who are currently excluded.

4.2 Accountability Structure:

a. **Primary Jurisdiction: Host-State** - The court of first instance must be in the host-state. With optimum temporal and physical proximity to evidence, victims,
witnesses, operational environments, and the accused, the host-state is best placed to investigate and prosecute, either acting alone or in partnership with the investigative authorities of the UN. However, jurisdiction may be committed to the sending state where the host-state lacks capacity (and the UN is not able to assist) or where the SOFA dictates that it must.⁴⁵

b. **Secondary Jurisdiction: Sending-State** - The matter will pass to the sending-state if it has relevant extraterritorial jurisdiction in criminal cases to give effect to the terms of the SOFA, has relevant offences incorporated into its criminal law, and meets international standards in terms of adjudication and sentencing. Where any of these requirements are not satisfied, or the sending-state fails to act, then either the case could be remitted to the host-state⁴⁶ or referred elsewhere.

c. **Tertiary Jurisdiction: Third-Party States with Universal Jurisdiction** - Certain states accept jurisdiction for the prosecution of crimes committed outside of its territory by non-nationals. Most notably, Germany has brought a number of prosecutions in a wide range of matters, ranging from the prosecution of a Dutch man for dealing drugs in the Netherlands,⁴⁷ to the conviction of Kjuradjo Kuslić for aiding genocide in Bosnia and Herzegovina.

d. **The ICC**: Where offences rise to the level of war crimes and crimes against humanity and if all previous courts have failed or been unable to act, a prosecution at the ICC may be possible.

e. **An Additional Option**: The mandate for the mission in Haiti actually envisaged the possibility of setting up a Tribunal or similar in country to deal with issues of a criminal nature committed by peacekeepers. There is also precedent from the Tribunal in Kosovo although it has a restricted mandate. This idea should be more fully explored as it could complement existing mechanisms where there are logistical or other impediments.

### 4.2 Key Recommendations

a. The issue of UN PKOs and specifically the conduct of personnel will be brought to the forefront of discussions in all relevant fora of the UN:

i. **UN Special Procedures and, in particular, the Universal Periodic Review of both host and sending states will address questions relating to personnel conduct.**

ii. **Treaty bodies will include relevant and targeted questions in their list of issues put to host and sending-states**

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⁴⁵ Note that discussants strongly advocated for such provisions to be removed from the model-SOFA

⁴⁶ Presumably only in cases where the court of first instance has been determined under the terms of the SOFA and not as a result of capacity limitations.

iii. Funding should be directed towards relevant monitoring groups and NGOs in order that shadow reports submitted to the treaty bodies can provide detailed information regarding the situation on the ground

b. UN PKO personnel of all levels to be provided with more appropriate training both pre-deployment and in-country
   i. Personnel will be provided with sensitivity training carried out with local partners
   ii. Officers and their subordinates will be trained separately
   iii. Training will specifically address what the consequences of misconduct and violations will be
   iv. Training will include information regarding how to report misconduct
   v. Trainers and their programs will be subject to review and vetting
   vi. There will be command responsibility for training; superiors are not only responsible for ensuring that their subordinates receive training, but must also ensure that the training is understood

c. Reform of the model SOFA.
   i. If the sending-state is to reserve exclusive jurisdiction to itself, the SOFA must address how jurisdiction is to be established for crimes committed in the host-state and what accountability procedures are in place for the investigation and prosecution of offenders. Failure to do so must result in severance of the clause in order for the matter to remit to the host-state/international authorities, or prevent the state from contributing personnel altogether
   ii. There must be consequences for states that fail to act upon reports of misconduct:
      iii. A system of punitive fines
      iv. Blacklisting

d. Mechanisms must be put in place to facilitate more effective investigation of suspected crimes:
   i. The accused must be prevented from being removed from the host-country for a reasonable period in order for investigations to be resolved or trials concluded
   ii. Monitoring and investigative bodies must properly engage with local communities and identify relevant vulnerabilities to encourage victims in coming forward
   iii. Investigations must give priority to the safety and security of the witnesses
   iv. Whistleblowers must be protected from the fear and occurrence of retaliation
4. CONCLUSIONS

The zero tolerance policy was first muted in the Secretary General’s Bulletin in 2003. It hasn’t worked. As the above discussion illustrates, the policy does have a basis in law and the jurisdictions, applicable legal regimes from the national to the international, can all be implicated in developing a comprehensive accountability mechanism. All that seems to be lacking is the political will to do so. The political will should emanate from States as a part of their obligation under human rights law, including the growing jurisprudence on extra territorial jurisdiction.

Leadership needs to come from the Secretary General. The problem has been acknowledged but institutional responses have been sadly inappropriate. A policy, even one based on law, will not work unless the institution embraces it, and this cannot happen without a cultural shift.

Within the UN, but in DPKO in particular, there is a culture of hegemonic masculinity, of inequality in gender relations, particularly in theatre. This breeds a sense of privilege and entitlement, which is dangerous to the population, which hosts the peace keepers and other internationals; the population they are there to serve.

The Secretary General must show leadership in demanding this change. The law is there. It should be complied with.