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# PROSECUTING U.N. PEACEKEEPERS FOR SEXUAL AND GENDER-BASED VIOLENCE IN THE CENTRAL AFRICAN REPUBLIC

## INTRODUCTION

Women and children living in armed conflict are amongst the most vulnerable populations at-risk of sexual and gender-based violence.<sup>1</sup> When U.N. peacekeepers arrive to help dispel conflict, these populations believe that the soldiers in blue helmets will protect them from violence and exploitation. Instead, hundreds of women and children in the Central African Republic (CAR) have reported being raped and sexually violated by U.N. peacekeepers.<sup>2</sup> Despite compelling evidence to validate

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1. Rosanne Marrit Anholt, *Understanding Sexual Violence in Armed Conflict: Cutting Ourselves With Occam's Razor*, 1 J. INT'L HUMANITARIAN ACTION, no. 6, June 2016, at 1, 2; UN WOMEN, A FRAMEWORK TO UNDERPIN ACTION TO PREVENT VIOLENCE AGAINST WOMEN 13, [http://www2.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/prevention\\_framework\\_unwomen\\_nov2015.pdf?v=1&d=20151124T225223](http://www2.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/prevention_framework_unwomen_nov2015.pdf?v=1&d=20151124T225223).

2. Joshua Berlinger, Holly Yan & Richard Roth, *U.N. Peacekeepers Accused of Raping Civilians*, CNN (Apr. 6, 2016), <http://www.cnn.com/2016/04/06/africa/united-nations-peacekeepers-sexual-abuse/>; Catherine Wambua-Soi, *UN: Dealing with Rape in Central African Republic*, AL-JAZEERA (July 11, 2016), <http://www.aljazeera.com/blogs/africa/2016/07/dealing-rape-central-african-republic-160711164252767.html>.

these claims,<sup>3</sup> U.N. peacekeepers who commit these crimes are seldom held accountable.<sup>4</sup>

In 1948 and 1949, the first peacekeeping missions occurred under the control of the U.N. Office of Special Political Affairs.<sup>5</sup> The first peacekeepers were deployed during the Cold War era under the U.N. Truce Supervision Organization (UNTSO) and U.N. Military Observer Group in India and Pakistan (UNMOGIP) to dispel violence across the Middle East.<sup>6</sup> In 1992, Secretary-General, Boutros Boutros-Ghali, created the U.N. Department of Peacekeeping Operations (DPKO), which was charged with overseeing all peacekeeping operations worldwide.<sup>7</sup> As of July 2016, there are over 180,000 DPKO personnel, consisting of

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3. See, e.g., Emily Wax, *Congo's Desperate 'One-Dollar U.N. Girls'*, WASH. POST (Mar. 21, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A52333-2005Mar20.html> ("The United Nations is investigating 150 instances in which 50 peacekeeping troops or civilians in the Congo mission are suspected of having sexually abused or exploited women and girls, some as young as 12."); *UN Troops Face Child Abuse Claims*, BBC NEWS (Nov. 30, 2006), <http://news.bbc.co.uk/2/hi/americas/6195830.stm> ("The UN has faced several scandals involving its troops in recent years, including a DR Congo pedophile ring and prostitute trafficking in Kosovo."); Elsa Buchanan, *UN Peacekeeping: Allegations of Sexual Exploitation and Abuse—A 20 Year History of Shame*, INT'L BUS. TIMES (Mar. 7, 2016), <http://www.ibtimes.co.uk/un-peacekeeping-allegations-sexual-exploitation-abuse-20-year-history-shame-1547581> (outlining scandals from 1996 to 2016).

4. Marie Deschamps, Hassan B. Jallow & Yasmin Sooka, *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*, UNITED NATIONS, v (Dec. 17, 2015), <http://www.un.org/News/dh/infocus/cenafricrepub/Independent-Review-Report.pdf> ("Unfortunately, neither the SRSG of MINUSCA nor the head of HRJS considered the U.N. to have a duty to pursue the accountability process. As a result, they took no steps to inform the French government of the Allegations."); see also Samuel Oakford, *French Peacekeepers Allegedly Tied Up Girls and Forced Them Into Bestiality*, VICE NEWS (Mar. 31, 2016), <https://news.vice.com/article/french-peacekeepers-allegedly-tied-up-girls-and-forced-them-to-have-sex-with-dogs> ("French authorities say they are investigating the initial cases from late 2013 and early 2014, but have provided few details and have not announced any charges against soldiers.").

5. *Department of Peacekeeping Operations*, U.N. PEACEKEEPING, <https://peacekeeping.un.org/en/department-of-peacekeeping-operations> (last visited Dec. 29, 2017).

6. *Id.*

7. *Id.*

roughly 80,000 peacekeepers, working at sixteen U.N. peacekeeping missions around the world.<sup>8</sup>

Despite its name, U.N. peacekeepers have failed to achieve peace.<sup>9</sup> In some instances, these peacekeepers have brought further terror upon local populations by sexually abusing and exploiting women and children, thereby compounding their trauma.<sup>10</sup> From sexual assault and exploitation to survival sex and rape, U.N. peacekeepers have consistently been caught in scandal after scandal,<sup>11</sup> continuing to act with impunity.<sup>12</sup>

In recent years, the United Nations has increased efforts to eradicate the incidence of abuse perpetrated by its peacekeepers against local populations.<sup>13</sup> The United Nations, however, is constrained by Status of Forces Agreements (SOFAs) and Memoranda of Understanding (MOUs), which give troop contributing countries—the providers of U.N. peacekeepers—exclusive jurisdiction over its own military personnel and sole responsibility for redressing their troops' misconduct.<sup>14</sup> When allegations of

8. *Id.*

9. Wax, *supra* note 3; *UN Troops Face Child Abuse Claims*, *supra* note 3; Buchanan, *supra* note 3.

10. Wax, *supra* note 3, at 1 (“The United Nations is investigating 150 instances in which 50 peacekeeping troops or civilians in the Congo mission are suspected of having sexually abused or exploited women and girls, some as young as 12.”); *UN Troops Face Child Abuse Claims*, *supra* note 3, at 1 (“The UN has faced several scandals involving its troops in recent years, including a DR Congo pedophile ring and prostitute trafficking in Kosovo.”).

11. Buchanan, *supra* note 3, at 1 (outlining scandals from 1996 to 2016).

12. Felicity Lewis, *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment While Continuing Peacekeeping Missions for Humanitarian Progress*, 23 S. CAL. INTERDISC. L.J. 595, 597 (2014). See also Mark L. Goldberg, *Haiti Peacekeeper Abuse and Why It's So Hard to Prosecute International Peacekeepers*, UN DISPATCH (Jan. 9, 2012), <https://www.undispatch.com/haiti-peacekeeper-abuse-and-why-its-so-hard-to-prosecute-international-peacekeepers/>; Tom Dennenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L. 127, 127–28 (2009).

13. Press Release, Security Council, Security Council Condemns ‘in the Strongest Terms’ All Acts of Sexual Abuse, Exploitation by UN Peacekeeping Personnel, U.N. Press Release SC/8400 (May 31, 2005).

14. See U.N. Secretary General, *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All of Their Aspects*, annex ¶¶ 14, 24–31, 46–49, U.N. Doc. A/45/594 (Oct. 9, 1990) [hereinafter Model SOFA] (discussing jurisdiction); Rep. of the Special Committee on Peacekeeping Operations and

misconduct are conveyed to the troop contributing countries, the onus is on them to investigate the allegations and prosecute if necessary.<sup>15</sup> Unfortunately, prosecution seldom occurs, leaving victims without justice.<sup>16</sup>

This Note will address how to hold U.N. peacekeepers accountable for their human rights violations, namely the sexual exploitation and abuse of women and children in CAR during its armed conflict. This Note will argue that troop-contributing countries should retain responsibility and jurisdiction over their military personnel sent on U.N. peacekeeping missions. Failure to investigate and prosecute their troops should constitute a breach in state responsibility to exercise due diligence<sup>17</sup> in preventing human rights abuses, namely the right to be free from sexual violence. In order to address this ill, as well as balance national sovereignty interests and international human rights concerns, the United Nations should continue to allow troop contributing countries to retain sole prosecutorial powers, but also implement strict guidelines in SOFAs and MOUs for States Parties to follow when investigating and punishing peacekeeper misconduct. Should States Parties fail to implement these guidelines, they ought to be held liable for failure to follow through on agreed upon commitments.

This Note will introduce the conflict in CAR and the human rights abuses that followed. It will also examine the legal infrastructure that insulates the peacekeepers from accountability, while proposing a new framework that ensures peacekeeper prosecutions in troop contributing countries by way of invoking state responsibility. Part I of this Note will explain the current crisis in CAR, detail the international response to the crisis, and

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its Working Group on the 2007 Resumed Session, U.N. Doc. A/61/19 (Part III), annex (June 11, 2007) [hereinafter Revised Model MOU].

15. *Accountability for Conduct and Discipline in Field Missions*, UNITED NATIONS DEPARTMENT OF POLITICAL AFFAIRS, DEPARTMENT OF PEACEKEEPING OPERATIONS, AND DEPARTMENT OF FIELD SUPPORT ¶¶ 16.1–16.5 (Aug. 1, 2015), [https://unmil.unmissions.org/sites/default/files/policy\\_on\\_accountability\\_for\\_conduct\\_and\\_discipline\\_in\\_field\\_missions\\_30-07-2015.pdf](https://unmil.unmissions.org/sites/default/files/policy_on_accountability_for_conduct_and_discipline_in_field_missions_30-07-2015.pdf).

16. Lewis, *supra* note 12, at 597. See also Goldberg, *supra* note 12; Dennenbaum, *supra* note 12, at 127–28.

17. G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women, (Feb. 23, 1994), art. 4(c), [hereinafter Declaration on the Elimination of Violence Against Women] (referring to the due diligence obligation to prevent, investigate, punish, and provide compensation for acts of violence against women, whether those acts are perpetrated by the State or by private persons).

document the alleged sexual assaults by U.N. peacekeeping forces. Part II will then introduce the international legal landscape that insulates peacekeeping forces from being held accountable by the United Nations itself, despite international laws, treaties, and cases actively fighting to prevent violence against women and children in conflict situations. Finally, Part III will propose a solution to this institutional failure by calling for the enforcement of strict investigation and prosecution requirements, which will hold States responsible for the human rights abuses of their troops.

#### I. OVERVIEW OF CAR: HOW A HISTORY OF COLONIALISM AND ETHNIC STRIFE CULMINATED INTO INTERNATIONAL CONFLICT

This Part will provide a brief overview of the current crisis in CAR, including details of human rights violations by the two warring factions, Séléka and anti-balaka. It will then explain the international community's response to the crisis, including the creation of the peacekeeping mission in CAR. Finally, this Part will document the alleged sexual assaults by U.N. peacekeeping forces through official reports and personal accounts.

##### A. *Central African History and Roots of the Current Conflict*

Like most of Africa, CAR has a rich and varied history. Roughly 10,000 years ago, diverse groups began to settle in the CAR region, transforming a nomadic lifestyle into that of fishermen and farmers.<sup>18</sup> As the region's population grew, and as the world continued to develop transportation technology, additional groups began to settle in the region, bringing with them diverse cultures and languages.<sup>19</sup> Beginning in the sixteenth century, however, the CAR region experienced violent raids by Muslim slave raiders, dramatically depopulating and devastating the region.<sup>20</sup> The CAR region continued to change dramati-

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18. AMY MCKENNA, *THE HISTORY OF CENTRAL AND EASTERN AFRICA* 4 (2011).

19. *Id.* at 6.

20. Thomas E. O'Toole, Tamara Lynn Giles-Vernick & Jan S.F. van Hoogstraten, *Central African Republic*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/place/Central-African-Republic> (last visited Dec. 29, 2017).

cally during the “Scramble for Africa,” where European countries fought over parts of the continent to colonize.<sup>21</sup> In 1894, after a tug-of-war between Belgium, France, Great Britain, and Germany, France took control over the CAR region, naming it ‘the French Congo.’<sup>22</sup> Similar to the rest of the African continent plagued by colonialism, the French wreaked havoc on the indigenous populations. Most notably, the French favored some groups over others, serving as a harbinger to the ethnic strife observed in the ensuing decades.<sup>23</sup> After World War II and years of violent resistance, France began to relinquish some of its powers, ultimately leading to CAR’s independence in 1960.<sup>24</sup>

After declaring independence, CAR struggled to create a stable and effective form of government, experiencing several dramatic regime changes<sup>25</sup> and ongoing religious tension between the Christian leadership and Muslim minorities.<sup>26</sup> In the early 2000s, under the Christian President, François Bozizé,<sup>27</sup> CAR government forces ramped up religious aggressions and engaged

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21. *The Scramble for Africa*, ST. JOHNS COLLEGE LIBRARY, UNIVERSITY OF CAMBRIDGE, [https://www.joh.cam.ac.uk/library/library\\_exhibitions/schoolresources/exploration/scramble\\_for\\_africa/](https://www.joh.cam.ac.uk/library/library_exhibitions/schoolresources/exploration/scramble_for_africa/) (last visited Dec. 29, 2017) (“In 1884–5 the Scramble for Africa was at full speed. Thirteen European countries and the United States met in Berlin to agree the rules of African colonization. From 1884 to 1914 the continent was in conflict as these countries took territory and power from existing African states and peoples.”).

22. O’Toole, *supra* note 20, at 9.

23. *Id.* at 1.

24. *Id.* at 9.

25. Alexis Arieff, *Crisis in the Central African Republic*, CONGRESSIONAL RES. SERV. 1 (Jan. 27, 2014).

26. Spencer Zifcak, *What Happened to the International Community? R2P and the Conflicts in South Sudan and the Central African Republic*, 16 MELBOURNE J. OF INT’L LAW 52, 62 (2015).

27. President Bozizé came to power through a coup against then-President Patassé in 2003. Arieff, *supra* note 25, at 1. CAR had elected President Ange-Félix Patassé in 1999, after years of military and autocratic rulers. *Id.* at 4. Patassé was from northern CAR, but was Christian and at first appeared capable of stabilizing the country. *Id.* at 5. Patassé, however, soon led large-scale human rights abuses against CAR civilians, prompting Bozizé, then an army general, to oust Patassé. *Id.* Similar to Patassé, Bozizé looked promising at first by bringing relative stability to the country. *Id.* Bozizé, however, began to perpetrate violence against opposition leaders and Muslim civilians, prompting many to view him as just another autocratic, self-interested president. *Id.*

in widespread human rights abuses against the Muslim opposition.<sup>28</sup> In March 2013, after finally reaching a tipping point, the Séléka rebel forces<sup>29</sup> ousted Bozizé, citing the President's failure to follow the terms of a peace agreement reached between the government and Séléka forces in the previous years.<sup>30</sup> This coup d'état placed the Muslim opposition in power for the first time in CAR's modern history, providing them with the opportunity to seek vengeance for past grievances.<sup>31</sup> Indeed, once in power, the predominantly Muslim Séléka forces perpetrated attacks on Christian communities, including, sexual assault, rape, murder, and torture,<sup>32</sup> further exacerbating ethno-religious tensions in CAR.<sup>33</sup> The attacks by the Séléka prompted the creation of another rebel faction, the anti-balaka, a Christian militia that launched attacks against Muslim communities that were so severe that the United Nations declared that they amounted to

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28. Zifcak, *supra* note 26, at 63.

29. For a further explanation of the Séléka, see Jason Warner, *Who Are Séléka*, GLOBAL PUB. SQUARE (Jan. 17, 2013), at 1, explaining that:

[T]he Séléka insurgency is an alliance of an estimated 1,000 to 3,000 former rebels. . . . Officially, Séléka is the title given to the broader alliance of smaller groups . . . that have qualms with Bozizé's government. Indeed, Séléka is thought to have come into existence only [in] September [2012], making its coalition official . . . when three of the country's rebel groups—The Patriots' Convention for Justice and Peace (CPJP), The Union of Democratic Forces for Unity (UFDR), and The Democratic Front of Central African People (FDPC)—allied themselves in opposition to the Bozizé regime.

*Id.*

30. Zifcak, *supra* note 26, at 62.

31. *Id.*

32. Arieff, *supra* note 25, at 1; Zifcak, *supra* note 26, at 63.

33. *Central African Republic: The Roots of Violence*, INT'L CRISIS GROUP (Sept. 21, 2015), <https://www.crisisgroup.org/africa/central-africa/central-african-republic/central-african-republic-roots-violence>.

“ethnic cleansing.”<sup>34</sup> In response, Séléka forces stepped up aggressions even further,<sup>35</sup> implicating all sides in human rights abuses.<sup>36</sup>

### *B. The International Response*

By September 2013, it became clear that the situation in CAR warranted an international response.<sup>37</sup> Not wanting to send a U.N. peacekeeping force right away, the U.N. Security Council adopted *Resolution 2127*,<sup>38</sup> authorizing the International Support Mission to the Central African Republic (MISCA), led by the African Union (AU), and deploying French-backed peacekeepers, code-named “Operation Sangaris.”<sup>39</sup> The 6,000 MISCA peacekeepers and 1,600 Sangaris forces soon found themselves ill-equipped to protect the nearly two million Central Africans in need.<sup>40</sup> As the situation in CAR continued to spiral out of control, international organizations strongly urged the U.N. Security Council to create a U.N. peacekeeping mission to generate stability and peace in the region.<sup>41</sup>

Despite initial opposition from Russia and the United States, the Security Council could no longer ignore the atrocities occurring in CAR.<sup>42</sup> In April 2014, after nearly a year of violence in CAR, the Security Council adopted *Resolution 2149*,<sup>43</sup> establishing the United Nations Multidimensional Integrated Stabilization Mission in Central African Republic (MINUSCA) and authorizing the deployment of U.N. peacekeepers to CAR.<sup>44</sup> In July

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34. Final Report of the International Commission of Inquiry on the Central African Republic, Dec. 22, 2014, U.N. Doc. S/2014/928; Arieff *supra* note 25, at 1.

35. Zifcak, *supra* note 26, at 62.

36. *Id.* at 53.

37. See Human Rights Council, *Situation of Human Rights in the Central African Republic: Report of the United Nations High Commissioner for Human Rights*, Agenda Items 2 and 10, U.N. Doc A/HRC/24/59 (Sept. 12, 2013).

38. S.C. Res. 2127, ¶¶ 28, 50 (Dec. 5, 2013).

39. *Id.* at ¶ 50.

40. U.N. Secretary General, *Report of the Secretary-General on the Situation in the Central African Republic*, ¶ 57, U.N. Doc. S/2013/787 (Dec. 31, 2013); Zifcak, *supra* note 26, at 63–64.

41. Zifcak, *supra* note 26, at 65.

42. *Id.* at 64.

43. S.C. Res. 2149 (Apr. 10, 2014).

44. *Id.* at ¶ 18; see also U.N. SCOR, 69th sess., 7153rd mtg., U.N. Doc S/PV.7153 (Apr. 10, 2014).

2016, the mission was reauthorized with *Resolution 2301*, due to the ongoing violence and instability in the country.<sup>45</sup>

*C. The Humanitarian Toll: Vulnerability and Exploitation by Peacekeepers*

The civil war has sent CAR into turmoil.<sup>46</sup> Even with the deployment of 10,000 military personnel in September 2014, serious human rights violations, such as rape, murder, forced labor, and torture persist throughout the country. As a result, CAR remains politically, economically, and socially unstable.<sup>47</sup> As of August 2016, three and a half years after the start of the conflict in CAR, nearly 421,000 Central Africans remain internally displaced, over 470,000 have fled to neighboring countries,<sup>48</sup> and 2.5 million are in need of humanitarian assistance.<sup>49</sup>

The lack of socioeconomic opportunity and political stability has heightened the vulnerability of all Central Africans, especially women and children.<sup>50</sup> In the first ten months of 2015, more than 60,000 accounts of sexual and gender-based violence were reported to various international organizations, victimizing over 30,000 Central Africans.<sup>51</sup> It is estimated that nearly 44 percent of CAR's female population have been victims of sex crimes, such as rape, forced marriage, trafficking, and genital mutilation.<sup>52</sup> While the majority of these victims were violated by members of rebel groups, relatives, or other members in their community, there have been at least 108 victims—the majority

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45. See SC Res 2301, (July 26, 2016).

46. Nathalie Baptiste, *The Central African Republic's Forgotten Crisis*, NATION (Sept. 11, 2014), <https://www.thenation.com/article/central-african-republics-forgotten-crisis/>.

47. *October 2016 Monthly Forecast: Central African Republic*, SEC. COUNCIL REP. (Sept. 20, 2016), [http://www.securitycouncilreport.org/monthly-forecast/2016-10/central\\_african\\_republic\\_17.php](http://www.securitycouncilreport.org/monthly-forecast/2016-10/central_african_republic_17.php) (last visited Jan. 7, 2018).

48. *What's Driving the Global Refugee Crisis?*, INT'L CRISIS GROUP (Sept. 15, 2016), <https://www.crisisgroup.org/global/what-s-driving-global-refugee-crisis> (last visited Jan. 7, 2018).

49. Humanitarian Bulletin: Central African Republic, Situation Report No. 39, U.N. OFF. COORDINATION HUMANITARIAN AFF. 1 (Aug. 20, 2014), [insert link here].

50. Dalia Al Achi & Leo Dobbs, *Human Rights Day: Abuses Rife in Central African Republic*, UNHCR (Dec. 10, 2015), <http://www.unhcr.org/en-us/news/latest/2015/12/5669a3a66/human-rights-day-abuses-rife-central-african-republic.html>.

51. *Id.*

52. Zifcak, *supra* note 26, at 65.

of whom are children—who have come forward alleging sexual assault perpetrated by U.N. peacekeepers from the Democratic Republic of the Congo, Republic of Congo, Morocco, France, Chad, Equatorial Guinea, Gabon, and Burundi.<sup>53</sup>

Women's and children's bodies in the CAR conflict have been used in exchange for vital resources, such as food, water, and currency.<sup>54</sup> Four girls have alleged that they were forced by a French military commander to have sex with a dog in exchange for nine dollars.<sup>55</sup> Dozens of others have alleged forced sexual activity in exchange for food and money by French, Chadian, and Equatorial Guinean forces.<sup>56</sup>

Other children have been violated simply because they were in the wrong place at the wrong time. As one fourteen-year-old girl recalls, as she was walking home one day:

The [peacekeepers] were dressed in their military uniforms and had their guns. I walked by and suddenly one of them grabbed me by my arms and the other one ripped off my

53. Tom Murphy, *The U.N. Cannot Stop its Peacekeepers From Raping Children in the Central African Republic*, HUMANOSPHERE, <http://www.humanosphere.org/world-politics/2016/04/u-n-cannot-stop-peacekeepers-rape-children-central-african-republic/>; 'Sickening' Sex Abuse Alleged in CAR by U.N. Peacekeepers, AL-JAZEERA (Mar. 31, 2016), <http://www.aljazeera.com/news/2016/03/sex-abuse-alleged-car-peacekeepers-160331183645566.html>; Hisham Aidi, *The Sex-for-Food Scandal in Central African Republic*, AL-JAZEERA (May 7, 2015), <http://www.aljazeera.com/in-depth/opinion/2015/05/sex-food-scandal-central-african-republic-150505071049079.html>.

54. This Note will not draw a strong distinction between direct, physical sexual violence (i.e. rape) and transactional sex (i.e. prostitution). Peacekeepers are often coming from a position of power, having access to resources that the local populations in which they come into contact with do not. The 'choice' to sell one's body, especially in conflict zones, is often a choice made in the absence of other viable options for survival. The coercive nature of these transactions, strictly within the context of war, conflict, and peacekeeping, cannot be seen as a meaningful one. Furthermore, transactional and/or survival sex can never be seen as consensual when a child is involved. See ELEMENTS OF CRIMES, INT'L CRIM. CT. 8 (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (discussing elements of the crimes against humanity within the context of rape, prostitution, and sexual violence, stating that "it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.") (emphasis added).

55. Oakford, *supra* note 4.

56. Aidi, *supra* note 53.

clothes. They pulled me into the tall grass and one held my arms while the other one pinned down my legs and raped me. The soldier holding my arms tried to hold my mouth, but I was still able to scream. Because of that, they had to run away before the second soldier could rape me.<sup>57</sup>

Other victims also allege being gang-raped by Congolese forces at a base near the Bambari airport.<sup>58</sup>

Young boys have also been targets of sexual exploitation and abuse.<sup>59</sup> Between December 2012 and June 2013, there were reports of orphan boys in a camp for internally displaced persons being raped and sodomized by French peacekeepers.<sup>60</sup> Unfortunately, these abuses are notoriously underreported amongst the male population, especially in areas devastated by conflict.<sup>61</sup>

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57. "Central African Republic: Rape by Peacekeepers," HUM. RTS. WATCH (Feb. 4, 2016), <https://www.hrw.org/news/2016/02/04/central-african-republic-rape-peacekeepers>.

58. *Id.* at 2.

59. *See id.*; *see also* Sandra Laville, *UN Aid Worker Suspended for Leaking Report on Child Abuse by French Troops*, GUARDIAN (Apr. 29, 2015), <https://www.theguardian.com/world/2015/apr/29/un-aid-worker-suspended-leaking-report-child-abuse-french-troops-car>.

60. *See* Laville, *supra* note 59.

61. *See* Muna Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions*, 27 BERKELEY J. INT'L L. 127, 143 (2009) ("Given the widely acknowledged fact that sexual abuse is often not reported by victims who feel powerless and are frightened and intimidated at the prospect of being confronted by investigators, the figures could very well be an under-reporting of the problem."); *see also* CORINA CSÁKY, NO ONE TO TURN TO: THE UNDER-REPORTING OF CHILD SEXUAL EXPLOITATION AND ABUSE BY AID WORKERS AND PEACEKEEPERS, SAVE THE CHILDREN (2008), <http://www.unhcr.org/refworld/docid/483c2a822.html>.

## II. INTERNATIONAL LEGAL LANDSCAPE

History is fraught with the subjugation of women.<sup>62</sup> Women's vulnerabilities are exacerbated in times of conflict,<sup>63</sup> where their bodies are viewed as both spoils and tools of war.<sup>64</sup> While the international community has made progress towards protecting civilians in conflict, especially women and children, it has yet to be successful in totally eradicating sexual and gender-based violence during conflict.<sup>65</sup> Admittedly, the international community has yet to eradicate sexual and gender-based violence in times of peace as well. As a model for the rest of the world, one would expect the United Nations to lead by example and comply with all international human rights laws. Instead, the United Nations and troop contributing countries have allowed its peacekeeping forces to continue sexually exploiting and abusing local populations with impunity,<sup>66</sup> thereby directly violating international laws regarding sexual exploitation and abuse.<sup>67</sup>

This Part will introduce the international community's delayed recognition of women's rights and discuss the eventual response to violence against women in conflict situations. It will also demonstrate how the international legal landscape, which

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62. See Patricia A. Broussard, *Repair Versus Rejuvenation: The Condition of Vaginas as Proxy for the Societal Status of Women*, 9 SEATTLE J. SOC. JUST. 935, 944 (2011); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 297 (2003); Sarah T. Deutch, *Putting the Spotlight on "The Terminator": How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence During Conflict*, 22 WM. & MARY J. WOMEN & L. 655, 657 (2016).

63. See *Addressing Sexual and Gender-Based Violence*, U.N. DEV. PROGRAMME (2017), <http://www.undp.org/content/undp/en/home/ourwork/democratic-governance-and-peacebuilding/rule-of-law—justice-and-security/sexual-and-gender-based-violence/> ("During violent conflict, rape is often used as a military tactic to harm, humiliate and shame.").

64. See Cassandra Clifford, *Rape as a Weapon of War and its Long-term Effects on Victims and Society*, 7th Global Conference Violence and the Contexts of Hostility (May 2008), <http://icsforum.org/mediarchive/wp-content/uploads/sites/6/2012/04/BMJCliffordPaper.pdf>.

65. See *Sexual and Gender-Based Violence (SGBV)—SGBV Framework*, U.N. OFF. FOR COORDINATION OF HUMANITARIAN AFF., <http://www.unocha.org/what-we-do/advocacy/thematic-campaigns/sgbv/sgbv-framework> (last visited Jan. 8, 2018) (listing ongoing reports of sexual violence against women in conflict situations).

66. See Lewis, *supra* note 12, at 597.

67. Goldberg, *supra* note 12; Dennenbaum, *supra* note 12, at 127–28.

insulates peacekeeping forces from being held accountable, runs counter to international laws, treaties, and cases actively fighting violence against women and children in conflict situations.

### *A. International Law and Violence Against Women in Conflict Situations*

It was not until the late twentieth and early twenty-first centuries that violence against women became a prosecutable crime.<sup>68</sup> Despite its continued existence,<sup>69</sup> rape is so universally prohibited by States that it is now nearly considered *jus cogens*,<sup>70</sup> otherwise known as a peremptory norm. Most significant to the field of international law was the recognition and prosecution of rape and other forms of sexual violence as international wrongful acts.<sup>71</sup> Both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda found that sexual violence could constitute genocide, crimes against humanity, torture, enslavement, and war crimes.<sup>72</sup>

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68. U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, at 13, U.N. Doc. A/61/122/Add.1 (July 6, 2006).

69. *Facts and Figures: Ending Violence Against Women*, UN WOMEN, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (last visited Feb. 20, 2018) (reporting that one in three women in her lifetime will experience sexual assault).

70. David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law As A Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 232 (2005) (finding that, “[i]n order to become *jus cogens*, there must be a general norm of international law that is recognized and accepted by the international community of states as a whole. As articulated in Article 38 of the Statute of the International Court of Justice (ICJ), an international rule must satisfy the three basic sources of international law: treaty, custom, and general principles of law.”); Askin, *supra* note 62, at 242 (noting that “[i]nternational treaties, documents, and U.N. resolutions serve as an indication of the direction international law is heading regarding fundamental norms of international law. The greatly increased activity in international law in the 1990s towards affording greater protection, status, and equality to women evidences a universal trend toward *jus cogens* status for gender-based abuses, particularly violence.”).

71. Ndulo, *supra* note 61, at 131.

72. *Id.*; Prosecutor v. Delalic, Case No. IT-96-32-A, Judgment (Feb. 20, 2001) (finding that sexual humiliation constituted a war crime and was a ‘grave breach’ of the Geneva Conventions); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) (finding that rape could constitute genocide); Prosecutor v. Tadic, Case No. IT-94-1-T, Sentencing Judgment (July 14,

The Rome Statute of the International Criminal Court (ICC) defines “crimes against humanity” to include acts of “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity as crimes against humanity.”<sup>73</sup> Recently, Jean Pierre Bemba, former Vice President of the Democratic Republic of Congo, was prosecuted for his crimes against humanity and war crimes, including crimes of rape and sexual violence in CAR.<sup>74</sup> The former Vice President was convicted of crimes committed against Central Africans from 2002 to 2003 by his rebel faction, the Movement for Liberation of Congo.<sup>75</sup> This was the first time in ICC history that an individual was prosecuted for crimes of sexual violence.<sup>76</sup>

In addition, Common Article III of the Geneva Conventions lays out minimal protection requirements for internal armed conflicts.<sup>77</sup> Article III provides that all parties to the conflict are required to treat civilian noncombatants “humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria,”<sup>78</sup> including “violence to life and person” and “outrages upon personal dignity, in particular humiliating and degrading treatment,”<sup>79</sup>

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1997) (recognizing formally that sexual violence is a crime in international law); Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶ 171 (Dec. 10, 1998) (holding that rape constitutes torture and can be a war crime).

73. Rome Statute of the International Criminal Court, art. 7 (1)(g), July 17, 1998, 2187 U.N.T.S. 3.

74. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08 (Mar. 21, 2016).

75. *Id.* at 171–72.

76. *Id.* at 52 (charging rape as a crime against humanity and a war crime).

77. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva IV].

78. Common Article III is contained in all four Geneva Conventions. See sources cited *supra* note 77.

79. *Id.*

which can include rape and sexual violence.<sup>80</sup> Because the Geneva Conventions only apply to States Parties, the United Nations adopted rules and guidelines that mirror the minimum standards outlined in the Geneva Conventions.<sup>81</sup> DPKO, therefore, is effectively governed by the Geneva Conventions, to the extent that the United Nations has incorporated them into its own rules and guidelines.<sup>82</sup>

In addition, there are many other firm commitments from the international community to safeguard the rights of women and children, such as the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>83</sup> and the Convention on the Rights of the Child (CRC).<sup>84</sup> CEDAW obligates States to create and enforce laws that protect violence against women.<sup>85</sup> Similarly, the CRC requires States Parties to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the . . . Convention.”<sup>86</sup>

There is no doubt that legal systems across the globe have responded to the sexual violations perpetrated against women and girls, in times of peace and conflict.<sup>87</sup> From international recognition<sup>88</sup> to national legislative incorporation, women’s rights are finally human rights—at least on paper.<sup>89</sup> Despite these efforts

80. *Rule 93: Rape and Other forms of Sexual Violence*, INT’L COMMITTEE RED CROSS, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule93#Fn\\_56\\_2](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93#Fn_56_2) (last visited Jan. 8, 2018).

81. See U.N. Secretariat, Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).

82. Ndulo, *supra* note 61, at, 138.

83. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14 [hereinafter CEDAW].

84. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

85. CEDAW, *supra* note 83, art. 2.

86. CRC, *supra* note 84, art. 4.

87. It must be noted that men and boys are also severely affected by sexual violence. Women and girls, however, constitute the vast majority of victims in CAR and worldwide. See U.N. Secretary-General, *Conflict-Related Sexual Violence: Report of the Secretary-General*, ¶ 6, U.N. Doc. A/66/657-S/2012/33 (Jan. 13, 2012); Margot Wallström, *Introduction: Making the Link Between Transitional Justice and Conflict-Related Sexual Violence*, 19 WM. & MARY J. WOMEN & L. 1 (2012). Men and boys deserve particular attention for their own unique vulnerabilities and particular barriers to justice, which is a topic beyond the scope of this Note.

88. CEDAW, *supra* note 83.

89. Wallström, *supra* note 87.

to mainstream women's rights,<sup>90</sup> rape and sexual assault remain the most underreported and pervasive crimes in the world,<sup>91</sup> where one in three women are likely to be sexually assaulted in their lifetime.<sup>92</sup> There has been a plethora of research conducted on the barriers victims face in accessing the criminal justice system in times of war and conflict, including sociocultural norms and inaccessible complaint mechanisms (i.e. law enforcement, courts).<sup>93</sup> It must be noted, however, that Central African women and girls, who have been exploited by U.N. peacekeepers, encounter additional barriers to receiving justice, namely the immunity and protections of the United Nations and DPKO, as well as the protections afforded to peacekeepers in the name of national sovereignty.<sup>94</sup>

### B. *The DPKO*

Despite compelling evidence of ongoing sexual exploitation and abuse perpetrated by U.N. peacekeepers in CAR, the United Nations has not been able to hold these troops accountable for their actions.<sup>95</sup> Unfortunately, this is not a problem unique to CAR. Sexual exploitation and abuse has been a longstanding problem for U.N. peacekeeping missions.<sup>96</sup> Peacekeepers go

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90. See, e.g., CEDAW, *supra* note 83.

91. Meetings Coverage, Security Council, Sexual Violence in Conflict One of World's Most Vicious Crimes: Global Community Must Use All Its Tools to End It, Says Secretary-General in Security Council, U.N. Meetings Coverage SC/10977 (Apr. 17, 2013).

92. *Facts and Figures: Ending Violence Against Women*, *supra* note 69.

93. See Hilmi M. Zawati, *The Challenge of Prosecuting Conflict-Related Gender-Based Crimes Under Libyan Transitional Justice*, 10 J. INT'L L. & INT'L REL. 44, 46 (2014) (citing to structural failings in the Libyan legal system that failed to protect women, amongst other sociological and cultural barriers, such as piety, shame, stigma, and self-blame); Wallström, *supra* note 87, at 2 (noting that "sexual violence remains an afterthought in many transitional justice processes"); AMNESTY INTERNATIONAL, OLD CRIMES, SAME SUFFERING: NO JUSTICE FOR SURVIVORS OF WARTIME RAPE IN NORTH-EAST BOSNIA AND HERZEGOVINA (2012), <http://www.amnesty.org/en/library/asset/EUR63/002/2012/en/f688b1c8-1fa2-46ba-ae26-0b6ec344401f/eur630022012en.pdf> (citing State inaction and lack of political will as barriers to justice).

94. Lewis, *supra* note 12, at 597.

95. Goldberg, *supra* note 12; Dennenbaum, *supra* note 12, at 127–28.

96. See generally, Ndulo, *supra* note 61, at, 143; Csáky, *supra* note 61; UNHCR and Save the Children-UK, *Note for Implementing and Operational*

largely unpunished, due to the lack of U.N. authority over the prosecution of such cases, as well as the lack of an international instrument demanding that troop contributing countries hold their soldiers responsible for such crimes.<sup>97</sup> As Muna Ndulo, professor and scholar of international law, points out, “[t]he fact that sexual violence, exploitation, and abuse occur on a comparatively widespread basis in conflict areas indicates that the peacekeepers committing these acts either do not view the acts they engage in as wrong or that they fear no serious negative repercussions for their actions.”<sup>98</sup>

### 1. The United Nations has no Authority to Enforce its Codes of Conduct

In response to sexual abuse allegations made against U.N. peacekeepers during the Bosnian War in the 1990s and peacekeeping missions in West Africa in 2003,<sup>99</sup> then-U.N. Secretary-General, Kofi Annan, created explicit prohibitions against sexual exploitation and abuse.<sup>100</sup> The Secretary-General defined ‘sexual exploitation’ as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to profiting monetarily, socially or politically from the sexual of another.”<sup>101</sup> He has explicitly defined ‘sexual abuse’ as the “actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”<sup>102</sup>

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*Partners on Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone* (Feb. 2002); U.N. Secretary-General, Special Measures for Protection From Sexual Exploitation and Sexual Abuse, U.N. Doc A/58/559 (Nov. 10, 2003); Paul Higate, *Gender and Peacekeeping Case Studies: The Democratic Republic of the Congo and Sierra Leone*, (Institute for Security Studies No. 91, Jan. 2003), <https://www.africaportal.org/documents/4266/Mono91.pdf>.

97. Lewis, *supra* note 12, at 597. See also Goldberg, *supra* note 12; Dennenbaum, *supra* note 12, at 127–28.

98. Ndulo, *supra* note 61, at 144.

99. See G.A. Res. 57/306, Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa (May 22, 2003).

100. U.N. Secretary-General, Secretary-General’s Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse, § 2.2, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003).

101. *Id.* § 1.

102. *Id.*

Moreover, the United Nations has produced codes of conduct for its peacekeeping personnel in two publications: *Ten Rules: Code of Conduct for Blue Helmets*<sup>103</sup> and *We Are United Nations Peacekeepers*.<sup>104</sup> Specifically, Rule Four in the *Ten Rules* provides that peacekeepers will “not indulge in immoral acts of sexual, physical, or psychological abuse or exploitation of the local population or United Nations staff, especially women and children.”<sup>105</sup> *We Are United Nations Peacekeepers* contains a near identical corollary in its articles.<sup>106</sup> These rules, however, often fall on deaf ears. Because the United Nations does not have its own standing army, it relies solely on its Member States to contribute military personnel to its peacekeeping operations.<sup>107</sup> The rules contained in the *Ten Rules* and *We Are United Nations Peacekeepers*, therefore, are considered mere guidelines and are non-binding.<sup>108</sup>

It is the troop contributing countries, not the United Nations or DPKO, that retain “exclusive jurisdiction to prosecute and otherwise discipline its military personnel.”<sup>109</sup> These jurisdictional agreements are contained within the SOFAs<sup>110</sup> and MOUs<sup>111</sup> of each peacekeeping mission. The United Nations utilized the model SOFA for MINUSCA.<sup>112</sup> The agreements signed between the troop contributing countries and MINUSCA provide

103. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, TEN RULES: CODE OF PERSONAL CONDUCT FOR BLUE HELMETS (1998), <https://cdu.unlb.org/UNStandardsOfConduct/TenRulesCodeofPersonalConductForBlueHelmets.aspx> [hereinafter TEN RULES].

104. See U.N. DEP'T OF PEACEKEEPING OPERATIONS TRAINING UNIT, WE ARE UNITED NATIONS PEACEKEEPERS, [http://www.un.org/en/peacekeeping/documents/un\\_in.pdf](http://www.un.org/en/peacekeeping/documents/un_in.pdf) [hereinafter WE ARE UNITED NATIONS PEACEKEEPERS].

105. TEN RULES, *supra* note 103.

106. WE ARE UNITED NATIONS PEACEKEEPERS, *supra* note 104, at 3 (“[U.N. peacekeepers will not] commit any act that could result in physical, sexual, or psychological abuse of the local population, especially women and children.”).

107. Elizabeth F. Defeis, *U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity*, 7 WASH. U. GLOBAL STUD. L. REV. 185, 205–06 (2008).

108. Press Release, Special Committee on Peacekeeping Operations, Special Committee on Peacekeeping Operations Begins Review of Report on Sexual Exploitation: Stressing Urgency, Determination to Address Problem, Department Head Outlines Measures Taken So Far, U.N. Doc GA/PK/186 (Apr. 4, 2005).

109. Defeis, *supra* note 107, at 206.

110. Model SOFA, *supra* note 14, ¶¶ 15, 24–31, 46–49 (discussing jurisdiction).

111. Revised Model MoU, *supra* note 14.

112. S.C. Res. 2149, ¶ 41 (Apr. 10, 2014).

that each State is responsible for holding its soldiers accountable for sexual violations.<sup>113</sup> While the United Nations has not been given the authority to independently prosecute these crimes, it does retain the ability to send troops home.<sup>114</sup>

## 2. The U.N.'s Response to CAR, the Sexual Exploitation and Abuse Policies, and Failure to Protect

Although the United Nations does not have jurisdiction to prosecute or otherwise punish U.N. peacekeeper misconduct, its initial response to the allegations of sexual exploitation and abuse perpetrated by its peacekeepers in CAR was wholly ineffective and counter to its mandate, rules, and regulations. According to an independent review led by Marie Deschamps:

The manner in which U.N. agencies responded to the Allegations was seriously flawed. The head of the U.N. mission in CAR failed to take any action to follow up on the Allegations; he neither asked the Sangaris Forces to institute measures to end the abuses, nor directed that the children be removed to safe housing. He also failed to direct his staff to report the Allegations higher up within the UN. . . . Instead, information about the Allegations was passed from desk to desk, inbox to inbox, across multiple U.N. offices, with no one willing to take responsibility to address the serious human rights violations. . . . Overall, the response of the U.N. was fragmented and bureaucratic, and failed to satisfy the UN's core mandate to address human rights violations.<sup>115</sup>

The United Nations has two policy frameworks which, according to the independent review, were not applied to the allegations of sexual violence in CAR.<sup>116</sup> The first is a collection of policies focused on responding to sexual exploitation and abuse by U.N. troops under its command, known as the SEA Policies.<sup>117</sup>

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113. *Central African Republic: Rape by Peacekeepers*, *supra* note 57, at 2.

114. *Id.*

115. Deschamps, *supra* note 4, at i.

116. *Id.* at ii–iii.

117. *Id.* at ii–iii (explaining that SEA policies outline the appropriate responses to sexual exploitation and abuse committed “by UN staff and related personnel, including troops under UN command. They do not apply to troops not under UN Command. The Sangaris Forces, for example, are not covered by the SEA Policies.”)

These policies do not give the United Nations authority to punish a perpetrator.<sup>118</sup> Rather, the United Nations is required to investigate and then defer to the authority of the troop contributing country to handle the situation.<sup>119</sup> Unfortunately, this policy has resulted in the troop contributing countries' failure to prosecute perpetrators, thereby allowing the sexual exploitation by peacekeepers to continue with impunity.<sup>120</sup> Moreover, the independent review found that when acts of sexual violence were committed by peacekeepers, U.N. staff did not believe that the human rights framework applied, and further, where "an allegation that a peacekeeper not operating under UN command has sexually assaulted a civilian (and the SEA Policies do not apply), some UN staff [took] the view that the UN has no obligation, or indeed authority, to address the reported sexual violence."<sup>121</sup>

The second framework comes from the U.N. Charter, which focuses on the promotion and protection of human rights, as well as the duty of the United Nations to respond to allegations of human rights violations.<sup>122</sup> Ideally, a response to allegations would include an investigation, reporting, protection and services, and the promotion of accountability to hold perpetrators responsible for their actions.<sup>123</sup> The U.N. failed to operationalize a coordinated response and protect these victims of sexual violence because it did not want to hold itself accountable for its peacekeeping forces' actions. While the United Nations has recently acknowledged the allegations briefly in its reauthorization of MINUSCA in *Resolution 2301*,<sup>124</sup> it has been ineffective

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118. *Id.* at iii.

119. *Id.*

120. *Id.*

121. *Id.*

122. U.N. Charter art. 1, ¶ 3 (declaring that "[t]he Purposes of the United Nations are [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.").

123. Deschamps, *supra* note 4, at iii.

124. *Resolution 2301* briefly addresses the allegations of sexual exploitation by expressing concern over these allegations and "stressing the urgent need for Troop- and Police-contributing countries . . . to promptly investigate those allegations . . . and for those responsible for such criminal offenses or misconduct to be held to account." S.C. Res. 2301, at 2 (July 26, 2016).

in protecting victims of sexual violence perpetrated by U.N. peacekeepers and vindicating the rights of those victims.<sup>125</sup>

### 3. Privileges and Immunities of the United Nations

The privileges and immunities of the United Nations were first announced in Article 105, paragraph 1, of the U.N. Charter, declaring for itself that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”<sup>126</sup> The Charter further declared in Article 105, paragraph 2, that “representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.”<sup>127</sup> Immediately following the adoption of the Charter, the United Nations adopted the Convention on the Privileges and Immunities of the United Nations,<sup>128</sup> further describing the Organization’s immunity rights and declaring that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case it has expressly waived its immunity.”<sup>129</sup> In effect, this means that unless the Secretary-General waives immunity, U.N. personnel cannot be prosecuted for acts performed in the course of their U.N. duties.<sup>130</sup>

During the investigation of the allegations made against the French Sangaris forces by the French government, the United Nations, citing its immunity, refused to allow a human rights officer, who possessed pertinent information regarding the alleged misconduct, to cooperate in the investigation.<sup>131</sup> In effect, the United Nations halted an investigation of human rights abuses. After a year of back and forth between the United Nations and French officials, the Secretary-General finally waived

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125. Patrick J. Lewis, *Who Pays for the United Nations’ Torts?: Immunity, Attribution, and ‘Appropriate Modes of Settlement’*, 39 N.C. J. INT’L L. & COM. 259, 261 (2014).

126. U.N. Charter art. 105, ¶ 1.

127. *Id.* ¶ 2.

128. See Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15.

129. *Id.* art. 2, § 2.

130. *Id.*

131. Deschamps, *supra* note 4, at vi.

the immunity of the human rights officer.<sup>132</sup> The independent review of the handling of the allegations in CAR found that this approach was unnecessary, stating that the United Nations should declare immunity only where it has determined that “disclosure of information . . . could result in a security threat to the victims or witnesses, or where the victim did not provide his or her informed consent to the disclosure of the information.”<sup>133</sup>

#### 4. State Sovereignty and Failure to Prosecute Peacekeepers

States have long enjoyed sovereign immunity.<sup>134</sup> The advent of international law and the United Nations, however, has begun to alter what it means to be sovereign in a globalized, communitarian world.<sup>135</sup> Indeed, the proliferation of human rights commitments has dramatically reshaped the ways in which States conduct themselves, both inter- and intra-nationally. Among these commitments is the responsibility of the State to not violate the rights of others and the obligation to protect, promote, and fulfill human rights.<sup>136</sup>

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132. *Id.*

133. *Id.* at xii.

134. Lewis, *supra* note 125, at 260; ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 81 (1994); Jurisdictional Immunities of the State (Ger. v. Italy), 2012 I.C.J. 99 (Feb. 3); The Case of the S.S. Lotus, 1927 PCIJ Series A, No. 10 (finding that whatever is not explicitly prohibited by international law is permitted).

135. See generally THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (2006) (examining the effects of humanitarian law and human rights law on international law). See also U.N. Secretary-General Boutros-Ghali, *Empowering the United Nations*, 71 FOREIGN AFF. 89, 98–99 (Winter 1992–93) (“While respect for the fundamental sovereignty and integrity of the state remains central, it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory.”).

136. The Universal Declaration of Human Rights, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, form the International Bill of Human Rights. *Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights*, OHCHR 1, <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>. By becoming parties to the aforementioned Covenants and Declaration, as well as other international human rights treaties, States assume obligations and duties under international law to respect, protect, and fulfill human rights. *Id.* at 4.

Within the context of sexual exploitation and abuse, failure to act with due diligence is a violation of these obligations.<sup>137</sup> States have an explicit obligation to prevent sexual violence, investigate occurrences of sexual violence, prosecute offenders, and provide protection to the victims of such atrocities.<sup>138</sup> Therefore, despite the United Nations' egregious mishandling of the allegations of sexual exploitation and abuse, the ultimate responsibility to prosecute peacekeepers for their sexual misconduct lies with troop contributing countries.<sup>139</sup>

As per the SOFAs and MOUs in MINUSCA, the troop-contributing countries retain full jurisdiction to prosecute and discipline their troops for misconduct.<sup>140</sup> As of 2017, however, only three peacekeepers have been prosecuted for their alleged sexual exploitation and abuse.<sup>141</sup> The failure to adhere to its international obligations of prevention, punishment, and compensation to victims ought to be treated as a breach of state responsibility.

### III. THEORIZING A NEW WAY FORWARD: INVOKING STATE RESPONSIBILITY TO ENSURE PEACEKEEPING ACCOUNTABILITY

While the United Nations is certainly to blame for its institutional failings in handling the allegations of sexual exploitation and abuse in CAR, ultimate responsibility lies with the States to

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137. Hum. Rts. Council Resolution, e.g. 14/12 (2010) (stressing that States have the obligation to prevent, investigate, prosecute, and punish the perpetrators of violence against women and girls and provide protection to the victims, and that failure to do so violates their human rights and fundamental freedoms); G.A. Res. 67/144 (Feb. 27, 2013) (finding that States have the obligation to promote and protect human rights and fundamental freedoms for all, and must exercise due diligence to prevent, investigate, prosecute, and punish the perpetrators of violence against women and girls and eliminate impunity); Declaration on the Elimination of Violence Against Women, *supra* note 17, at art. 4(c), (referring to the due diligence obligation to prevent, investigate, punish, and provide compensation for acts of violence against women, whether those acts are perpetrated by the State or by private persons).

138. *Id.*

139. *Id.*; see also, Model SOFA, *supra* note 14; Revised Model MoU, *supra* note 14.

140. Model SOFA, *supra* note 14.

141. As of 2017, the prosecution of three peacekeepers is ongoing in the Democratic Republic of Congo. *UN Peacekeepers Go on Trial for CAR Sex Abuse*, ALJAZEERA (Apr. 5, 2016), <http://www.aljazeera.com/news/2016/04/peacekeepers-trial-sex-abuse-car-160405040318812.html>.

prosecute their troops. This Part will propose the invocation of state responsibility for troop contributing countries that fail to investigate and prosecute their peacekeepers for sexual violations.

### A. *Establishing the Attribution of Troop Contributing Countries*

The laws of state responsibility, as articulated in the International Law Commission's Responsibility of States for Internationally Wrongful Acts (also known as the Articles on State Responsibility, or ARSIWA), are the principles governing when an international obligation has been breached, whether that breach is attributable to the State, and the legal consequences of that violation (cessation and/or reparations).<sup>142</sup> While ARSIWA does not put forth any primary or substantive rules, it does articulate when State actions are in violation of the primary rules.<sup>143</sup>

#### 1. The Actual Acts of Sexual Exploitation and Abuse by Peacekeepers are Not Attributable to the Troop Contributing Countries

Conduct is attributable to a State when a state organ acts within<sup>144</sup> or beyond its capacity,<sup>145</sup> or when a private individual acts with the State's endorsement.<sup>146</sup> Within the context of the MINUSCA peacekeeping mission, the sexual exploitation and abuse allegedly perpetrated by peacekeepers are not attributable *per se* to troop contributing countries because the peacekeepers were acting under the command and control of MINUSCA.<sup>147</sup> As explained, however, the United Nations is constrained by

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142. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 31 (2001) [hereinafter DRAFT ARTICLES].

143. *Id.*

144. *Id.* at 40.

145. *Id.* at 43.

146. *Id.*

147. The actions of Sangaris forces before the establishment of MINUSCA under Resolution 2149, however, may be directly attributable to France. While their mission was authorized by the Security Council under Resolution 2127, they remained under the command of French authorities. S.C. Res. 2127 ¶ 50 (Dec. 5, 2013). In this case, the actions of Sangaris forces can be seen as attributable to France under Article 7 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. DRAFT ARTICLES, *supra* note 142, at 43.

MOUs<sup>148</sup> and SOFAs<sup>149</sup> to punish this misconduct because it has delegated all jurisdictional authority to prosecute peacekeepers to the troop contributing countries. Therefore, State responsibility cannot be invoked for the actions of the troop contributing countries' peacekeeping forces while under MINUSCA command.

## 2. Failure to Investigate and Prosecute Peacekeepers is a Breach of an International Obligation

Although state responsibility cannot be invoked for the actions of troop contributing countries' peacekeeping forces while under MINUSCA command, state responsibility can be invoked for failure to follow through on international obligations to investigate and prosecute these crimes.<sup>150</sup> The jurisdiction of troop contributing countries over peacekeeping forces is explicit in the MOUs<sup>151</sup> and SOFAs.<sup>152</sup> Article 7 *quinquies* of the Revised Draft Model Memorandum of Understanding provides that:

(1) Military members and any civilian members subject to national military law of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by the while they are assigned to the military component of [United Nations peacekeeping mission]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes or offences.

(2) The Government further assures the United Nations that it shall exercise such disciplinary jurisdiction as might be necessary with respect to all other acts of misconduct committed by any members of the Government's national contingent while they are assigned to the military component of [United Nations peacekeeping mission] that do not amount to crimes or offences.<sup>153</sup>

Article 47(b) of the Model Status of Forces Agreement states that "[m]ilitary members of the military component of the U.N.

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148. Revised Model MoU, *supra* note 14.

149. Model SOFA, *supra* note 14.

150. DRAFT ARTICLES, *supra* note 142, at 31.

151. Revised Model MoU, *supra* note 14.

152. Model SOFA, *supra* note 14.

153. Revised Model MoU, *supra* note 14, at art. 7.

peacekeeping operation shall be subject to the exclusive jurisdiction of the respective participating States in respect of any criminal offences which may be committed by them in [their host country/territory].”<sup>154</sup> SOFAs and MOUs are considered treaties and have binding authority over States,<sup>155</sup> and troop contributing countries must comply with their terms.<sup>156</sup> It is clear that troop contributing countries have breached their obligations under MOUs<sup>157</sup> and SOFAs<sup>158</sup> by failing to discipline their peacekeepers for alleged acts of misconduct.<sup>159</sup>

Further, the obligation of due diligence applies in the context of failing to investigate and prosecute peacekeeping forces who allegedly sexually exploited and abused civilians.<sup>160</sup> States are responsible for the human rights violations they commit.<sup>161</sup> Overtime, international law has also required States to protect,<sup>162</sup> promote,<sup>163</sup> and fulfill human rights.<sup>164</sup> Although the actions of peacekeepers under MINUSCA control are not attributable to troop contributing countries, the failure to prosecute

154. Model SOFA, *supra* note 14, art. 47(b).

155. *Id.* (“The SOFA and MOU are binding documents which establish the relationship, in the case of the SOFA, between the UN and the host country, and in the case of the MOU, between the UN and the contributing State.”).

156. *Id.*

157. Revised Model MoU, *supra* note 14.

158. Model SOFA, *supra* note 14 art. 47(b).

159. BRUCE OSWALD, HELEN DURHAM & ADRIAN BATES, DOCUMENTS ON THE LAW OF UN PEACE OPERATIONS 12 (Oxford University Press, 2010). (“The SOFA and MOU are binding documents which establish the relationship, in the case of the SOFA, between the UN and the host country, and in the case of the MOU, between the UN and the contributing State.”).

160. DRAFT ARTICLES, *supra* note 142, at 34 (“The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence.”).

161. See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 452 (Mar. 1990).

162. Declaration on the Elimination of Violence Against Women, *supra* note 17.

163. See Hum. Rts. Council Res. 14/12, U.N. Doc A/HRC/RES/14/12 (June 30, 2010) (stressing that States have the obligation to promote and protect all human rights and fundamental freedoms of women and girls).

164. G.A. Res. 67/144 (Feb. 27, 2013) (finding that States have the obligation to promote and protect all human rights and fundamental freedoms for all).

these human rights violations, as per the SOFA and MOU agreements, is a violation of the obligation of due diligence.<sup>165</sup> It is the failure to adhere to the terms in the SOFA and MOU agreements, as well as the failure to act with due diligence, that cause troop contributing countries to continue committing human rights abuses with impunity.

*B. Finding an Injured or Interested Party: Who Can Invoke State Responsibility?*

Article 33 of the Draft Articles provides:

(1) The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

(2) This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.<sup>166</sup>

In other words, States owe other States, or the international community as a whole, the obligation to not violate their international obligations. The Draft Articles create the ability for an injured State to invoke state responsibility, but also provides that States may bring actions for violations that affect the entire international community.<sup>167</sup>

In the instant matter, the slowly reforming CAR government may seek to invoke state responsibility on behalf of its citizens

165. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), at 172 (finding that “[a]n illegal act, which violates human rights and which is initially not directly imputable to a State, can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”).

166. DRAFT ARTICLES, *supra* note 142, at 94.

167. *Id.* at 117,126 (providing that an injured State may “invoke the responsibility of another State if the obligation breached is owed to . . . that State individually . . . or a group of States including that State, or the international community as a whole”); *see also* Barcelona Traction, Light & Power Co. (Belgium v. Spain), New Application, 1970 ICJ Rep. 4, 32 (finding that some rights implicate the entire international community, and that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”).

by seeking not only cessation, but also reparations.<sup>168</sup> In the alternative, a third-party State may also invoke state responsibility if they can establish a nexus between the sexual violence committed in CAR and an *erga omnes* obligation to the international community generally, as well as establish their own legal interest.<sup>169</sup> Individuals cannot invoke state responsibility directly, but rather need either their government or some other legally interested party to invoke state responsibility on their behalf.<sup>170</sup>

### *C. Will States Continue to Contribute Troops Under Rigid Rules?*

There always remains the concern that States will not sign onto an agreement that in some way limits their sovereignty. Ideally, the inclusion of strict investigation and prosecution requirements into SOFAs and MOUs would balance sovereignty and enforcement concerns by still allowing States to have control over the investigation and prosecution of their own forces, while also allowing for the invocation of state responsibility should they fail to follow the agreements. If a State refuses to operate under such terms, the United Nations should cut its losses. The United Nations should not seek to allow a State to deploy its troops on U.N. peacekeeping missions if that State cannot promise to (a) refrain from raping and sexually exploiting local populations, and/or (b) investigate and prosecute offenders. Ideals, however, even at the United Nations, can only go so far when there are scant resources available.

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168. DRAFT ARTICLES, *supra* note 142, at 126 (explaining that injured States “may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition . . . and (b) performance of the obligation of reparation . . . in the interest of the injured State or of the beneficiaries of the obligation breached.”).

169. *Belgium v. Spain*, *supra* note 167, at 32 (providing that *erga omnes* obligations derive “from the outlawing of acts of aggression, and of genocide, [and] also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination . . . others are conferred by international instruments of a universal or quasi-universal character.”).

170. RODA VERHEYAN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 242 (2005).

## CONCLUSION

There have been an exhaustive number of pleas for internal reform at the United Nations and DPKO. It is time that the two agencies adequately respond to these allegations of sexual exploitation and abuse by peacekeepers, invoking their core mandates of peace and security. The best way to balance sovereignty and human rights concerns within the peacekeeping context is to allow troop contributing countries to retain sole prosecutorial powers, while also including strict guidelines in SOFAs and MOUs for States Parties to follow, invoking state responsibility for any failure to follow through on those commitments. The sexual exploitation and abuse perpetrated by U.N. peacekeepers undoubtedly undermines the legitimacy of peacekeeping operations as a whole. By holding governments accountable for the actions of its troops, the United Nations can work to restore its reputation as human rights defenders.

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