

# Allocating Individual Criminal Responsibility to Peacekeepers for International Crimes and other Wrongful Acts committed during Peace Operations

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## Abstract

To delve into the realm of peace operations and the allocation of individual criminal responsibility for international crimes and other wrongful acts committed by peacekeepers is to enter a legal dimension of countless discrepancies and legal vacuums that have impeded a uniform application of even the most basic principles of responsibility. It is yet a system incapable of linking the notions of shared responsibility and commitment to the direct consequences of intensifying multilateral and collective activity in international law. Thus, even when the commission of a crime or wrongful act has been recognized, those injured are regularly unable to hold the perpetrators responsible and due redress to the victims is rarely a common practice. In light of this, we have inquired into the causes of these inconsistencies and the underlining reality and challenges posed by an underdeveloped system of criminal law – be that domestic, military and international- vis-à-vis the sui generis nature of peacekeepers and peace operations’ inherent multidimensional character.

## Keywords

peace operations; individual criminal responsibility, jurisdiction; international crimes; wrongful acts

## 1. Introduction

Today, international organizations (‘IOs’) constitute power centers in the international system alongside States.<sup>1</sup> They manage everyday interstate

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<sup>1</sup> Henry G Schermers and Niels M Blokker, *International Institutional Law* (4<sup>th</sup> Revised edn, Martinus Nijhoff Publishers 2003) 6.

interactions, as well as those with other entities; harmonize international politics, policies, and operational activities; and play, together with States, an increasingly active role in international conflicts. The most relevant of these power centers is the United Nations ('UN'). Entrusted to maintain international peace and security, it holds a primary role in international law. Nonetheless, the rise and diversification of conflicts, their players, victims, the scourge of war itself, and the lack of a real *international army*, are aspects of the current state of international affairs pushing the UN beyond its originally conceived capacities for fulfilling its obligations.

In filling the gaps left by the original system of collective security, *peacekeeping* has obtained center-stage in conflict-management. Originally a 'self-interested response by the international system designed to contain conflicts that might otherwise threaten the fabric of the system as a whole';<sup>2</sup> they have evolved from an inter-state to an intra-state activity.<sup>3</sup> For simplicity, we use the umbrella term *peace operations* ('POs'), defined as 'the dispatch of expeditionary forces, *with or without a UN mandate*, to implement an agreement between warring States or factions, which may (or may not) include enforcing that agreement in the face of willful defiance.'<sup>4</sup> Today, POs constitute an amalgamated version of traditional peacekeeping and enforcement action,<sup>5</sup> entailing peacekeeping, conflict prevention, humanitarian aid, peacemaking, peace-building, and peace enforcement.<sup>6</sup> Additionally, they are conducted either under UN command and mandate, or solely by Member States, or subjected to *regionalization* processes,<sup>7</sup> or tailor-made to specific conflicts under the mandate of

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<sup>2</sup> Norrie MacQueen, *Peacekeeping and the International System* (Routledge 2006); See Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers 2005) 11.

<sup>3</sup> See William J Durch, 'UN Peace Operations and the "Brahimi Report"' (2001) *The Henry L Stimson Center* 2.

<sup>4</sup> Alex Bellamy and Paul Williams, 'Who's Keeping the Peace? Regionalization and Contemporary Peace Operations' (2005) 29(4) *International Security* 157 (emphasis added).

<sup>5</sup> Zwanenburg (n 2) 31-32; Joint Publication 3-07.3, 'Joint Tactics, Techniques, and Procedures for Peace Operations' (1999) I-7, pt III-1.

<sup>6</sup> UNGA, UNSC 'Report of the Panel on United Nations Peace Operations' (2000) UN Doc A/55/305, S/2000/809, para 10; NATO, 'Peace Support Operations' (July 2001) AJP-3.4.1, paras 0202, 0216-0217; David S Alberts and Richard E Hayes, 'Command Arrangements for Peace Operations' (1995) CCRP Publication Series 11-17; Durch (n 3) 2; Jakkie Cilliers, Mark Shaw and Grey Mills 'Towards a South African Policy on Preventive Diplomacy and Peace Support Operations' (1995) 4(2) *African Security Review* 1.

<sup>7</sup> Bellamy and Williams (n 4) 157-158, 172.

various organizations, coalitions of the willing, or other similar arrangements. For example, coalition forces in the Gulf War, the United Task Force in Somalia, and the multinational forces in Timor-Leste.<sup>8</sup>

However, the increase of POs and the fulfillment of their mandates, while understaffed, underfunded, and particularly, unprepared to run a country, has been proportional to the increase of assaults, trafficking and enslavement accusations, international humanitarian law ('IHL') violations, indiscriminate attacks, and human rights ('HR') abuses. It has become a widespread and continuing phenomenon, affecting countries typically characterized by collapsed economies and/or rule of law and significant power differentials.<sup>9</sup> This has been worsened by the fact that 'there is sufficient documentary and anecdotal evidence to indicate that, over the past decades, there have been many instances of personnel engaging in such conduct' irrespective of incomplete official records.<sup>10</sup> Needless to say, this is detrimental to the local population, weakens the mandates' legitimacy, negatively affects the image of participating entities, and harms the public perception and security of POs as a whole.

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<sup>8</sup> See Keiichiro Okimoto, 'Violations of International Humanitarian Law by United Nations Forces and their Legal Consequences' (2003) 6 Yearbook of International Humanitarian Law 204.

<sup>9</sup> Muna Ndulo, 'The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions' (2009) 27 Berkeley Journal of International Law 128; Refugees International, 'Haiti: Sexual Exploitation by Peacekeepers Likely to be a Problem' (2005) <<http://www.unhcr.org/refworld/docid/47a6eeb40.html>> accessed 26 February 2012; Ansel Herz, 'U.N. Clash with Frustrated Students Spills into Camps' *Inter-Press Service* (Port-Au-Prince, 25 May 2010); Jonathan Clayton and James Bone, 'Sex scandal in Congo threatens to engulf UN's peacekeepers' *The Times* (23 December 2004); 'UN Peacekeepers in Timor Face Possible Sex Charges' *Reuters* (03 August 2001); Owen Bowcott, 'Report reveals shame of UN peacekeepers' *The Guardian* (London, 25 March 2005); UN News Service, 'Peacekeepers' sexual abuse of local girls continuing in DR of Congo, UN finds' *UN News Center* (07 January 2005); Sandra Jordan, 'Haiti's children die in UN crossfire' *The Guardian* (London, 01 April 2007); Kate Holt and Sarah Hughes, 'South African Troops Raped Kids in DRC' *Pretoria News* (12 July 2004).

<sup>10</sup> 'Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations ("GLE Report")' (2006) UN Doc A/60/980, para 12; UNGA, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' (2005) A/59/710, para 3; Max Du Plessis and Stephen Pete, 'Who Guards the Guards? The ICC and serious crimes committed by United Nations Peacekeepers in Africa' (2004) 13(4) *African Security Review* 5, 7-8; Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member States Troop Contingents Serving as United Nations Peacekeepers' (2010) 51(1) *Harvard International Law Journal* 1, 117-120.

To counteract this, the UN has implemented various preventive measures, namely, adopting resolutions, issuing bulletins, and concluding agreements confirming the applicability of general international conventions and IHL to the conduct of military personnel.<sup>11</sup> Similar actions have been taken by the North Atlantic Treaty Organization ('NATO').<sup>12</sup> Nevertheless, these have failed to deter the commission of wrongful acts, provide redress or hold accountable those responsible.<sup>13</sup> In our opinion, this is in part due to an overall perception that the UN system is flawed and weak, since the language used in these measures, most if not all of which constitute nothing more than *soft law*, tend to be more of a moral rather than of an operative character. Moreover, the fact that the *punishment trend* for peacekeeper's wrongful conduct tends to be simple repatriation - without tangible assurances and proof of relevant investigative, prosecutorial and punishment processes by Member States' national judiciary - indirectly provides peacekeepers a *carte blanche* to do and undo accordingly.

This, alongside the intensification of multilateral activity, the on-the-ground realities, the modifying nature of POs, the complex relationships between Troop Contributing Countries ('TCCs') and IOs, the evolving nature of POs' organizational structures and command relationships, and the culture of dismissiveness that has characterized allegations of abuse against peacekeepers, further poses interesting challenges to attributing international accountability and delimitating peacekeepers' individual criminal responsibility. Consequently, the tangible need for a *harder law* composed of intensive oversight, better training before deployment, and a more comprehensive investigative and disciplinary framework, which includes an actual exercise of disciplinary and criminal jurisdiction, beyond the realm of resolutions and bulletins, is stressed throughout this paper.

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<sup>11</sup> See UNGA, 'Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-keeping Operations' (1991) A/46/185; Secretary-General's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law' (1999) UN Doc.ST/SGB/1999/13, pt 3; Ndulo (n 9) 131ff.

<sup>12</sup> NATO, 'Policy on Combating Trafficking in Human Beings (and Appendixes)' (2004) Appendixes 1-3; See Zwanenburg (n 2); Roberta Arnold, 'The NATO Policy on Human Trafficking: Obligation to Prevent, Obligation to Repress' in Roberta Arnold (ed), *Law Enforcement within the Framework of Peace Support Operations* (International and Comparative Criminal Law Series, Martinus Nijhoff Publishers, 2008) 351ff.

<sup>13</sup> See Matt Halling and Blaine Bookey, 'Peacekeeping in Name Alone: Accountability for the United Nations in Haiti' (2008) 31 *Hastings International & Comparative Law Review* 461.

In the process, we come across the diversion between theory and practice, namely, a legal vacuum unable to effectively hold parties accountable. Accordingly, the eroded sense of shared responsibility and commitment, and the underdeveloped system of multiple responsibilities becomes more concrete and obvious. In examining the challenging reality of a shared international responsibility system, we have decided to focus primordially on peacekeepers' individual criminal responsibility for international crimes and other wrongful acts. In seeking to hold these criminally responsible, we play the *devil's advocate* role in analyzing both the feasibility and the core obstacles of exercising domestic and international criminal jurisdictions over peacekeepers: particularly when examining the intrinsic challenges of presenting a claim before diverse legal mechanisms in our delimitation of an adequate *forum conveniens* for attributing responsibility.

The methodology to be employed in our examination interprets the principles of responsibilities addressed in light of the influence that other principles and norms of international and national law have over them and vice-versa. The foregoing legal analysis will be complemented by academia, principles of law, political developments, literature, case-law, the work of the International Law Commission, and any other relevant elements drawn from other fields of law.

## 2. Individual Criminal Responsibility

In analyzing peacekeepers' individual criminal responsibility, a brief overview of the international responsibility framework highlights the lack of comprehensive responses, or a heterogeneous criminal justice system for individual peacekeepers,<sup>14</sup> as illustrated by the multitude of sources and available relevant mechanisms addressed by this paper. This analysis underlines *Cassese's* consideration of international criminal law as an essentially *hybrid branch of law* 'impregnated with notions, principles, and legal constructs',<sup>15</sup> such as domestic criminal law, Common Article 3 to the Geneva Conventions, customary international law, general principles of law, provisions contained in the statutes of international and

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<sup>14</sup> Marten Zwanenburg, 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?' (1999) 10(1) *European Journal of International Law* 124.

<sup>15</sup> Antonio Cassese, *International Criminal Law* (2<sup>nd</sup> edn, Oxford University Press 2008) 7.

internationalized courts and tribunals, as well as specific policies, guidelines or other measures developed by the UN.

### 2.1. *Domestic jurisdiction*

In order to preserve the independent exercise of POs' functions and mandates, domestic, criminal and disciplinary jurisdiction over peacekeepers is retained, in principle, by TCCs, according to the Model SOFAs.<sup>16</sup> These operations could not run effectively if peacekeepers could be exposed to criminal prosecution in host-States, some of which might be politically motivated. Also, national contingents join POs under the umbrella of their national law, disciplinary codes and structures, which challenges the exercise of jurisdiction by any other State. Additionally, legitimate questions and doubts of objectivity and impartiality may arise if the State, where the operation is established, is allowed to exercise jurisdiction, especially where POs have been deployed without the express consent of the receiving State.

Nonetheless, the Group of Legal Experts has recommended that exercise of jurisdiction over peacekeepers should be carried out by the host-State. These, aided by the UN, can assert jurisdiction over the wrongful conduct within its territory; have direct access to witnesses and evidence, which avoids unnecessary costs, delays or other inconveniences; and, gives the local population a greater sense of justice and accountability.<sup>17</sup> To immediately assume that these are unable to exercise jurisdiction simply because the operation is carried out in a post-conflict area is erroneous,<sup>18</sup> for not all post-conflict areas have failed judiciary systems incapable of or unwilling to exercise the appropriate jurisdiction with relevant due-process guarantees.

Nonetheless, fear that political instability will eventually affect a conflict-State's judiciary highlights a practice of recognizing home-States, and not

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<sup>16</sup> For instance, UNFICYP's SOFA stated: 'Members of the Force shall be subjected to the *exclusive criminal jurisdiction of their respective national States* in respect of any criminal offences which may be committed by them in Cyprus' in Agreement between the United Nations and the Government of the Republic of Cyprus Concerning the Status of the United Nations Peace-Keeping Force in Cyprus. (31/03/1964) para 11; Model Status-of-Forces Agreement for Peacekeeping Operations (1990) A/45/594, para 47, 11. Also, 'Accord entre l'Organisation des Nations Unies et le Gouvernement Haïtien concernant le statut de l'Opération des Nations Unies en Haïti' (July 2004) para 51.

<sup>17</sup> *ibid* 10-11.

<sup>18</sup> GLE Report (n 10) 2.

host-States, with the capacity of exercising the corresponding jurisdiction. Hence, peacekeepers are repatriated to their countries once allegations of transgressions or commission of crimes surface. Once in custody, home-States have a duty to thoroughly investigate the wrongdoings and identify, prosecute and punish the violators, irrespective of their nature or position: an obligation that persists until duty is fully complied with.<sup>19</sup> In case the purported wrongful conduct is of a disciplinary nature, States have the option of court-martialing members of their armed forces. However, if the wrongful conduct reaches the level of serious HR violation, the exceptional and restrictive nature of military courts is inapplicable and peacekeepers are to be tried by civilian courts.<sup>20</sup>

The exercise of domestic-military or civil-jurisdiction, however, faces two main problems. First, re-collecting evidence and securing witnesses poses an overwhelming challenge to national courts because of the conflict's nature and the complexities of conflict areas.<sup>21</sup> Second, even where evidence can be gathered, States rarely exercise criminal jurisdiction over their peacekeepers, regardless of the nature of the acts or formal assurances given to the UN Secretary-General to do so.<sup>22</sup> The lack of effective legal mechanisms through which the Department of Peacekeeping Operations could force States to prosecute, complicates matters further. In this regard, the UN should begin to contemplate the possibility of modifying the Model-SOFA to resemble that of NATO's, which allows host-States to exercise secondary jurisdiction over TCCs' nationals when the latter refuses to

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<sup>19</sup> *Trujillo Oroza v Bolivia* (2002) Inter-American Court of Human Rights (Series C) No 92 [111].

<sup>20</sup> Jurisdiction of military courts should be: 'limited to offences of a strictly military nature'; 'should be set aside in favor of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations (...)' in Sub-Commission on Promotion and Protection of Human Rights, 'Draft Principles Governing the Administration of Justice through Military Tribunals' (2005) 52<sup>nd</sup> Session E/CN.4/Sub.2/2005/9; 'confined to military offences' in 'Draft Universal Declaration on the Independence of Justice' (1989) E/CN.4/Sub.2/1985/18/Add.5/Rev.1; Choice of assuming jurisdiction over a case should lie with the civilian court, OSCE/DCAF, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (OSCE/ODIHR 2008) 229; International Commission of Jurists and Amnesty International ("Int.Comm.J.-AI"), 'Response to the First Draft of the Guidelines of the Committee of Ministers of the Council of Europe on Impunity' (2010) IOR 61/008/2010, 13-14.

<sup>21</sup> 'Lack of sufficient and proper evidence to pursue prosecution in the troop-contributing state can prove insurmountable'. Ndulo (n 9) 157; cf UNGA, 'Comprehensive Strategy' (n 10).

<sup>22</sup> Model Status-of-Forces Agreement for Peacekeeping Operations, para 48.

prosecute them.<sup>23</sup> This exercise of secondary jurisdiction, however, has not been successful, since host States ‘are often reluctant to be seen as “going against” those who are there to help them’.<sup>24</sup> This particularity aside, we still consider that a similar provision within the Model-SOFA would be, undeniably, very welcome. If only theoretically speaking, it would help in strengthening the accountability regime.

Another feasible option would be to prosecute peacekeepers in States other than the host-State (impeded by SOFAs or the dysfunctionality of its legal system) or the home-State (unwilling or unable). Still, universal jurisdiction is considered controversial and challenging. First, third-States must have already amended their legislation allowing for the exercise of this jurisdiction. Second, SOFAs implicitly exclude this jurisdiction because TCCs have ‘exclusive’ jurisdiction over troops. However, if peacekeepers’ conduct is such that it breaches IHL or *jus cogens* norms then universal jurisdiction could be exercised without constraints. Third, immunity-related procedural problems may arise. Also, difficulties in gathering evidence and witnesses may also be present, although nothing bars third-States from requesting host-States to assist, gather evidence or arrest alleged offenders if capable to do so.

Moreover, the non-uniform application of international due process norms and HR among national courts encourages a fear that, if convicted, peacekeepers may receive harsher punishments than at home. It can also be argued that peacekeepers’ scattered crimes are not coated with the seriousness of, for example, crimes of torture, or that the third-State exercising universal jurisdiction over peacekeepers may be condemned at the international level for the initiative. However, the underlining fact that international crimes are committed by those entrusted to protect vulnerable populations, from areas where they have been deployed, impedes us from considering them simple ordinary crimes,<sup>25</sup> or that the unwillingness or inability by the host or home-State of prosecuting a simple misstep in the exercise of international justice.

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<sup>23</sup> Noelle Quéniévet, ‘The Role of the International Criminal Court in the Prosecution of Peacekeepers of Sexual Offences’ in Arnold (ed), (n 12) 426, citing ‘Agreement between the Parties to North Atlantic Treaty Regarding the Status of their Forces’ (1951) 199 UNTS 67, Art VII(3)(a)(ii).

<sup>24</sup> Du Plessis (n 10) 6, citing Pam Spees, ‘Gender Justice and Accountability in Peace Support Operations-Closing the Gaps’ (Policy Briefing Paper, International Alert, 2004) 23.

<sup>25</sup> See GLE Report (n 10), paras 53-55.

In reality, the universal jurisdiction solution is not ideal. But the fact that it can - once its weaknesses are sorted out, through, hopefully, a growing State practice - play an important role in fighting impunity and ascertaining individual criminal responsibility, through the exercise of domestic jurisdiction. Stressing, in this regard, the relevance of national criminal law in a time when the trend seems always inclined towards international jurisdiction. An exercise of jurisdiction that because of the many prosecutorial conditions it must fulfill, can be as problematic, controversial, and/or weak as exercising universal jurisdiction.

## 2.2. *International Criminal Jurisdiction*

Peacekeepers may also be held accountable before international criminal courts or internationalized/hybrid tribunals, providing the possibility of transposing international criminal law obligations onto individuals. The principal forum is the International Criminal Court ('ICC'), which exercises a novel international jurisdiction beyond accepted regimes of universal jurisdiction.<sup>26</sup> It has jurisdiction over natural persons individually responsible for committing crimes within its jurisdiction, regardless of official capacities, immunities or special procedural rules.<sup>27</sup>

However, the ICC's actual power to prosecute peacekeepers is limited both procedurally and substantially. First, the Prosecutor must be satisfied with the complementarity and gravity criteria before proceeding.<sup>28</sup> As a last resort court, it can only initiate proceedings if States are unwilling or unable to investigate or prosecute international crimes committed by their nationals.<sup>29</sup> But matters of 'unwillingness' or 'inability' may be hard to deal with if TCCs' military justice systems are systematically deficient or implements alternative approaches other than prosecution. In these matters, the Inter-American Court of Human Rights ('IACtHR') considers that alternative means to prosecution, such as amnesty or prescription provisions, or measures designed to eliminate responsibility are inadmissible because they prevent investigating and punishing those responsible.<sup>30</sup> Thus, there is

<sup>26</sup> Zwanenburg (n 14) 129.

<sup>27</sup> UNGA, 'Rome Statute of the International Criminal Court' ('Rome Statute') (17 July 1998) A/CONF 183/9, Articles 25, 27.

<sup>28</sup> Rome Statute, Art 17, 53; Office of the Prosecutor, International Criminal Court, 'Selection of Situations and Cases' Draft Policy Paper with Human Rights Watch (June 2006).

<sup>29</sup> Rome Statute, Art 17(1)(a).

<sup>30</sup> *Gómez Paquiyauri Brothers v Perú* (2004) Inter-American Court of Human Rights (Series C) No 110 [233]; *19 Tradersmen v Colombia* (2002) Inter-American Court of Human

room to question the legitimacy of States' establishment of special courts or procedures to deal specifically with international crimes committed by their national contingents or individual peacekeepers: especially when these measures may result in either very low forms of punishment or complete exoneration, which contravenes a State's duty to seriously investigate.

Where it can be proven that States' proceedings consist of nothing more than mere formalities or setting up of 'kangaroo courts', the Prosecution moves towards assessing gravity from the scale, nature, manner of commission, and impact of the crimes in question.<sup>31</sup> However, the qualitative and/or quantitative threshold of gravity could be almost impossible to satisfy in a PO context, for it would be highly difficult to prove, for instance, that wrongful acts were committed as part of a plan or policy or with specific intent, or constitute more than isolated acts of abuse.<sup>32</sup>

Another limitation is the Court's intricate relationship with the SC and certain States' circumvention of its responsibility framework. For instance, the United States has preempted the prosecution of its nationals by the ICC and lobbied for the adoption of Resolutions that grant peacekeepers from non-Member States of the Court a (renewable) one-year exemption from the ICC's investigation or prosecution.<sup>33</sup> The possibility of these limitations stretch the limits of Article 16 of the Statute beyond - in our reading - its original scope, and considerably weakens the accountability mechanism of the Court.<sup>34</sup>

In spite of this, the option of establishing internationalized or hybrid tribunals remains. As 'third-generation' criminal bodies, they have emerged

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Rights (Series C) No 93 [262]; *Molina Theissen v Guatemala* (2004) Inter-American Court of Human Rights (Series C) No 106 [83]; *Barrios Altos v Peru* *Barrios Altos v Peru* (2001) Inter-American Court of Human Rights (Series C) No 75 [41]; *Castillo Páez v Peru* (1997) Inter-American Court of Human Rights (Series C) No 34 [105].

<sup>31</sup> *Prosecutor v. Lubanga*, 'Decision on Prosecutor's Application for a Warrant of Arrest' (10 February 2006) No ICC-01/04-01/06-8-US-CORR, paras 41, 45-46; *Situation in Darfur, Sudan, Prosecutor v Bahr Idriss Abu Garda*, 'Decision on Confirmation of Charges' (08 February 2010) No ICC-02/05-02/09.

<sup>32</sup> See Angela Lin and others, 'Humanitarian Law Perspectives 2009 Topic 1: International Peacekeepers and IHL' (2009) Malleasons Stephens Jaques 9834563\_4 research paper, 9.

<sup>33</sup> UNSC Res 1422 (2002) 4572<sup>nd</sup> Meeting, para 1; UNSC Res 1502 (2003) 4814<sup>th</sup> Meeting.

<sup>34</sup> See Alexandra R Harrington, 'Victims of Peace: Current Abuse Allegations against UN Peacekeepers and the Role of Law in Preventing Them in the Future' (2005) 12 ILSA Journal of International & Comparative Law, 141-142; Halling (n 13) 462.

as a ‘promising alternative in post-conflict justice’.<sup>35</sup> They are governed by the same due process principles that regulate other international criminal law bodies and seek to sanction and deter international law violations, without having to face complementarity or gravity constraints because they can be established to deal exclusively with crimes that do not rise to international crimes. As such, they are usually created to address particular situations for a limited amount of time and form part of the judiciary of a State or have simply been grafted into the local judicial system.<sup>36</sup> As such, their governing Statute *might provide* for criminal jurisdiction to be exercised for crimes committed during the conflict or post-conflict situation to which peacekeepers have been assigned. For instance, they could be endowed with competence to exercise jurisdiction over peacekeepers for breaching the obligation to protect or prevent HR violations where they have been deployed.<sup>37</sup> In such a scenario, the ‘knew or had reason to know’ and ‘failure to take appropriate measures’ arguments could be brought without the procedural hurdles faced before domestic courts. Moreover, the fact that these tribunals are composed of independent, international and national judges, casts a light of impartiality that helps legitimize the exercise of jurisdiction over peacekeepers by the host-State.

### 3. Allocating responsibility in peace operations: From theory to practice

We now turn to delimitating a *forum conveniens*, by analyzing the spectrum of available options and their inherent obstacles. Although aware that it would be unwise and unrealistic to attempt and expect to accommodate the variety of IOs related claims ‘by providing one single, comprehensive, all-encompassing remedial mechanism’,<sup>38</sup> failure to institute some form of claim regime or delimit a pertinent forum would strain the rule of law and

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<sup>35</sup> Parinaz Kermani Mendez, ‘The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?’ (2009) 20(1) *Criminal Law Forum* 53.

<sup>36</sup> Project on International Courts and Tribunals (PICT) ‘Hybrid Courts’.

<sup>37</sup> Applicability of HR treaties extends to peacekeeping forces, UNHRC, ‘General Comment 31’ [80] in ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev 1/Add13, para 10.

<sup>38</sup> Karel Wellens, *Remedies against International Organizations* (Cambridge University Press 2002) 171.

adversely impact the legitimacy and reputation of IOs, TCCs and POs vis-à-vis local populations.

### 3.1. *Military discipline and courts-martial*

When preventive or corrective approaches, within the exercise of military discipline, are of no avail, or when breaches of discipline are so severe that punishment is necessary to maintain morale and ensure obedience among subordinates, court-martial procedures become appropriate.<sup>39</sup> As with regular military bodies, discipline is vital and critical within POs because discipline among contingents is critical to the effectiveness or failure of particular units or the operation as a whole, particularly when considering mandates' evolutions and complexities, and the situations and areas they are exposed to. Nonetheless, exercising military discipline within POs is not as clear as with regular armed forces due to their multinational constitution, with diverse disciplinary structures and practices.<sup>40</sup> Consequently, when the operation on the ground deviates from the original mandate and results in actions beyond peacekeeping duties or contravening originally-conceived obligations, confusion may arise as to which disciplinary structure must be applied.

The exercise of disciplinary measures rests with the contingent's commander.<sup>41</sup> However, commanders can be held accountable for failing or refusing to exercise due oversight or taking actions to prevent, repress or punish the commission of crimes by the contingent's members.<sup>42</sup> This extends to being accountable to the local population, international society and TCCs for their responsibility to provide security and protection and take reasonable and necessary steps to ensure the population's welfare. Those who fail to meet managerial and command objectives of creating

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<sup>39</sup> Loyd W McBride, 'Discipline' [1981] *Air University Review*; 'Military Law' [1978] *Air University Review* 11.

<sup>40</sup> Hilaire McCoubrey and Nigel D White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth Publishing Group 1996) 178. The Multinational Force and Observers is comprised of units from twelve different nations.

<sup>41</sup> See Department of Peacekeeping Operations, 'Directive for Disciplinary Matters Involving Military Members of National Contingents' (July 2003) UN Doc DPKO/MD/03/00993; See 'Directive on Sexual Harassment in United Nations Peacekeeping and Other Field Missions' (2003) UN Docs DPKO/MD/03/00996 and DPKO/CPD/DPIG/2003/001; Arnold (ed), (n 12) 337-338.

<sup>42</sup> *Prosecutor v Hadzihasanovic et al* ICTY-Appeals Chamber (2003) Case No IT-01-47-AR72 (Partial Dissenting Opinion, Judge Shahabuddeen).

and maintaining an environment of discipline, prevention, and respect for the law, must be held accountable.<sup>43</sup> Accordingly, the Rome Statute expressly establishes that commanders will be held criminally responsible for crimes committed by forces under his/her effective command, authority and control, *as a result of his or her failure to exercise control properly over such forces*.<sup>44</sup>

If, however, commanders have met expected managerial and command standards and if preventive or corrective approaches implemented do not succeed, or if the gravity of a particular situation so requires, the commander is compelled to call on the corresponding TCC. Peacekeepers that may have committed criminal offenses are to be relocated to their home jurisdiction. This jurisdiction is, in principle, military. It enjoys a restrictive and exceptional approach leading to protect special interests related to functions assigned to military forces,<sup>45</sup> but it does not extend to crimes amounting to serious HR violations. Moreover, this jurisdiction is not dependent on the *locus delicti commissi* but on the status of members of the armed forces of the prosecuting State.<sup>46</sup> On this basis, one could argue that it should not apply to peacekeepers as they no longer act as active members of the armed forces of their corresponding State under their State's control or instructions. Nevertheless, to be placed at IOs' disposal does not sever the legal and institutional link between Member States and their troops. Furthermore, the ceasing of this link cannot be presumed because the UN Charter does not indicate whether members of Member States' armed forces lose their status as soldiers in their national army, or enjoy immunity from national military jurisdiction if contributed to UN operations.<sup>47</sup> Thus, the belief that national court-martial jurisdiction seems to be the only available option for dealing with UN forces' disciplinary or criminal infractions seems accurate.<sup>48</sup>

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<sup>43</sup> UNGA, 'Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2005 Resumed Session' (2005) A/59/19/Add.1.

<sup>44</sup> Rome Statute, Art 28 (emphasis added).

<sup>45</sup> *Durand Ugarte v Perú* (2000) Inter-American Court of Human Rights (Series C) No 68 [117]; *Cesti-Hurtado v Perú* (1999) Inter-American Court of Human Rights (Series C) No 62 [151]; *Genie Lacayo v Nicaragua* (1997) Inter-American Court of Human Rights (Series C) No 21 [87].

<sup>46</sup> *Solorio v United States* (1987) 483 US, paras 435, 447; 'Police personnel' in UN POs are considered under the jurisdiction of their 'sending State', whether or not States' laws reach overseas, see Durch (n 3).

<sup>47</sup> *Jennings v Markley, Warden* (1960) US District Court.-SD Indiana 186 F Supp 611.

<sup>48</sup> McCoubrey (n 40) 183; Jan Klabbers, *An Introduction to International Institutional Law* (1<sup>st</sup> edn, Cambridge University Press 2002) 309.

Current practice inclines us to believe that there is ample judicial support for expecting soldiers to be court-martialed by their home-States irrespective of their peacekeepers' status. For instance, 23 of 108 Sri Lankan peacekeepers repatriated over allegations of sexual exploitation and abuse during their participation in MINUSTAH have been found guilty by national courts-martial; two were forced out of the military and another soldier was discharged.<sup>49</sup> More recently, the Uruguayan government claimed that Uruguayan peacekeepers from MINUSTAH will be brought to justice for the sexual assault committed by them against an 18-year-old Haitian man.<sup>50</sup> Such an exercise of jurisdiction complements Judge *Cunningham's* opinion that where there is an existing and appropriate forum in national military jurisdiction, there is no need to accept other jurisdictions.<sup>51</sup>

Unfortunately, theory often diverges from practice; records show that the majority of nations did not even respond when UN requested information about their investigative or disciplinary processes.<sup>52</sup> Consequently, we are inclined to believe that States' decisions to take disciplinary or military action over peacekeepers is so rare that it is often more the exception than the norm. In order to counteract this situation, the establishment of on-site courts-martial - undertaken either by TCCs or the IO in the peacekeeping zone - is plausible. The issue of relevance, however, resides in whether or not IOs (most specifically the UN) should establish a system of 'international military discipline' and if so, on what basis.

One could sustain that the UN has, in principle, the power to establish courts-martial to prosecute peacekeepers under the 'implied powers' theory through which it established the UN Administrative Tribunal ('UNAT'). Accordingly, the *Effect of Awards* case underscored that although the power to establish the UNAT was not expressly provided in the Charter, it resulted from the GA's necessity to fulfill its tasks and duties effectively.<sup>53</sup> Hence, applying the Court's logic, one could argue that by establishing

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<sup>49</sup> Punishment of remaining troops yet to be reported, see Steve Stecklow and Joe Lauria, 'UN Peacekeepers Dodge Discipline' *The Wall Street Journal* (New York, 22 March 2010); 'Sri Lankan peacekeepers face jail if abuse proven' *LankaNewspapers.com* (Sri Lanka, 04 November 2007).

<sup>50</sup> Ansel Herz, Matthew Mosk and Rym Momtaz, 'New MINUSTAH disgrace in Haiti, this time Uruguay' *ABC News* (02 September 2011); Mark Weisbrot, 'Is this Minustah's "Abu Ghraib moment" in Haiti?' *The Guardian* (London, 03 September 2011).

<sup>51</sup> *Re Brown and Fisher et al* (1994) 133 DLR [102], [111].

<sup>52</sup> Stecklow (n 49).

<sup>53</sup> *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (Advisory Opinion) ICJ Report 1954.

court-martial proceedings, the creating organ is not delegating the performance of its own functions but exercising a power enjoyed under the Charter to regulate staff relations. The problem with this argument, however, is that peacekeepers cannot be considered UN staff members, but persons who occupy positions within the organization and to whom privileges and immunities are accorded without entailing 'staff member' character,<sup>54</sup> since the link between States and troops remains. And even if peacekeepers from UN operations could be considered staff members, current international institutional law is incapable of enlightening us on what would happen with peacekeepers from joint operations between the UN and another organization or State? Would this imply that these peacekeepers are outside the realm of applicable 'UN law'? If so, what would then be the binding regime if 'UN law' is inapplicable and other jurisdictional options are of no avail? Would we not be before yet another void in the flawed framework of international responsibility?

This situation is further complicated by the Security Council's lack of competence to determine individual cases of criminal liability, when faced with emergency situations of this sort. This would compel it to create - in fulfilling its obligation to maintain peace and security - ad-hoc tribunals or international courts, which would, in this scenario, adopt the nature of courts-martial fit to deal with the consequences of peacekeepers' acts and omissions. Nonetheless, there is room to argue whether peacekeepers' crimes are, in a case-by-case basis, so grave as to validate establishing this mechanism (and, as a result, circumventing recourse to the ICC) as a necessary measure for restoring and maintaining international peace and security. The current situation in Haiti, for instance, serves as a prime example. There have been numerous revolts against the MINUSTAH after the cholera outbreak, allegedly caused by the Nepalese contingent.<sup>55</sup> These resulted in violent encounters between Haitians and peacekeepers, affecting the already precarious socio-political and security situation in Haiti, as well as, indirectly, the overall health security of a third-State, the Dominican Republic. But can this dire situation, in all honesty, be compared to *Srebrenica* or *Rwanda*? In our opinion, it cannot. It could, however, meet the Rome Statute's gravity threshold or could even incline the Council to defer to the Court when dealing with non-ICC Member States.

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<sup>54</sup> Nature of a State's military personnel does not change when contributed to POs, see Secretary-General's Bulletin, 'Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission' (2002) ST/SGB/2002/9.

<sup>55</sup> Matthew Bigg, 'UN Peacekeepers likely caused Haiti Cholera' *Reuters* (30 June 2011).

Consequently, the creation and establishment of a judicial organ (i.e. ad-hoc tribunal) would fall outside the scope of implied powers because organs cannot delegate to subsidiary organs they have created more powers than what the organ itself possesses. That is, since peacekeepers are not staff members of the organization and since their acts or omissions have yet to affect the maintenance of international peace and security, there is no power enjoyed by the Assembly or the Council that can be transferred to the subsidiary organ. Furthermore, the creation of a UN court-martial risks a marked politicization of the whole judicial process, which would greatly increase budgetary costs for Member-States, and would further the under-use of the ICC recourse, in situations where it could properly allocate responsibility.

Logistically, we also encounter a variety of complications. For one, the UN Office of Internal Oversight Services has very limited investigative authority and lacks the power to take legal action or act as a substitute for national justice.<sup>56</sup> Moreover, to grant it prosecutorial rights would inevitably encroach upon TCCs' jurisdictional sovereignty, as rightly noted by *Quénivet*. And yet, the establishment of courts-martial involves the participation of commissioned officers, military judges, prosecutors and defense lawyers, but it is unclear whether officers from the peacekeepers' home-State, specially sent to pursue this task, would fulfill these functions. Or, would the UN mandate members from other contingents to exercise these functions?

It is imperative for the UN to clarify which code of military justice to apply for individual courts-martial, or develop and adopt its own peacekeepers' military disciplinary codes, with comprehensive definitions and detailed structures and processes. Such an instrument cannot be considered a simple internal or administrative instrument, but a mandatory common legal standard in complete accordance with due process guarantees. However, this would entail that States adapt their own military codes and legislation to that of the organization, in order for these 'special' codes to be binding to contributed troops, who already operate under their own (national) legal framework. These amendments to national military law will not be swift or generally accepted, especially when national legislation may not preclude certain acts or omissions or if their constitutive elements are different to those at the international level.

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<sup>56</sup> *Quénivet* (n 23) 429.

Consequently, creating structurally coordinated systems that could tackle this issue is almost impossible.<sup>57</sup> Furthermore, the establishment of this entity would be resource-intensive, thus straining the already complicated resource management process. It is rather unlikely that UN Member States would be keen to increase their financial allocations to the Organization. Additionally, it would be highly unlikely, if not altogether impossible that TCCs ever allow their nationals to be investigated, prosecuted and punished in courts-martial composed of officers who are non-nationals of the TCC.<sup>58</sup> All of which further strengthens our claim that the current responsibility framework seems to have prosecutorial and jurisdictional options that, in practice (both current, till further notice and future), are never feasible.

Despite this, it could be argued that the UN should establish courts-martial as part of a greater system of 'international military discipline'. Such system could be deemed imperative in sending a message to the international community, but impunity can still be addressed without establishing yet another 'special' tribunal. If anything, the UN (and other organizations) should press States to hold on-site courts-martial in conflict zones; organized by the IO, but carried out by the corresponding TCCs' military officers. These would be more advantageous.

Firstly, TCCs would not lose the exclusiveness of their jurisdiction in respect of any disciplinary or criminal offences that might be committed by their nationals in the host-State. Also, evidence and witness gathering problems would not exist because claim-related information and documentation are generally located in the *locus delicti*, as illustrated by the current 'war zone court-martial' against Captain Semrau, Officer of the Canadian contingent in Afghanistan. The said court-martial moved from Canada to the Canadian military's main base in Kandahar to hear from Afghan witnesses and obtain relevant evidence.<sup>59</sup> Furthermore, there would be no more need to rely on States' 'assurances' of preparedness to exercise

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<sup>57</sup> Extreme political sensitivity may prove an 'insurmountable block', in McCoubrey (n 40) 191.

<sup>58</sup> David Letts, 'Peacekeepers in Post-Conflict Situations - Upholding the Rule of Law' in Ustinia Dolgopol and Judith Gardam (eds), *The Challenge of Conflict: International responds* (Martinus Nijhoff Publishers 2006).

<sup>59</sup> 'Canadian court martial moves to Kandahar' *UPI.com* (16 June 2010); Paul Watson, 'Brig-Gen Jon Vance steps back into the battlefield' *The Star* (15 June 2010); Paul Watson 'Officer shot Afghan prisoner, interpreter tells court-martial' *The Star* (19 June 2010).

jurisdiction, as there would be no other option than to exercise jurisdiction immediate to the alleged commission, claim or investigation, where the internationally wrongful act took place and with the peacekeepers' national officers. If carried out effectively this would become a vital (and most welcome) tool.

### 3.2. *Domestic jurisdiction*

In theory, injured parties should be able to bring suits for damages suffered before the TCCs' or host-States' national courts. The injurious acts should, in principle, create a claim under relevant national tort law, particularly where special legislations, for litigating before national civil courts, for harm resulting from HR violations, were enacted.<sup>60</sup> However, immunity is endowed to IOs to safeguard the effective functioning and fulfillment of their purposes.<sup>61</sup> To subject peacekeepers to local courts could have a 'devastating impact on staff recruitment'.<sup>62</sup>

Hence, the venue of national courts is, in most cases, of no avail. This is so, even if the UN should, in given situations, be considered liable. For instance, in *Manderlier* it was decided that 'in the present state of international institutions there is no jurisdiction before which the appellant can bring his dispute with the UN'.<sup>63</sup> In parallel, *Mothers of Srebrenica* sustained that 'the UN has been granted the most far-reaching immunity, in the sense that the UN cannot be brought before any national court of law'.<sup>64</sup> Accordingly, immunity has indirectly trumped the right to access a court even when injured parties did not assume the risk of being unable to bring their claim before domestic courts or agreed to have recourse to alternative dispute settlement mechanisms.<sup>65</sup> More recently, however, in *Nuhanović* and *Mustafić-Mujić*, the Netherlands was condemned for DUTCHBAT's unlawful eviction and consequent death of three victims by Bosnian Serb

<sup>60</sup> eg USA's Alien Tort Statute 28USC pt 1350; Torture Victim Protection Act (1992) 106 Stat 73.

<sup>61</sup> UN Charter refers to functional immunity whilst CPIUN seems to embrace 'absolute' immunity. See UNGA, 'Convention on the Privileges and Immunities of the United Nations "CPIUN"' Resolution 22 (I) A (13 February 1946), Art II, section 2.

<sup>62</sup> Frederick Rawski, 'To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations' (2002) 18 Connecticut Journal of International Law 128.

<sup>63</sup> *Manderlier v United Nations and Belgium* (1969) 69 ILR 143 (CA of Brussels).

<sup>64</sup> *Mothers of Srebrenica et al v State of the Netherlands and United Nation* (2010) No 200.022.151/01 (CA of The Hague) para 4.2.

<sup>65</sup>

forces, based on DUTCHBAT's awareness of the Bosnian Serbs actions at the time.<sup>66</sup>

These decisions, notwithstanding exceptions, underscore that the existence of liability need not guarantee a remedy. There appears to be no domestic forum where the (il)legality of IOs' activities can be adjudged upon. Which is the appropriate judicial or quasi-judicial forum to receive claims?<sup>67</sup> What about Member States' duty to ensure that IOs have available dispute settlement mechanisms?<sup>68</sup> The viability of establishing other amicable settlement procedures is discussed below.

### 3.3. *Claims settlement mechanisms*

The UN is compelled to make arrangements for dispute settlements when so required.<sup>69</sup> In claims arising from POs, the use of local claim review boards ('LCRBs')<sup>70</sup> has been employed in a relatively uniform fashion. These are composed of the organization's staff members performing administrative functions. Their competence operates on a mission-by-mission basis, in order to handle claims brought against the Organization or against TCCs, but not against individual peacekeepers.<sup>71</sup> However, the image and effectiveness of these panels has been questioned. They are slow and resource intensive, while coping with third-party liability alongside issues of internal liability and liability vis-à-vis TCCs.<sup>72</sup> Furthermore, their use seems

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<sup>66</sup> *Nuhanović v The Netherlands* (2011) No 200.020.174/01 (CA of The Hague); *Mustafić-Mujić et al v The Netherlands* (2011) No 200.020.173/01 (CA of The Hague).

<sup>67</sup> Not the case where damage cannot be attributed to the organization. In these scenarios, local courts are competent to hear claims relating to POs, in Wellens (n 38) 105; August Reinisch, *International Organizations before National Courts* (Cambridge University Press 2000) 322.

<sup>68</sup> *Bosphorus v Ireland* No 45036/98 (ECtHR, 2006) pts 155-156; *Matthews v United Kingdom* No 24833/94 (ECtHR 1999), pt 19; *Waite & Kennedy v Germany* No 26083/94 (ECtHR, 1999) pt 67; *Beer & Regan v Germany* No 28934/95 (ECtHR, 1999) pt 57.

<sup>69</sup> Section 29, CPIUN (n 61).

<sup>70</sup> See Jean Salmon, 'De Quelques Problèmes Posés aux Tribunaux Belges par les Actions de Citoyens Belges contre L'ONU en Raison de Faits Survenus sur le Territoire de la République Démocratique du Congo' (1966) 81 *Journal des Tribunaux* 715; Zwanenburg (n 14) 301.

<sup>71</sup> See Daphna Shrager, 'The United Nations as an Actor Bound by International Humanitarian Law' (1998) 15(2) *International Peacekeeping* 64; Catherine E Sweetser, 'Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel' (2008) 83 *New York University Law Review* 1643, 1664.

<sup>72</sup> Frederic Mégret, 'The Vicarious Responsibility of the United Nations for "Unintended Consequences" of Peacekeeping Operations' in Chiyuki Aoi, Cedric de Cooning and Ramesh

dependent on international pressure or litigation by the victim's State and bound by temporal and financial limitations to third-party liability claims. Additionally, the organization's liability for any consequences arising out of 'operational necessity' is excluded.<sup>73</sup> Such limitations are highly controversial, seem incompatible with international responsibility law<sup>74</sup> and contradict *reparation* principles.

Moreover, their composition and lack of publicity of their rulings, questions their independence, impartiality and objectivity.<sup>75</sup> For instance, international independence and impartiality standards were claimed to be not met in the KFOR Claims Commission's decisions on KFOR's liability, which were made by KFOR claims officers in consultation with KFOR contingent commanders.<sup>76</sup> Additionally, the Appeals Commission's decisions were *not legally binding* on either the TCC or HQKFOR. What was then the purpose of this mechanism if decisions rendered could simply be ignored by the adjudged responsible parties? Moreover, to advise the claimants to bring an action against high-level officers within the TCC's domestic courts—as the available option<sup>77</sup>—was rather cynical, particularly when those injured tend to be ordinary citizens unable to cover overwhelming legal expenses. Even if able to bring forth a claim, they might still be required to present substantive and documentary evidence about the exact course of events. Such requirement would present an insurmountable procedural obstacle that would not ensure the proper administration of justice.

A standing claims commission ('SCCs'), however, may be feasible. These would deal with disputes of private law character as envisioned in Article 51 of the Model SOFA and CPIUN's Article 29. Their diverse tripartite composition is a desirable change. They determine their own procedure and appeal before a three-arbitrators tribunal. Also, there would be no need to

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Thakur (eds), *The 'Unintended' Consequences of Peace Operations* (United Nations University Press 2007) 12.

<sup>73</sup> UNGA, 'Third-party liability: temporal and financial limitations' UNGA Res A/RES/52/247 (1998) 52<sup>nd</sup> Session pt 8; Financing Report (n 49) 9-10, paras 38-40; Shraga (n 71) 410-412.

<sup>74</sup> See Zwanenburg (n 2) 35-37.

<sup>75</sup> International Law Association, 'Accountability of International Organizations' (2004) Berlin Conference 39; See Zwanenburg (n 2) 28; UNGA, 'Report of the Secretary-General on the Administrative and Budgetary Aspects of the Financing of the United Nations Peace-keeping Operations' (1997) UN Doc A/51/903, para 10; Wellens (n 38) 104.

<sup>76</sup> Margaret Cordial, 'Outline of Presentation on the Situation in Kosovo' in Alexandre Faite and Jérémie Labbé Grenier (eds), *Report Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (ICRC-UCIHL 2003) 53.

<sup>77</sup> HQKFOR, 'Standard Operating Procedure' (No 3023) para 8 in *ibid* 54.

have it reconvene for each individual claim, thus ensuring a speedier and less costly process, while giving better access to individuals.<sup>78</sup> Nevertheless, if the host Government does not participate in the proceedings then this forum would be inapplicable. In this scenario, the most logical option to enhance possibilities of redress and strengthening the right to reparation is recourse to LCRBs, as an *ad-hoc* remedy, when and if SCCs cannot apply, as the first available ‘institutional’ remedy.

Despite this, SCCs are yet to be established. This, alongside the disadvantages of LCRBs, gives the impression that no competent venue, to which regular parties (without national States’ aid) can access in order to hold the organization (or even its Member States) accountable. This hinders the implementation of institutional checks and balances and fosters impunity, while undermining the public’s perception of POs and the social legitimacy of IOs beyond repair.

#### 4. International jurisdiction

The last available means of redress is the exercise of international jurisdiction. Within its scope, we examine the feasibility, jurisdictional obstacles and challenges of bringing claims directly against TCCs, through HR bodies, or having TCCs bring claims against the organization or another State before the ICJ, for State’s inactions in dealing with peacekeepers’ criminal liability, not attributing and allocating responsibility accordingly, and, consequently, not providing appropriate redress.

##### 4.1. Human Rights Bodies

If peacekeepers breach human rights, and States are inactive or negligent in safeguarding their obligations, then the right of individual plaintiffs to claim against peacekeepers’ home-State surfaces, based on States’ positive obligations to ensure that rights and freedoms contained in binding HR treaties extend to all within their jurisdiction<sup>79</sup> - including POs - as recognized by the Human Rights Committee (‘HRC’).<sup>80</sup>

<sup>78</sup> See Sweetser (n 71) 1664.

<sup>79</sup> Rhona KM Smith, *Texts & Materials on International Human Rights* (Routledge-Cavendish 2007) 51; Rhona KM Smith, *Textbook on International Human Rights* (2<sup>nd</sup> edn, Oxford University Press, 2005) 206-207.

<sup>80</sup> General Comment 31 (n 37) [80] para 10; Katarina Månsson, ‘Integration of Human Rights in Peace Operations: Is there an Ideal Model?’ (2006) 13(4) *International Peacekeeping* 547.

For example, let's contemplate the possibility that the IACt.HR is forwarded a claim from individual Haitian plaintiffs against Brazil - for failing to prevent, investigate and prosecute the multiplicity of violations allegedly committed by Brazilian troops in MINUSTAH<sup>81</sup> - to adjudge on Brazil's international responsibility for its *negligence* in avoiding it. Or Haitian nationals bring a claim against Haiti for acts committed by MINUSTAH, for knowing or having reason to know, of the existence of real and immediate risks posed by peacekeepers to its nationals. One could still generally argue that States, where POs are deployed, do not have the capacity to effectively stop violations from being committed, much less against those supposedly sent to prevent or stop these. Hence, States are unable - and presumably not unwilling - to stop these commissions. Nevertheless, such an argument, although of moral weight, provides no real legal impediment from invoking a claim (regardless of its degree of success) before HR bodies. In the case of MINUSTAH, alleged crimes are being committed by nationals of Brazil against nationals of Haiti, both parties to the American Convention on Human Rights.

A more complex scenario is if a party to a specific convention takes decisions that might affect the fundamental rights of those outside the convention's direct scope of application. Regionally, the European Court on Human Rights' Grand Chamber's examination of *Al-Skeini* - which forms part of a string of cases dealing with attribution of conduct and responsibility for violations committed by British contingents in Iraq - surprisingly deviated from its '*Banković*' reasoning and granted the European Convention on Human Rights extra-territorial effect where States' decisions might have had this risk.<sup>82</sup> Similarly, the HRC has held that an interpretation of the International Covenant on Civil and Political Rights cannot allow State parties to perpetrate violations of the Covenant on another State's territory which it could not perpetrate on its own.<sup>83</sup>

This would bind forces, entrusted with a limited operation, to respect specific HR insofar as they interfere with them, while also binding TCCs to

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<sup>81</sup> Halling (n 13), 478ff; Todd Howland, 'Peacekeeping and Conformity with Human Rights Law: How MINUSTAH Falls Short in Haiti' (2006) 13(4) *International Peacekeeping* 462, 472.

<sup>82</sup> *Banković and Others v Belgium and 16 Other Contracting States* No.52207/99 (ECtHR, 2001), para 80; *Al-Skeini and Others v The United Kingdom* No.55721/07 (ECtHR-GC, 2011) paras 137, 149-150; *Soering v United Kingdom* No.14038/88 (ECtHR 1989).

<sup>83</sup> *Delia Saldias de Lopez v Uruguay* (1984) HRC UN Doc CCPR/C/OP/1, para 12.3; See *Alejandro and Others v Cuba* Inter-American Court of Human Rights (1999) Case 11.589 [25].

secure the entire range of rights where they have *de facto* control over the territory.<sup>84</sup> The implementation of such framework of proportional responsibility would provide a reexamination of the extraterritorial application of HR law to POs and their TCCs, as well as a stronger uniformity in the allocation of international responsibility.

#### 4.2. *International Court of Justice*

##### 4.2.1. *Breach of an international obligation*

States' failures to prevent, investigate and punish violations of HRs entail their responsibility<sup>85</sup> and breach international obligations contained in relevant HR treaties, which *necessitate positive action on the part of the State*, must *make its safeguards practical and effective*<sup>86</sup> and compels that its obligations be undertaken seriously and *not as mere formalities preordained to be ineffective*.<sup>87</sup> A due diligence obligation that entails a duty to organize the government's apparatus in order to be able to thoroughly investigate violations committed and identify, prosecute and punish the violators,<sup>88</sup> irrespective of whether those injured have forgiven those responsible.<sup>89</sup> There is also a 'duty to ensure the deterrent function of the criminal law and maintain public confidence in the rule of law, through prosecutions for crimes that are appropriate to the gravity of the HR's violations involved, as

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<sup>84</sup> Jérémie Labbé Grenier, 'Extraterritorial applicability of human rights treaty obligations to United Nations-mandated forces' in Faite (n 76) 84; Ian Leigh, 'Peacekeeping Forces and Human Rights Law' (2005) Geneva Centre for the Democratic Control of Armed Forces, CIS Model Legislation on Peacekeeping and Military Affairs Conference, 2.

<sup>85</sup> *Dianna Ortíz v Guatemala*. (1996) Inter-American Commission on Human Rights No 10.526 OEA/Ser.L/V/II.95, Doc 7 rev [80]-[84], 127; *González et al. v Mexico* (2009) Inter-American Court Human Rights (Series C) No205 [245]-[247]; Int.Comm.J.-AI (n 20) 9.

<sup>86</sup> *Airey v Ireland* No 6289/73 (ECtHR, 1981), para 32; *Soering v United Kingdom* (n 82), para 87; *Right to Information on Consular Assistance within the framework of the guarantees of legal due process*. (Advisory Opinion) 1999 OC-16/99 Inter-American Court of Human Rights (Series A) No16 [113]; Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2003) 328.

<sup>87</sup> *Bámaca Velásquez v Guatemala* (2000) Inter-American Court of Human Rights [212]; *Villagrán-Morales et al v Guatemala* (1999) Inter-American Court of Human Rights (Series C) No 160 [226].

<sup>88</sup> See *Cantoral Benavides v Peru* (2001) Inter-American Court of Human Rights (Series C) No 88 [12]; *Barrios Altos v Peru* (n 30) [5]; *Velásquez Rodríguez v Honduras*. (1988) Inter-American Court of Human Rights (Series C) No 4 [174].

<sup>89</sup> *Garrido and Baigorria v Argentina* (1998) Inter-American Court of Human Rights (Series C) No 39 [73].

well as appropriate penalties'.<sup>90</sup> This obligation remains 'whatsoever the agent to which the violation may eventually be attributed, even individuals, because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State's international responsibility'.<sup>91</sup>

Namely, from the State's inactivity in preventing and prosecuting or failing to diligently exercise the full extent of their retained criminal and disciplinary jurisdiction, irrespective of peacekeepers' 'status', it could be argued that: the violation occurred with governmental support, tolerance, or acquiescence (e.g. State issued specific orders/authorizations to peacekeepers), or the State allowed the act to take place without taking measures to prevent or punish those responsible (e.g. troops' lack of adequate training may breach the obligation to prevent).<sup>92</sup> Once determined, responsibility could be allocated accordingly and a claim brought before the ICJ, on the basis of the Articles on State Responsibility.

This seems in line with the existence of States' originally-conceived obligation to investigate and prosecute.<sup>93</sup> This obligation found its way into military manuals, State practice, agreements and official statements and has been reaffirmed by the SC and considered by the IACt.HR as an international obligation that cannot be renounced.<sup>94</sup> Additionally, numerous

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<sup>90</sup> *Oneriyildiz v Turkey* No 48939/99 (ECtHR, 2004), para 117; *Budayeva v Russia* No.15339/02 (ECtHR, 2008), para 143; *MC v Bulgaria* No 39272/98 (ECtHR, 2003), para 153; *Yeter v Turkey* No 33750/03 (ECtHR, 2009), para 71; Int.Comm.J.-AI (n 20) 13.

<sup>91</sup> *Pueblo Bello Massacre v Colombia* (2006) Inter-American Court of Human Rights [145]; *Kawas Fernández v Honduras* (2009) Inter-American Court of Human Rights (Series C) No 196 [78]; *Ranste v Cyprus and Russia* No 25965/04 (ECtHR, 2010), paras 232, 234. See *McCann v UK* No 18984/91 (ECtHR, 1995); *Aydin v Turkey* No 23178/94 (ECtHR, 1997); UNGA, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 Arts 5, 6, 12-13, 27(1); General Comment 31 (n 37) [80].

<sup>92</sup> *Velásquez Rodríguez v Honduras* (n 88) [173]; *Godínez Cruz v Honduras*. (1989) Inter-American Court of Human Rights (Series C) No 5 [182]; *Gangaram Panday v Suriname* (1994) Inter-American Court of Human Rights (Series C) No 16 [62]; *Villagrán Morales et al v Guatemala* (n 87), [75]; *Paniagua Morales et al v Guatemala* (1998) Inter-American Court of Human Rights [91].

<sup>93</sup> See Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78(2) *California Law Review* 449, 500ff.

<sup>94</sup> See eg Memorandum of Understanding on the Application of International Humanitarian Law Between Croatia and the SFRY, Art 11, para 343; Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina, Art 5, para 345; Comprehensive Agreement on Human Rights in Guatemala, Art III, para 347; Inter-American Commission of Human Rights, 'Second Report on the Situation of Human Rights in Peru' (2000) Doc 59 rev OEA/Ser.L/V/II.Io6, para 230.

multilateral treaties - through ‘ensure and respect’ and right to remedy clauses - deliver support for a State’s international obligation or at least offer the basis under which it might be inferred,<sup>95</sup> as a component of the duty to guarantee.<sup>96</sup> Accordingly, the HRC has characterized it as an international obligation,<sup>97</sup> while the adoption of the Rome Statute has endowed it with heightened significance.<sup>98</sup>

This movement towards a ‘universal standard for State responsibility’ imposes an affirmative obligation on States to investigate and prosecute. As such, it underscores its compelling international nature and stresses that when acts of private parties are not seriously or effectively investigated, they are somewhat aided by the government, thereby making the State internationally responsible.<sup>99</sup> Therefore, we argue that States’ unwillingness or negligence to exercise jurisdiction retained over their peacekeepers would constitute a breach of the international obligation to investigate – individually, or as part of the comprehensive obligation to prevent, prosecute and punish and/or the obligation to protect host-States’ civilian populations. Hence, the elements for the ICJ’s exercise of jurisdiction are satisfied.<sup>100</sup>

#### 4.2.2. *Nature and scope of reparation*

Legal disputes might also concern the nature or extent of appropriate reparation, whenever a legal right is invaded.<sup>101</sup> Nonetheless, when a right is

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<sup>95</sup> Naomi Roht-Arriaza, ‘Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress’ in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995) 24; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Volume I: Rules, ICRC and Cambridge University Press 2007) 608.

<sup>96</sup> Federico Andreu-Guzman, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* (Volume 1, International Commission of Jurists 2004) 32.

<sup>97</sup> See *Nydia Erika Bautista v Colombia* HRC (1995) UN Doc CCPR/C/55/D/563/1993, para 8.6; *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia* HRC (1997) UN Doc CCPR/C/60/D/612/1995, para 8.8.

<sup>98</sup> No Peace without Justice, ‘Closing the gap: The role of non-judicial mechanisms in addressing impunity (2010) 19 <<http://www.npwj.org/ICC/ICCKampala-Public-launch-%E2%80%9CClosing-Gap-role-non-judicial-mechanisms-addressing-impunity%E2%80%9D.html>> accessed 26 January 2012.

<sup>99</sup> *Velásquez Rodríguez v Honduras* (n 88) [177]; *Godínez Cruz v Honduras*. (1989) Inter-American Court of Human Rights (Series C) No 5 [188]; *Caballero-Delgado and Santana v Colombia* (1995) Inter-American Court of Human Rights (Series C) No 22 [58].

<sup>100</sup> Statute of the International Court of Justice, Art 36(2)(c).

<sup>101</sup> See Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (1625) (Francis Kelsey tr, Oceana Publications 1964) 12; Donna E Arzt, ‘The Right to Compensation: Basic Principles under

‘invaded’ within POs, we increasingly witness a continuous blame-shifting between IOs and TCCs or between TCCs, in detriment of injured third parties.<sup>102</sup> This ‘blame-passing’ affects the nature of the reparation that may be claimed. On one side, the nature or extent of the reparation to be made by, for instance, local SCCs might simply not constitute an effective redress to injured individuals or States. Here States could exercise diplomatic protection or directly bring a claim against Member States of the IO that authorized, mandated and/or controlled the PO or solely against the TCCs. However, in such specific scenarios there is a tangible absence of authoritative or consistent precedent through which responsibility or redress (individually or collectively) can be allocated, or respondents (in collective claims) held responsible *as a whole* for crimes committed.

Thus, the Court’s exercise of jurisdiction - concerning Article 36(2)(d) - will be done, in our understanding, in a case-by-case basis. Nevertheless, it is doubtful that break-through international law developments will take place through such individually specific cases. In all truthfulness, it is unlikely that this option would be chosen, especially when States would refrain from exercising diplomatic protection over cases that concern random compensation complaints as to avoid straining international relations.

#### 4.2.3. *Case referrals and the exercise of diplomatic protection*

States’ exercise of *proprio motu* powers allows claim to be raised, in principle, by one State against another. Procedural challenges, however, might be put forward with the respondent(s)’s submission of preliminary objections to the Court’s jurisdiction or the admissibility of the application.<sup>103</sup> Thus, jurisdictional grounds might trump the admissibility of certain cases, as in the *Legality of Use of Force* proceeding: a decision in which the Court, in its wisdom, failed to provide much needed practical guidance concerning the principles and processes of multiple responsibilities allocation. This is a much needed guidance in the current development of a shared responsibility framework, since a mature system of international law must

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International Law’ (Background Paper for International Development Research Centre’s Workshop on Compensation for Palestinian Refugees, 1999) citing Theo Van Boven, ‘Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Report’ (1990) UN Doc E/CN4/Sub2/1990/10

<sup>102</sup> See *Behrami v France and Saramati v France, Germany and Norway* Nos 71412/07 and 78166/01 (ECtHR, 2007)

<sup>103</sup> *Rules of the International Court of Justice* (14 April 2005), Art 79.

be able to comprehend the responsibility of multiple actors for a single event.<sup>104</sup>

It might also be the odd case that States exercise diplomatic protection on behalf of their nationals injured during POs. This remains a personal-discretionary-right that States assert if and when they consider it appropriate, for there is no duty incumbent upon them to exercise it.<sup>105</sup> In the context of IOs, however, the exercise of diplomatic protection by States vis-à-vis IOs on behalf of their nationals is considered as ‘one of the least explored areas of public international law’.<sup>106</sup>

Nevertheless, some seem to implicitly consider that the modalities of this protection are the same regardless of the respondent party.<sup>107</sup> Does the rule of the exhaustion of local remedies apply in this context, and if so, how would these be formulated? Can LCRBs be considered ‘local remedies’ when IOs “do not have the same array of judicial or administrative courts or bodies that States have”<sup>108</sup>? How then should we reconcile the belief that these indeed constitute a remedy to be exhausted prior to exercising diplomatic protection,<sup>109</sup> with the one that considers the rule not sacrosanct or ‘necessarily inherent in every international experiment granting procedural status to individuals’<sup>110</sup>? These questions lead to reinterpreting the rule and wondering, in the process, whether there is indeed a new duty, to exhaust remedies, provided for by SCCs or LCRBs - as administrative mechanisms - before any other action.<sup>111</sup>

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<sup>104</sup> John E Noyes and Brian D Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13(2) *Yale Journal of International Law* 225.

<sup>105</sup> *The Mavrommatis Palestine Concessions* PCIJ (Series B) No 3 (1924); *Interhandel* ICJ Reports 1959; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application: 1962) ICJ Reports, para 44.

<sup>106</sup> Jean-Pierre Ritter, ‘La Protection diplomatique à l’égard d’une organisation internationale’ in Wellens (n 38) 74.

<sup>107</sup> Chitharanjan Félix Amerasinghe, *Local Remedies in International Law* (Cambridge University Press 2004) 371; Zwanenburg (n 2) 43; Report of the ILC (2006) 58<sup>th</sup> Session UN Doc A/61/10, 15-21.

<sup>108</sup> Zwanenburg *ibid* 44.

<sup>109</sup> Borhan Amrallah, ‘The International Responsibility of the United Nations for Activities Carried out by UN Peace-keeping Forces’ (1976) 32 *Revue Egyptienne de Droit International* 57, 76.

<sup>110</sup> Antonio Augusto Cançado Trindade, ‘Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century’ (1977) 24(3) *Netherlands International Law Review* 373, 380, 391.

<sup>111</sup> ‘Duty of private claimants to exhaust SOFA remedies first’ in Wellens (n 38) 77; Institut de Droit International, ‘Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Forces may be engaged’ (1971) Zagreb session 469-470.

This is an issue that requires further study, but due to our current limitations, we leave it as *food-for-thought*. In the meantime, we are hopeful that if and when a case is brought before it, the Court will clarify whether it is imperative that prior exhaustion takes place or, if in the case of such *sui generis* situations, it finds it to be inapplicable. A window of opportunity would then open, for certain claims to be referred and for States' tendency to avoid recourse to it, for *inter alia* political or procedural reasons might be remedied. Consequently, injured parties would not need to look for alternative means of redress that rarely provide clear responsibility allocation or effective reparation. A standoff that, in the eyes of those affected may be seen as an invitation to condemnation and even entail retaliation against POs as a whole.

## 5. Conclusion

In effectively allocating responsibility for international crimes committed during POs, we have faced countless discrepancies and legal vacuums, impeding a uniform application of even the most basic responsibility principles. Even when the commission of crimes has been recognized, those injured are regularly unable to allocate responsibility because multiple attribution of conduct does not frequently occur in practice. This underlines, as a result, the system's incapability of linking the notions of shared responsibility, POs' multidimensional character, and commitment to the direct consequences of intensifying multilateral and collective activity in international law.

Emphasizing on the premise that 'if the rule of law means anything at all, it means that no one, including peacekeepers, are above the law'.<sup>112</sup> Whilst noting that no heterogeneous criminal justice system for individual peacekeepers currently exists, we compartmentalized our analysis on the advantages and disadvantages of: domestic jurisdiction exercised by the peacekeepers' home-State or the POs' host-State; universal jurisdiction exercised by third-States, particularly for IHL or *jus cogens* violations; and exercise of international jurisdiction before international criminal courts or internationalized/hybrid tribunals. The issue of *forum conveniens* was addressed as comprehensively as possible, even when an all-encompassing

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<sup>112</sup> UNSC, 'Report of the Secretary-General to the Security Council on the Rule of Law and Transnational Justice in Conflict and Post-Conflict Societies' (2004) S/2004/616, para 33.

mechanism to which POs-related claims can be raised is inexistent. To such avail, we examined the greater spectrum of available options; assessed their inherent advantages, disadvantages and challenges, and the means through which their jurisdiction could be activated. To a lesser extent, issues of immunity and reparation were addressed.

To actually attribute responsibility, to where responsibility actually lies, ensures that those concerned exercise (most needed) precaution and that crimes do not occur, or at least that impunity is no longer fostered. More importantly, it would provide the victims an effective means of redress and acknowledgments of the wrongful acts endured and reinforce domestic and international accountability methods between IOs and TCCs and the legitimacy of POs: the reputation of which has been severely marred by the culture of dismissiveness that has characterized the allegations of abuse, wrongful conduct and misconduct of peacekeepers.

As the principles of responsibility we have presented, and the arguments and framework of international responsibility that we have contributed, find their way into trials and are hopefully recognized as valid and viable, the system of shared international responsibility will be strengthened. If this is to be achieved, prior to the repetition of *Srebrenica* or *Rwanda*-like cases, and without loopholes or gaps which contribute to impunity, then a system, backed up by effective law enforcement machinery and applied in a consistent manner with the realities of international law vis-à-vis the requirements of international life, will benefit the proper development of international law and the basic precepts of international responsibility and justice.