

2018

Children's Participation in Holding International Peacekeepers Accountable for Sex Crimes

Sonja Grover

Follow this and additional works at: <https://lawcommons.luc.edu/clrj>



Part of the [Family Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Sonja Grover, *Children's Participation in Holding International Peacekeepers Accountable for Sex Crimes*, 38 CHILD. LEGAL RTS. J. 1 (2020).

Available at: <https://lawcommons.luc.edu/clrj/vol38/iss1/2>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Children's Legal Rights Journal by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

Children's Participation in Holding International Peacekeepers Accountable for Sex Crimes

Sonja Grover, Ph.D.¹

ABSTRACT

Over the years, there have been hundreds of unresolved allegations and specifically-identified, credible cases of United Nations- (“UN”) mandated or otherwise UN-authorized international peacekeepers perpetrating sex-related human rights violations and crimes against children in the country of deployment. In some situations, such as in the Central African Republic, children have been the frequent victims of these alleged sex crimes by international peacekeepers. Arguably, these crimes can rise to the level of Rome Statute-defined international crimes in some instances.² This paper discusses the potential for child participation in international judicial and quasi-judicial mechanisms directed towards: (i) criminal and/or civil accountability of individual international peacekeepers for sexual exploitation and abuse of children, and (ii) accountability of the troop-sending State where there is a failure of that State to properly investigate and, where warranted, prosecute their peacekeeper nationals responsible for SEA perpetrated while on a UN peacekeeping mission. This paper also highlights the tensions that can arise between (i) the child's right to participate in the pursuit of justice in seeking accountability and a remedy for their SEA victimization by international peacekeepers and (ii) the child's immediate and long-term protection needs.

¹ Dr. Sonja Grover is an Associate Editor of the *International Journal of Human Rights* and a Professor with the Faculty of Education at Lakehead University. Her area of research is international law with a particular emphasis on promoting the fundamental human rights of children and other highly vulnerable groups. Her most recent book is an edited book *R2P: Perspectives on the Concept's Meaning, Proper Application and Value* (Routledge), and concerns the international community's responsibility to protect civilians when their home State is unwilling and/or unable to protect them from certain mass atrocity international crimes. Dr. Grover's forthcoming book with Springer Publishing to be released in summer 2018 is *Child Refugee Asylum as a Basic Human Right: Selected Case Law on State Resistance*.

Acknowledgement: This legal research paper is a nonfunded contribution to the much larger project, *The International and Canadian Child Rights Partnership (ICCRP): Child Participation in International Child Protection*. The ICCRP project is supported by the Social Sciences and Humanities Research Council (Canada), [grant number 890-2015-0109]. Principal investigator Dr. Tara Collins, Ryerson University. Dr. Sonja Grover is one of the co-investigators. The views expressed in the paper are those of the author and not intended to represent the official view of SSHRC of Canada.

² The Rome Statute of the International Criminal Court and related ICC documents set out three categories of ICC international crime: Genocide, Crimes against Humanity and War Crimes and stipulate the elements of these crimes and the forms of conduct that fall under each Rome Statute international crime category. See Child Rights International Network: *Sexual Violence by Peacekeepers Against Children and Other Civilians – A Practical Guide for Advocacy* (Aug. 26, 2016), “Sexual violence can amount to a war crime, crime against humanity and a constitutive act with respect to genocide” at 8, https://www.crin.org/sites/default/files/guide_download/guide_-_peacekeeper_sexual_violence_final.pdf [hereinafter CRIN] (Sexual violence can amount to a war crime, crime against humanity and a constitutive act with respect to genocide).

1. INTRODUCTION

1.1 *On the Right to Justice for Child Victims of Sexual Victimization by International Peacekeepers*

This paper addresses the issue of sexual exploitation and abuse (SEA) of children by international peacekeepers while on a UN mission. The military peacekeepers in these cases could have been deployed under a UN mandate or by special UN Security Council authorization concerning specific national military contingents. “Child SEA victims”, as the term is used herein, refers to persons under age eighteen who were sexually victimized by international peacekeepers, including child-civilian victims (which also encompasses *former* child soldiers) in addition to child SEA victims still engaged in “child soldiering.”³ This work seeks to make a contribution to international human rights law by highlighting that (i) children are not only entitled under international customary and human rights treaty law to a criminal and/or civil⁴ law remedy for the sexual victimization they have suffered at the hands of international peacekeepers,⁵ but also (ii) wherever in the children’s best interests and practicable, are entitled to meaningful participation in the prosecutorial effort⁶ at both the investigation stage and during proceedings. Difficulties arise for peacekeeper child victims, however, in that criminal proceedings undertaken by a non-military criminal court, regarding SEA of civilians in the host country, take place in the military peacekeeper SEA perpetrator’s home country; the latter for reasons that will be explained here in a later section. This latter fact generally precludes the child’s participation in the proceedings. In practice, the possibility of child participation in prosecutorial hearings as a witness giving testimony is generally also unlikely should the military peacekeeper perpetrator be tried before a military court martial panel in the perpetrator’s home country or on-site in the host country. In addition, the possibility of civil proceedings exists against the Troop Contributing Country’s (TCC’s) individual military or allied civilian peacekeeper perpetrators of SEA; though there are generally major barriers to taking such action in the domestic courts of the perpetrator’s home country. It may further be possible, depending on the circumstances, to hold a State to account through civil proceedings relating to human rights violations by agents of the State. The latter through State reparations where that State failed to properly investigate, if at all and/or declined to prosecute, though prosecution was warranted, certain of its peacekeeper nationals responsible for

³ For United Nations definitions of terms relating to sexual victimization, *see* United Nations, UNITED NATIONS GLOSSARY ON SEXUAL EXPLOITATION AND ABUSE: THEMATIC GLOSSARY OF CURRENT TERMINOLOGY RELATED TO SEXUAL EXPLOITATION AND ABUSE (SEA) IN THE CONTEXT OF THE UNITED NATIONS (Oct. 5, 2016), <https://reliefweb.int/report/world/united-nations-glossary-sexual-exploitation-and-abuse>.

⁴ Children also have a right to participate in civil proceedings such as those that may occur regarding the victim’s claim for compensation for support of a child born as a result of sexual victimization by an international peacekeeper(s) and for punitive monetary damages for suffering endured for any form of SEA by an international peacekeeper.

⁵ *See* G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005); G.A. Res. 66/138, U.N. Doc. A/RES/66/138 (Dec. 11, 2011); *See also* Universal Declaration of Human Rights, G.A. Res. 217(III) at Art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, *opened for signature* Apr. 11, 1950, E.T.S. 005 (as amended June 1, 2010).

⁶ U.N. Convention on the Rights of the Child art. 12, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 54 [hereinafter *CRC*].

SEA perpetrated against child victims while those peacekeepers were deployed on a UN peacekeeping mission.

Most of the reported and well-documented cases involving international peacekeeper SEA of children while on a UN peacekeeping mission have involved child civilians and, therefore, these are the cases discussed in this paper.⁷ Nonetheless, the same right to a remedy and participation in the quest for justice would, of course, apply to child soldier victims of SEA by international peacekeepers participating in UN peacekeeping operations. While this paper focuses on SEA of children by international peacekeepers participating in UN peacekeeping operations, children are by no means the only victims of such international peacekeeper-perpetrated misconduct. In addition, it would be remiss not to mention that both select UN non-military personnel and UN military international peacekeepers have, on occasion, acted as whistleblowers by reporting, arguably against their own interests, the SEA of children by international peacekeepers during UN peacekeeping missions.⁸

This paper also outlines various immunities that create obstacles to child-victims of peacekeeper SEA pursuing and obtaining a remedy. Also considered are possible international legal mechanisms for holding accountable: (i) individual international peacekeepers who perpetrate SEA of children while on a UN mission, and/or (ii) the States of which these perpetrators are nationals. Effective access to a legal remedy for child victims of SEA by international peacekeepers has commonly been obstructed, furthermore, as will be discussed, due to States having failed to adequately address questions of international peacekeeper perpetrator criminal and/or civil liability in respect of their own nationals. Further discussed is how these international legal avenues could allow for potential child participation in the pursuit of justice. Tensions arise, however, as the children's right to participation in accountability measures taken against international peacekeeper SEA perpetrators, or the State, must be balanced against the individual child's immediate and long-term protection needs. Determination of the extent of appropriate child participation, if any, as witness or litigation party in an international peacekeeper SEA criminal and/or civil case and/or as complainant against the perpetrator's home State⁹ ideally will involve consultation with the child—where feasible, practicable, and in the child's best interests—and with any other relevant parties such as family members. There will be a need, then, for due consideration of the reasonably foreseeable impact of such participation on the SEA child victim's current and future well-being in all respects. The latter would also include assessment of the child's protection

⁷ 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* (Dec. 17, 2015), <http://www.un.org/News/dh/infocus/cenafricrepub/Independent-Review-Report.pdf>; [hereinafter *Deschamps*]; See also Human Rights Watch, *UN: Stop Sexual Abuse by Peacekeepers: New Report Reveals Lack of Justice Protection for Victims*, HUMAN RIGHTS WATCH (Mar. 4, 2016), <https://www.hrw.org/news/2016/03/04/un-stop-sexual-abuse-peacekeepers>.

⁸ See Sandra Laville, *Child Sex Abuse Whistleblower Resigns from UN*, THE GUARDIAN (June 7, 2016), <https://www.theguardian.com/world/2016/jun/07/child-sex-abuse-whistleblower-resigns-from-un>; See also Ivan Watson & Laura Dolan, *Marine under fire: Will the punishment fit the crime?*, CNN (Oct. 30, 2013), <http://www.cnn.com/2013/10/29/us/marine-classified-info-investigation>.

⁹ The child would be a complainant against the State in regard to the State's failure to conduct an adequate investigation and/or to prosecute where there are valid SEA claims by child victims and where reliable substantiation could have been proffered by the prosecution in regard to those claims.

needs, and safety measures to be taken should the child participate (i.e. including but not limited to witness protection and even relocation where necessary). Hence, the determination of the appropriateness, and to what extent, of child participation in proceedings against the individual SEA international peacekeeper perpetrator or the troop-sending State requires a case-by-case approach.

Effecting accountability for international peacekeeper SEA against children and providing, where possible and in the child's best interest, for the child's participation in accountability processes is properly considered an aspect of the UN's and the international community's duty to facilitate respect for the rule of law and enforcement thereof.

Before turning to the central issues discussed in this paper, it is important to set out the definitions assigned to some of the key terms referenced here, as relied upon for the limited purposes of this paper.

1.2 The Definitions of Key Terms as Used for the Purposes of this Paper

1.2.1 International Peacekeeper

The focus of this paper is on military international peacekeepers on a UN mission as they currently can potentially be held criminally and/or civilly liable in *the troop-sending country* for their SEA of child civilians and/or others while in the host country (country of deployment). This is because they are not covered by UN Convention immunity¹⁰ and are not shielded from prosecution *in their home country*. However, there is also consideration given to the Code Blue Campaign effort to establish a mechanism to hold accountable UN peacekeepers who are not part of the military contingents sent by troop contributing countries (namely UN-designated 'Experts' or 'Officials' on Mission) who commit SEA crimes against children and others while on a UN mission.¹¹ Currently, the latter are covered by immunity under the Convention on the Privileges and Immunities of the United Nations (Article VI) from prosecution through the State Party courts or judicial panels or tribunals but may face *administrative* sanction by the UN through a UN internal process.

1.2.2 'Sexual Exploitation and Abuse' of 'Children' in 'Coercive Circumstances' such as Armed Conflict and Unstable Post-Conflict Situations

The definition of SEA is set out in the UN Secretary-General's 2003 bulletin titled: *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*:

¹⁰ Convention on the Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, 33 U.N.T.S 261.

¹¹ AIDS-Free World, *Fact Sheet: Privileges and Immunities of the United Nations*, CODE BLUE CAMPAIGN (May 13, 2015), <http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/immunity>.

. . . the term “sexual exploitation” means 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 exploitation of another. Similarly, the term “sexual abuse” means the actual or threatened physical intrusion of a sexual nature, whether by force or *under unequal or coercive conditions* (emphasis added).¹²

The aforementioned UN definition of sexual victimization, as discussed below, overlaps with the approach of various international criminal courts and tribunals, such as the International Criminal Court (ICC) and International Criminal Tribunal for Rwanda (ICTR).¹³ Specifically, the latter also hold that sexual violence and/or victimization can occur in various situations that are coercive, involve psychological oppression and/or abuse of power and where there is a differential power imbalance between victim and perpetrators, even when brute force is not used to affect the sexual violation.¹⁴

The term ‘children’ refers here to all persons under the age of eighteen, whether child civilians or child soldiers.¹⁵ This is in recognition of the special vulnerability of this group (persons under eighteen) to victimization including potentially also by international peacekeepers. The latter have tremendously greater authority and power than do the children, especially in the unstable jurisdiction in which the children live and to which the peacekeepers have been deployed. That differential power arises in part by virtue of the international peacekeepers’ status and role. The very fact that international peacekeepers are adults with inherently greater potential to manipulate the situation to serve an illicit personal agenda, if they so wish, also contributes to the disparity in power that can lay the groundwork for possible SEA of the child.¹⁶ Thus, while Article

¹² U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* ¶ 2, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) [hereinafter *Protection from Sexual Exploitation*]. See also Stephanie Matti, *Governing sexual behavior through humanitarian codes of conduct*, 39 DISASTERS 626, 627 (Oct. 2015); Task Team on the SEA Glossary for the Special Coordinator, U.N. GLOSSARY ON SEXUAL EXPLOITATION AND ABUSE, (Oct. 5, 2016), https://interagencystandingcommittee.org/system/files/un_glossary_on_sea.pdf.

¹³ See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>; See also Office of the ICC Prosecutor, *Policy Paper on Sexual and Gender Violence* (June 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>. (An oppressive environment is also reflected by a cultural context in effect in large part neglectful of the suffering of the SEA victims and resigned *in practice* to the erroneous notion of UN peacekeeper SEA of civilians as supposedly inescapable and expected.). See United Nations Press Release 23 February, 2006 *Problem of sexual abuse by peacekeepers now openly recognized, broad strategy in place to address it Security Council told*, <http://www.un.org/press/en/2006/sc8649.doc.htm> (last visited Feb. 24, 2018) (“It was difficult to change a culture of dismissiveness, long developed “within ourselves, in our own countries and in the mission areas”).

¹⁴ See *id.*

¹⁵ For a discussion of the contentious notion of ‘child soldier,’ see Sonja Grover, *Child soldiers as victims of ‘genocidal forcible transfer’: Darfur and Syria as case examples*, 17 INT’L J. OF HUM. RTS. 411 (2013); Sonja C. Grover, CHILD SOLDIER VICTIMS OF GENOCIDAL FORCIBLE TRANSFER: EXONERATING CHILD SOLDIERS CHARGED WITH GRAVE CONFLICT-RELATED INTERNATIONAL CRIMES (2012); Sonja Grover, ‘Child Soldiers’ as ‘Non-Combatants’: *The Inapplicability of the Refugee Convention Exclusion Clause*, 12 INT’L J. OF HUM. RTS. 53, 54 (2008).

¹⁶ See e.g. Sonja Grover, *On Power Differentials and Children’s Rights: A Dissonance Interpretation of the Rind and Associates (1998) Study on Child Sexual Abuse*, 5 ETHICAL HUM. SCI. & SERV. 21 (2003); Sonja Grover, *Co-opting*

1 of the Convention on the Rights of the Child (CRC)¹⁷ excludes as children persons under age eighteen who have attained the age of majority under an applicable State law, “child” victim, as the term is used here, includes all persons under eighteen who have either been victims in the past or are currently victims of SEA by international peacekeeper perpetrators participating in UN peacekeeping operations.

The approach taken here-in terms of including as child victims of SEA by international peacekeepers all such victims under the age of eighteen is also linked to the issue of consent. The approach is consistent with recognition of the fact that, whether adolescent child or younger child, neither can be deemed to give voluntary consent in the coercive context of an armed conflict or fragile post-conflict situation to an adult with such high status who wields tremendous power in innumerable respects. Excluding adolescents as ‘children’ in the discussion by some regarding SEA of children by international peacekeepers, on the view here, promulgates a false narrative that adolescents can consent to sexual contact with an adult regardless of the power differential in various respects, and notwithstanding the surrounding highly coercive circumstances in which the SEA occurred. On the analysis here then; the false proposition being advanced by those who would exclude adolescents as “child” victims of SEA by international peacekeepers is that where such *alleged* voluntary consent is given by the adolescent, SEA has not occurred. Consider, in this regard, that lack of consent is *not* considered a material element of the crime of sexual violence (such as rape) under the Rome Statute Elements of the Crime. Given an appreciation for the coercive circumstances (i.e. armed conflict or unstable post-conflict context) in which such sex crimes most often occur and the need to serve the interests of justice, the ICC Trial Chamber in the Bemba Gombo case, for instance, noted:

... [the] victim’s lack of consent is not a legal element of the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice.¹⁸

Note that in the International Criminal Court Judgment in Bemba Gombo; it was recognized that the material element insofar as the circumstances or conditions required to consider that the sexual crime of rape has occurred, could be satisfied also where the perpetrator “took advantage of [already existing] coercive circumstances,” or where the victim was “a person incapable of giving genuine consent” (which incapacity could be related to age),¹⁹ or where there

Children’s Rights Language: An Example Concerning the Topic of Sexual Exploitation of Adolescents, 5 INT’L J. OF THE HUMAN. 53, 53–59 (2007).

¹⁷ CRC, *supra* note 5.

¹⁸ Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III Judgment, ¶ 105 (Mar. 21, 2016).

¹⁹ The Rome Statute Elements of the Crime at footnote 16 and 64 sets out that there can be an age-related incapacity to give consent for sexual violence (i.e. rape) though neither the Rome Statute nor the Rome Statute Elements of the Crime set out a specific age or age range in that regard. See Rome Statute of the International Criminal Court, Elements of Crimes (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [hereinafter *Rome Statute*].

was “psychological oppression.”²⁰ Notably, the usage of brute force, then, is not necessary to fulfill the elements of the sex crime even of rape. The coercive circumstances exploited by perpetrators of SEA of children could also include, the Bemba Gombo ICC tribunal held, “the military presence of hostile forces among the civilian population.”²¹ This is precisely the unstable conflict or fragile post-conflict context in which international peacekeepers who commit acts of SEA against children are likely to operate. Thus,

[C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and *other forms of duress which prey on fear or desperation* may constitute coercion, and *coercion may be inherent in certain circumstances, such as armed conflict....* (emphasis added).²²

Therefore, the analysis here, which is informed in part by the views of the ICC on the matter of coercive circumstances as an element of Rome Statute sexual crimes,²³ is that the victims of international peacekeeper SEA can also include adolescents rather than being limited to only younger children.²⁴ This given, at the very least, the coercive circumstances surrounding international peacekeeping which in and of itself also precludes the possibility of genuine (voluntary and informed) consent by the adolescent or younger child. In the context of this discussion regarding SEA of children by international peacekeepers and the age of the “child”, note also that the United Nations has set out, via the UN Secretary-General’s 2003 Bulletin, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, that:

3.2 (b) Sexual activity with *children (persons under the age of 18)* is prohibited regardless of the age of majority or age of consent locally. *Mistaken belief in the age of a child is not a defence* (emphasis added).²⁵

The prohibition against SEA of children, as set out in the UN Special Measures 2003 Bulletin, was stipulated to apply to both UN staff, and to forces from troop contributing countries (TCC), operating under the command and control of the UN:

2.1 The present bulletin shall apply to all staff of the United Nations, including staff of separately administered organs and programmes of the United Nations.

2.2 United Nations forces conducting operations under United Nations command and control are prohibited from committing acts of sexual exploitation and sexual abuse *and have a particular duty*

²⁰ Gombo, *supra* note 17, at ¶ 102. See also Nicole Brigitte Maier, *The Crime of Rape Under the Rome Statute of the ICC: With a Special Emphasis on the Jurisprudence of the Ad Hoc Criminal Tribunals*, AMSTERDAM L. F. 3(2) 146, 148 (2011) <http://amsterdamlawforum.org/article/viewFile/209/397>.

²¹ Gombo, *supra* note 17, at ¶ 104.

²² See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688. (Sept. 2, 1998).

²³ *Id.*

²⁴ See *Protection from Sexual Exploitation*, *supra* note 11, at point 3.2(b).

²⁵ *Id.*

of care towards women and children, pursuant to section 7 of Secretary-General's Bulletin ST/SGB/1999/13 entitled "Observance by United Nations forces of international humanitarian law" (emphasis added).²⁶

Note in addition that pre-deployment training for international peacekeepers who will contribute to a UN peacekeeping operation includes "awareness-raising" about SEA as a violation of the UN's Code of Conduct.²⁷ Further, the UN Code of Conduct includes the following admonition: "Do 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."²⁸

1.2.3 The Code Blue Campaign

The Code Blue Campaign has been a significant source of information for the international community on reported alleged incidents of SEA by international peacekeepers in the Central African Republic (CAR) and elsewhere.²⁹ Code Blue is an international campaign with a prime objective, amongst others, of removal of immunity for the UN's own peacekeeping personnel who are alleged to have committed SEA.³⁰ These UN personnel would include "any non-military peacekeepers classified as Officials or Experts on Mission" as they would normally be covered under the UN Convention on Immunities and Privileges.³¹ The Code Blue Campaign also seeks a sanctioning body separate from the UN to ensure the accountability of *all* peacekeepers who commit SEA while on a UN mission.³² Specifically, the Code Blue Campaign advocates for special courts dedicated exclusively to addressing the criminal prosecution of all within peacekeeping missions who committed SEA while on the UN mission. The Code Blue Campaign sets out the role of the special courts it envisions as one of providing for an independent adjudication of the criminal cases including against those international military peacekeepers charged with SEA while on a UN mission where the troop-sending country, for whatever reason, will not be handling the case. In addition, the Code Blue Campaign seeks the removal of immunity for non-military UN peacekeeper SEA perpetrators (Officials and Experts on Mission) so they can be prosecuted through the special court vehicle as well.³³ The special courts the Code Blue Campaign proposes

²⁶ *Protection from Sexual Exploitation*, *supra* note 11, at point 2.1-2.2.

²⁷ See generally U.N. POLICE, *Ten Rules: Code of Personal Conduct for Blue Helmets*, UN Conduct and Discipline Unit: UN Standards of Conduct (1999), https://police.un.org/sites/default/files/ten_rules.pdf [hereinafter *Ten Rules*]; See also UN SECURITY COUNCIL PRESS RELEASE, *Problem of Sexual Abuse by Peacekeepers Now Openly Recognized, Broad Strategy in Place to Address it, Security Council Told* (Feb. 23, 2006), <http://www.un.org/press/en/2006/sc8649.doc.htm>.

²⁸ *Ten Rules*, *supra* note 26.

²⁹ *Fact Sheet*, *supra* note 10.

³⁰ *Id.*

³¹ *Id.*

³² *Fact Sheet*, *supra* note 10.

³³ AIDS-Free World, *A Practical Plan to End Impunity for Peacekeeper Sexual Abuse* (Jan. 20, 2017), CODE BLUE, <https://www.codebluecampaign.com/s/FINAL-Special-Courts-Mechanism-Updated-20-January-2017.pdf> (Accessed Dec. 30, 2016).

would operate in the countries in which the SEA crimes occurred during international peacekeeping operations and:

Member States would give the courts full legal authority to investigate and try UN non-military personnel accused of sexual offenses, as well as soldiers sent by troop-contributing countries that cannot or do not respond when allegations are referred. In the spirit of UN system-wide coherence, alleged perpetrators would be held to a common standard—an agreed international definition of what constitutes crimes of sexual abuse—and would submit to one system of due process.³⁴

1.2.4 International Peacekeeper Forces in the Central African Republic Contributing to the UN Peace Effort: MINUSCA (the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic) and Non-MINUSCA Forces (i.e. Sangaris forces provided to the UN by France)

The issues addressed in this paper are discussed using the situation in the CAR as a case example, those issues being: (i) the accountability, *in practice*, for the sexual exploitation and abuse of children by international military peacekeeper forces on a UN mission (those peacekeepers often referred to colloquially as the ‘Blue Helmets’), and by UN peacekeeper staff (classified as Officials or Experts on Mission) and (ii) the SEA child victims’ right to and possibility for fuller participation in accountability processes.

The Security Council established MINUSCA (a UN peacekeeping mission in the Central African Republic) on April 10, 2014.³⁵ This subsidiary UN organ is considered to be under UN ultimate command and control. However, it is important to understand that:

... This [UN] control is of a primarily political nature and neither the Security Council, nor any other body within the UN has any control, or even direct influence over how the mission is actually conducted, beyond the (theoretical) possibility of not renewing the mandate.³⁶

While the States contributing troops to MINUSCA transferred, in some formal sense, part of the authority of their troops to the UN to ensure the integrity of the mission, the State members retain much of the operational authority over their troops in important practical respects. This includes, but is not necessarily limited to, exclusive jurisdiction of the troop contributing State over if and how wrongdoing, such as violations of international law by their deployed troops, will be

³⁴ *Id.*

³⁵ U.N. Multidimensional Integrated Stabilization Mission in the Central African Republic, *MINUSCA Fact Sheet*, U.N. PEACEKEEPING (last visited Feb. 24, 2018), <https://peacekeeping.un.org/en/mission/minusca> [hereinafter “MINUSCA”].

³⁶ Terry D. Gill, *Legal Aspects of the Transfer of Authority in UN Peace Operations*, 42 NETH. Y.B. OF INT’L L. 37, 54 (2011).

addressed.³⁷ This type of situation leads, as Gill notes, to “certain...legal questions... including those relating to accountability and possible legal responsibility.”³⁸ Gill points out that “the UN will not accept responsibility” for wrongdoing by military perpetrators participating in a UN-mandated mission where authority “has been delegated to a regional organization or group of States.”³⁹ Thus, the general practice is that Member States of the UN are held responsible for the conduct of their military forces.⁴⁰

The individual countries (known as “Troop Contributing Countries” or “TCCs” for short) that provide military enter into Memoranda of Understanding with the UN. These MOUs stipulate that only the TCC can prosecute its own military members for crimes committed on mission... They can only be prosecuted by their own countries, and not by either the UN or the country where they are serving (referred to as the “host country”).⁴¹

Thus, the TCCs have exclusive jurisdiction over their forces in accountability measures to be taken for misconduct of these nationals in terms of potential criminal prosecution.⁴² Hence, the UN generally takes the position that it does not assume any legal liability should there fail to be adequate such measures taken by the TCC regarding their military and allied civilian peacekeeper SEA perpetrators.

The Security Council under Chapter VII of the UN Charter set the MINUSCA mandate to include “protection of civilians as its utmost priority.”⁴³ MINUSCA commenced its mandated tasks through its military and police contingents on September 15, 2014.⁴⁴ One of MINUSCA’s prime responsibilities as stipulated by the UN is “to provide specific protection for women and children affected by armed conflict.”⁴⁵ MINUSCA’s other tasks include, among other things, “support for the transition process; facilitating humanitarian assistance; promotion and protection of human rights; support for justice and the rule of law; and disarmament, demobilization, reintegration and repatriation processes.”⁴⁶

Certain troops, separate from those that comprise MINUSCA, were also deployed to CAR as further reinforcement in carrying out the UN peace mandate, and worked alongside the troops that were part of MINUSCA.⁴⁷ These forces, such as the Sangaris forces of France, acted as agents

³⁷ *Id.* at 47.

³⁸ Gill, *supra* note 35, at 39.

³⁹ *Id.* at 53–54.

⁴⁰ Dieter Fleck, *The Legal Status of Personnel Involved in United Nations Peace Operations*, 95 INT’L REV. OF THE RED CROSS 613, 616 (2013).

⁴¹ *Fact Sheet*, *supra* note 10.

⁴² Rembert Boom, *Impunity of Military Peacekeepers: Will the UN Start Naming and Shaming Troop Contributing Countries?*, AM. SOC’Y OF INT’L L., Insights Vol. 19, Issue 5 (Nov. 24, 2015), <https://www.asil.org/insights/volume/19/issue/25/impunity-military-peacekeepers-will-un-start-naming-and-shaming-troop>.

⁴³ MINUSCA, *supra* note 34.

⁴⁴ *Id.*

⁴⁵ MINUSCA, *supra* note 34.

⁴⁶ *Id.*

⁴⁷ S.C. Res. 2149, at point 47 (Apr. 10, 2014), available at <https://www.un.org/sc/suborg/en/s/res/2149-%282014%29>.

of the member State (the TCC) to support the UN peacekeeping and peace enforcement mission in CAR as authorized by the UN under Chapter IV of the UN Charter and under paragraph 47 of UN Security Council Resolution 2149:

The Security Council:

Authorizes French forces, within the limits of their capacities and areas of deployment, from the commencement of the activities of MINUSCA until the end of MINUSCA's mandate as authorized in this resolution, *to use all necessary means to provide operational support to elements of MINUSCA* from the date of adoption of this resolution, at the request of the Secretary-General... (emphasis added)⁴⁸

Let us now turn to the continuing scourge of international peacekeeper sexual exploitation and abuse of children and consider this grievous human rights violation in the context of the Central African Republic (CAR) situation.

2. THE CONTINUING PROBLEM OF INTERNATIONAL PEACEKEEPER SEXUAL EXPLOITATION AND ABUSE OF CHILDREN: THE CASE EXAMPLE OF THE SITUATION IN THE CENTRAL AFRICAN REPUBLIC

Early documented cases of international peacekeeper SEA of civilians while the perpetrators were participating in UN peacekeeping include cases in the early 1990s in Bosnia, Herzegovina and Kosovo.⁴⁹ These human rights violations continue to date in various armed conflict and post-conflict locales globally. In some instances, such as in CAR, the problem has been quite widespread. The vulnerability of the population tragically appears to provide the fertile circumstances and window of opportunity for SEA by some international peacekeepers:

Peacekeeping forces are generally deployed to places where the social fabric has been torn apart by civil strife, where the rule of law is absent, where family structures have disintegrated, and where the local population endures severe economic and psychological hardship. Peacekeepers are viewed by the beneficiary population as wealthier than themselves and, as a result, peacekeepers can exercise enormous power over the local population. Under these conditions, power can be, and sometimes is, abused.⁵⁰

It should be noted that UN reporting statistics of SEA by international peacekeepers are likely to be a gross under-representation of the actual number of peacekeeper SEA incidents. This is due,

⁴⁸ *Id.*

⁴⁹ Elizabeth F. Defeis, *U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity*, 7 WASH. U. GLOBAL STUD. L. REV. 185, 186–87 (2008).

⁵⁰ *Id.* at 191.

in part, to the measure that the UN uses.⁵¹ The *Code Blue* Campaign reports with regard to UN tabulated allegations of international peacekeeper incidents of SEA that:

...an “allegation” is a unique UN unit of measurement that doesn’t represent one perpetrator or one victim. The UN groups as many as ten sex crimes together and counts them as a single “allegation”—a statistical manoeuvre described in a New York press briefing by a top peacekeeping official last month as a “science and art.”⁵²

Furthermore, the victims’ likely fear of stigmatization should they report the SEA, and their concern over possible retaliation by community members or others should they go forward with their allegations, may also depress the reporting and undermine the accuracy of the UN SEA alleged incident statistics.

On April 13, 2016, “AIDS-Free World...received leaked information that 41 additional cases of sexual violence by peacekeepers have been documented by MINUSCA, the United Nations peacekeeping mission in the CAR, following interviews with victims in Dekoa, a remote town in the country’s Kemo prefecture.”⁵³ These allegations were based on interviews with 59 women and girls.⁵⁴ It is clear that SEA of child civilians and other civilians in CAR continues largely unabated with relative impunity of the international peacekeepers involved. This rampant impunity appears to prevail whether the perpetrators be nationals of a troop-contributing country as part of a military contingent, civilian or other members integrated into or allied with military contingents, members of the peacekeeping personnel as part of a UN subsidiary organ, such as MINUSCA, or UN non-military staff (Experts or Officials on Mission).⁵⁵

The UN Security Council extended the mandate of MINUSCA until November 15, 2017, via Security Council Resolution 2301, adopted by the Security Council at its 7747th meeting on 26 July 2016.⁵⁶ The Sangaris participation in the UN peacekeeping operations in CAR, however, ended in October 2016, after three years of involvement, with France pulling 2000 Sangaris troops from the region and leaving only 350 troops to back up the MINUSCA-UN peacekeeping

⁵¹ AIDS-Free World, *The New UN Peacekeeper Sex Abuse Numbers No One Noticed*, CODE BLUE (2016), <http://www.codebluecampaign.com/press-releases/2016/3/8-1>.

⁵² *Id.*

⁵³ AIDS-Free World, *Another 41 Allegations of Peacekeeper Sex Abuse Undisclosed by the UN*, CODE BLUE (Apr. 13, 2016), <http://www.codebluecampaign.com/press-releases/2016/4/13>. See also Associated Press, *UN reports 31 new allegations of sexual abuse against peacekeepers, workers: Fifteen of the allegations are against civilians doing work for the UN refugee agency* (Nov. 3, 2017), <https://www.thestar.com/news/world/2017/11/03/un-reports-31-new-allegations-of-sexual-abuse-against-peacekeepers-workers.html> (last visited Feb. 24, 2018).

⁵⁴ See *id.*

⁵⁵ It has been suggested by some legal experts that there should be universal jurisdiction regarding SEA crimes by international peacekeepers in order to ensure accountability. See Carla Ferstman, *Sexual Exploitation and Abuse by Peacekeepers*, U.S. INST. OF PEACE, Special Report 335, at 8 (Sept. 2013).

⁵⁶ S. C. Res. 2301, at 8 (July 26, 2016).

operation. MINUSCA is comprised of more than 10,000 troops on the ground in CAR.⁵⁷ There was an expectation that the MINUSCA mandate would be extended beyond the November 2017 expiry date and indeed it has been extended, at the time of writing, to November 15, 2018.⁵⁸

Importantly Security Council Resolution 2301, regarding the MINUSCA mandate date extension, acknowledged that one of the prime indicators of the ongoing instability of the situation in CAR was the continuing problem of international peacekeeper SEA, and the need for prevention and accountability:

Welcoming the commitment of the Secretary-General to enforce strictly his zero-tolerance policy on sexual exploitation and abuse, *expressing grave concern over numerous allegations of sexual exploitation and abuse reportedly committed by peacekeepers in the CAR, as well as by non-United Nations forces*, stressing the urgent need for Troop-and Police-contributing countries and, as appropriate, MINUSCA, to promptly investigate those allegations in a credible and transparent manner and for those responsible for such criminal offences or misconduct to be held to account, and further stressing the need to prevent such exploitation and abuse and to improve how these allegations are addressed...(emphasis added).⁵⁹

The problem of international peacekeeper SEA and its seemingly intractable persistence was also acknowledged in UN Security Council Resolution 2272:

Stressing that sexual exploitation and abuse by United Nations peacekeepers undermines the implementation of peacekeeping mandates, as well as the credibility of United Nations peacekeeping, and *reaffirming* its support for the United Nations zero tolerance policy on all forms of sexual exploitation and abuse...⁶⁰

Expressing deep concern about the serious and continuous allegations and under-reporting of sexual exploitation and abuse by United Nations peacekeepers and non-United Nations forces,

⁵⁷ BBC NEWS, *France ends Sangaris military operation in CAR*, BBC NEWS (Oct. 31, 2016), <http://www.bbc.com/news/world-africa-37823047> (last visited Feb. 1, 2018).

⁵⁸ UN Security Council Report, *Central African Republic*, http://www.securitycouncilreport.org/monthly-forecast/2017-11/central_african_republic_23.php (last visited Feb. 1, 2018). *See also* UN News, *Central African Republic: UN mission mandate extended, additional 'blue helmets' authorized* (15 November, 2017), <https://news.un.org/en/story/2017/11/636232-central-african-republic-un-mission-mandate-extended-additional-blue-helmets> (last visited Feb. 25, 2018).

⁵⁹ S.C. Res. 2301, at 2. (July 26, 2016).

⁶⁰ S.C. Res. 2272, at 1 (Mar. 11, 2016).

*including military, civilian and police personnel, and underscoring that sexual exploitation and abuse, among other crimes and forms of serious misconduct, by any such personnel is unacceptable. . . (emphasis added)*⁶¹

At the same time, Resolution 2272 declared the UN absolved of final responsibility for ensuring criminal accountability of the TCC's international peacekeepers who perpetrated SEA while contributing to a UN peacekeeping mission:

*Recalling the primary responsibility of troop-contributing countries to investigate allegations of sexual exploitation and abuse by their personnel and of troop- and police-contributing countries to hold accountable, including through prosecution, where appropriate, their personnel for acts of sexual exploitation and abuse, taking into account due process*⁶²

Given, in part, the application of various immunities⁶³ and the complex system of attribution of responsibility relating to UN peacekeeping operations,⁶⁴ it is perhaps not surprising that not more progress has been made in preventing SEA of children and others by international peacekeepers, or in accountability of SEA peacekeeper perpetrators. Added to the potential obstacles to accountability is the general reluctance of States to prosecute members of their national forces for SEA that was perpetrated in the country of UN peacekeeping operation deployment. This inexcusable state of affairs was acknowledged by the current UN Secretary-General, António Guterres, in his statement on December 12, 2016:

The United Nations system has not yet done enough to prevent and respond to the appalling crimes of sexual violence and exploitation committed under the UN flag against those we are supposed to protect. I will work closely with Member States on structural, legal and operational measures to make the zero-tolerance policy for which Secretary-General Ban Ki-moon has fought so hard a reality. We must ensure transparency and accountability and offer protection and effective remedies to the victims.⁶⁵

⁶¹ Security Council Report, *supra* note 57.

⁶² *Id.*

⁶³ These immunities include, for instance: (i) UN Convention immunity for the UN and for its subsidiary organs as distinct legal entities and for its Officials and Experts on a UN mission (which immunity can only be waived by the UN Secretary-General) as well as (ii) host country immunity for the military and allied personnel deployed by the troop contributing countries (which can be waived only by the TCC). These immunities thus can be waived only by the holder of the immunity.

⁶⁴ Ray Murphy, *An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel*, 13 INT'L PEACEKEEPING, 531, 533 (2006); Dieter Fleck, *supra* note 39, at 614–16. *See also* U.N. Secretary-General, *Criminal Accountability of United Nations Officials and Experts on Mission*, ¶58, U.N. Doc. A/63/260 (Aug. 11, 2008).

⁶⁵ AIDS-Free World, *Statement: Secretary-General-designate António Guterres speaks out on sexual exploitation and abuse*, CODE BLUE (last visited Feb. 1, 2018), <http://www.codebluecampaign.com/latest-news>.

Guterres' special measures⁶⁶ have unfortunately, in the view of many human rights experts and advocates, failed to sufficiently ensure accountability for SEA crimes perpetrated by UN personnel or by troops and affiliated civilians.⁶⁷

We turn next to a discussion of the grant by the host country to the TCC of immunity in the country of deployment as a barrier to accountability for UN military and allied civilian international peacekeeper sexual victimization of children and the matter of whether such immunity necessarily implies impunity in all legal forums.

2.1 Status of Force Agreements and the Issue of Immunity versus Impunity

One major barrier to international peacekeeper perpetrator accountability for the SEA of civilians and other persons while participating in UN peacekeeping operations is the immunity of TCC peacekeepers from criminal liability both while in the host country to which the troops and integrated civilian personnel were deployed and while in any third-party State. Under Status of Forces Agreements (SOFAs), such personnel remain under the home State's sovereign jurisdiction in all matters regarding misconduct while deployed:

Express consent to the presence of troops and waiver of jurisdiction [by the host country] over them is usually expressed through a SOFA [Status of Forces Agreement].⁶⁸

U.N. personnel enjoy functional immunity from prosecution by the host state which can only be waived by the Secretary-General, while members of military contingents are subject to the exclusive jurisdiction of their respective TCC.⁶⁹

The TCCs, furthermore, have generally been reluctant to prosecute their peacekeeper force perpetrators for SEA committed extra-territorially creating the risk, in practice, of impunity:

The sending States' claim to adjudicate alleged criminal conduct committed by nationals acting as PKs [peacekeepers] may result in a sort of impunity of

⁶⁶ U.N. Secretary-General, *Special measures for protection from sexual exploitation and abuse: a new approach*, U.N. Doc. A/71/818A/71/818818, GAOR (Feb. 28, 2017).

⁶⁷ AIDS-Free World, *The UN's fatally flawed "new approach" to sex abuse*, CODE BLUE (Mar. 10, 2017), <http://www.codebluecampaign.com/press-releases/2017/3/10>.

⁶⁸ William Thomas Worster, *Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement*, 47 MIL. L. & THE L. OF WAR REV. 277, 302 (2008).

⁶⁹ Defeis, *supra* note 48, at 192.

blue helmets, since the effectiveness of States' efforts to prosecute them is questioned by many scholars.⁷⁰

Yet it should be recognized that international peacekeepers with a variety of military and non-military roles, whether, for instance, UN specially recruited mission-specific experts or officials, troops, police and civilians integrated into a military contingent of a troop sending State, are still bound by law.⁷¹ The question then, as Di Martino points out, is not one of immunity *per se*, but rather of determining the proper procedure and legal forum in which to address criminal or civil liability for one or more of the following: (i) crimes set out under the host country's domestic laws; (ii) crimes under the sending State domestic law (that may or may not be crimes in the host country where troops were deployed) committed extra-territorially while on mission;⁷² iii) international crimes (as defined under the Rome Statute); and d) other international treaty crimes.

More generally, the duty to abide by domestic and international rules –in particular, rules of international law of human rights and international humanitarian law– remains untouched by immunity: being immune does not mean being *legibus solutus*⁷³ from a substantive point of view.

In other words, once... it is clear that the act of which the defendant is accused would indeed amount to an offense (be it under the Statute of the International Criminal Court [ICC], customary international criminal law, the law of the territorial State or that of the sending State), any question as to the jurisdictional competence is a (merely) procedural one.⁷⁴

*It is important to understand that immunity does not imply impunity for military or civilian members of the forces of a sending state or international organisation. Neither can immunity limit the accountability of that state or international organisation. Rather, it bars the host state from taking direct action against the members of a visiting force, whereas the sending state and/or the international organisation is accountable. Individual perpetrators are to be prosecuted by the sending state... (emphasis added).*⁷⁵

⁷⁰ Alberto di Martino, *Crimes Committed by Peacekeepers: Immunity v. Principles of Criminal Jurisdiction: A Brief Outline*, in CHINA AND ITALY'S PARTICIPATION IN PEACEKEEPING OPERATIONS: EXISTING MODELS, EMERGING CHALLENGES, 333, 333-34 (Andrea de Guttry et al. eds., 2014). Also available at https://www.academia.edu/4459316/Peacekeepers_between_Criminal_Liability_and_Immunity.

⁷¹ Alberto di Martino, *supra* note 69 (explaining that crimes such as SEA are *not* part of what can be covered by immunity as such conduct is not encompassed by official duties).

⁷² Alberto di Martino, *supra* note 69 (stating that, for civilians from the troop contributing country who are integrated with the sending State's troops, SEA of children while in the host State may be prosecutable in the courts of the troop sending State only if that State's laws allow for SEA crimes under its domestic laws to be prosecuted also if the crimes were perpetrated extraterritorially).

⁷³ Aaron X. Fellment & Maurice Horwitz, *Guide to Latin in International Law* 164, Oxford Univ. Press (2009) (refers to "being released from the laws").

⁷⁴ Alberto di Martino, *supra* note 69, at 336.

⁷⁵ Dieter Fleck, *supra* note 39, at 616.

Here follows a discussion concerning recent high profile independent investigations of the general failure to date of accountability measures in respect of international peacekeeper perpetrators of SEA of children, and select resultant recommendations stemming from these investigations for improving the accountability situation.

3. THE DESCHAMPS INVESTIGATION INTO SEA ALLEGATIONS AGAINST INTERNATIONAL PEACEKEEPERS: THE CAR CASE EXAMPLE

Allegations regarding SEA of children by peacekeeper perpetrators serving in CAR came to the attention of UN authorities yet again in the Spring of 2014. During that spring, a UN Human Rights officer and local UNICEF personnel interviewed six boys concerning the allegations of international peacekeeper SEA in CAR occurring between December 2013 and June 2014, near a particular Internally Displaced Persons Camp.⁷⁶ The allegations concerned peacekeeper perpetrators offering the children food or small amounts of money for sex, and the children being sexually abused or witnessing other children being exploited and abused.⁷⁷ The allegations involved Sangaris forces operating in CAR by way of UN Security Council authority. The latter forces were under day-to-day operational command and control by the French military hierarchy, however, and protected (as is usual through Status of Forces Agreements) from criminal prosecution in the host country.⁷⁸

The accounts by the children, of their own alleged suffering and that of other children due to peacekeeper SEA during UN peacekeeping operations, were suggestive of a systematic pattern of sexual victimization of children by international peacekeepers, and hence potentially qualified as war crimes prosecutable under the Rome Statute, which would entail prosecution before the International Criminal Court:

The information reported by the children indicates that the violations were likely not isolated incidents. For example, some of the children described witnessing the rape of other child victims (who were not interviewed by the HRO); others indicated that it was known that they could approach certain Sangaris soldiers for food but would be compelled to submit to sexual abuse in exchange. In several cases soldiers reportedly acknowledged or coordinated with each other, for example by bringing a child onto the base, past guards, where civilians were not authorized to be, or by calling out to children and instructing them to approach (indicating that the perpetrators did not fear being caught). In sum, if the Allegations are substantiated by further investigation, they could potentially indicate the existence of a pattern of sexual violence against children by some peacekeeping forces in CAR.⁷⁹

⁷⁶ Deschamps, *supra* note 6, at ii.

⁷⁷ *Id.*

⁷⁸ *Id.* at iii, xi.

⁷⁹ Deschamps, *supra* note 6, at ii.

An independent panel, headed by former Canadian Supreme Court Justice Marie Deschamps, investigated the UN's and UNICEF's handling of these SEA allegations in a report submitted to the UN on December 17, 2015, and concluded that:

The manner in which UN agencies responded to the Allegations was seriously flawed. The head of the UN 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. Meanwhile, both UNICEF and UN human rights staff in CAR failed to ensure that the children received adequate medical attention and humanitarian aid, or to take steps to protect other potential victims identified by the children who first raised the Allegations.

Instead, information about the Allegations was passed from desk to desk, inbox to inbox, across multiple UN offices, with no one willing to take responsibility to address the serious human rights violations. Indeed, even when the French government became aware of the Allegations and requested the cooperation of UN staff in its investigation, these requests were met with resistance and became bogged down in formalities.⁸⁰

The Deschamps report suggests that, in large part, the inadequate response of the UN officials to the allegations of SEA against children in CAR by particular members of certain UN peacekeeping forces arose due to a “fundamental misperception by UN staff of the UN's obligations in responding to sexual violence by peacekeepers.”⁸¹ The Deschamps report offers this ‘explanation’ for the UN's lack of action to hold perpetrators accountable:

In the course of the Review it became clear that in the eyes of many UN staff, the human rights framework does not apply to allegations of sexual violence by peacekeepers [military troops and affiliated civilian personnel from Troop Contributing Countries (TCC)]. As a result, where there is 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 take the view that the UN has no obligation, or indeed authority, to address the reported sexual violence.⁸²

Under more recent measures, the UN may investigate the allegations if the TCC is unwilling to investigate or has not reported to the UN on progress in any investigation in a timely fashion.⁸³

⁸⁰ *Id.* at i.

⁸¹ *Id.* at iii.

⁸² Deschamps, *supra* note 6, at iii. See also Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic, U.N. Doc. A/71/99, at 4 (June 23, 2016).

⁸³ UNITED NATIONS, FACT SHEET ON SEXUAL EXPLOITATION AND ABUSE, <http://www.un.org/en/peacekeeping/documents/2015factsheet.pdf> (last updated Sep. 3, 2015) [hereinafter *Fact Sheet*].

With regard to TCC peacekeeper military troops and their allied civilians contracted by the military, there is the possibility of (i) repatriation of the individuals accused or of the whole unit by the UN to the TCC, and (ii) non-payment by the UN to the TCC for service of the troops and allied personnel to the peacekeeping mission. Repatriation of the whole unit might occur, for instance, where that military unit has been credibly alleged to have included multiple members involved in widespread and/or systematic SEA of civilians in the country of deployment and the TCC has not taken adequate accountability measures. On March 11, 2016, the UN Security Council adopted a resolution urging repatriation of whole units where the TCC had a continuing pattern of failing to properly investigate and prosecute peacekeeper SEA cases involving its own nationals (TCCs rarely to date have followed through with accountability measures).⁸⁴ Recall that the universal human right of victims to a remedy for harms—whether in peacetime, during, or post-armed conflict—is incorporated in a number of international human rights and humanitarian instruments,⁸⁵ and arguably has risen to the level of international customary law. It remains to be seen, given the UN's great dependence on TCC contributions of personnel⁸⁶ to participate in peacekeeping missions, to what degree the UN will in fact take punitive administrative action against any TCC (i.e. repatriation of the accused nationals of the TCC) that does not adequately follow through with accountability measures (i.e. criminal prosecution of their own international peacekeeper nationals who perpetrate SEA of civilians while on a UN peacekeeping mission).

Deschamps points out that the UN has an obligation under the UN Charter and in the interest of justice to foster and protect fundamental human rights.⁸⁷ Yet, international peacekeeper SEA of children and others in CAR, and elsewhere, continues,⁸⁸ and few international peacekeeper perpetrators have been held criminally and/or civilly liable.

4. THE CODE BLUE CAMPAIGN: IN SEARCH OF PEACEKEEPER ACCOUNTABILITY FOR SEA

At the time this article was written, there are additional UN, NGO and investigative journalist reports of previously undisclosed SEA by international peacekeepers of civilians, mostly children, in CAR.⁸⁹ These reports include over 100 allegations dating back to 2013 of SEA by (i) international peacekeepers within the UN mission in CAR and by (ii) non-UN peacekeeping forces operating in CAR under Security Council authorization.⁹⁰ Select peacekeepers from Morocco have

⁸⁴ Security Council Report, *supra* note 57.

⁸⁵ G.A. Res. 60/147, *supra* note 4, at Annex Preamble; *See also* International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioner's Guide* (2006), available at <https://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations>.

⁸⁶ Stewart M. Patrick, *The Dark Side of UN Peacekeepers*, NEWSWEEK (Aug. 8, 2015), <http://www.newsweek.com/why-are-un-peacekeepers-still-sexually-abusing-children-361065>.

⁸⁷ *See* Deschamps, *supra* note 6, at 25.

⁸⁸ *See generally* Jeni Whalan, *Dealing with Disgrace: Addressing Sexual Exploitation and Abuse in UN Peacekeeping*, INT'L PEACE INST. (Aug. 1, 2017), <https://www.ipinst.org/wp-content/uploads/2017/08/IPI-Rpt-Dealing-with-Disgrace2.pdf>.

⁸⁹ AIDS-Free World, *Shocking new reports of peacekeeper sexual abuse in the Central African Republic*, CODE BLUE (Mar. 30, 2016), <http://www.codebluecampaign.com/press-releases/2016/3/30>.

⁹⁰ Joshua Berlinger, Holly Yan & Richard Roth, *UN peacekeepers accused of raping civilians*, CNN (Apr. 6, 2016), <http://www.cnn.com/2016/04/06/africa/united-nations-peacekeepers-sexual-abuse/index.html>.

been accused of SEA of children in CAR along with particular peacekeepers from France, Gabon and Burundi.⁹¹ There was also a report of such SEA against one child victim who alleged that her SEA by a peacekeeper occurred in March 2016.⁹² Some of the specific details of certain instances of alleged SEA involve such vile sexual abuse of children that the peacekeeper perpetrator conduct has been described by France's UN Ambassador François Delattre as “sickening and odious.”⁹³

This author is in accord with the Code Blue Campaign that immunity for international peacekeeper perpetrators of SEA should also be eliminated where these persons are part of the UN's non-military personnel; that is UN-designated experts or officials on Mission. Options in this regard suggested by the Code Blue Campaign include waiver of that immunity by the UN Secretary-General,⁹⁴ or ideally, an amendment to the text of the UN Convention on Immunities and Privileges⁹⁵ so as to explicitly preclude immunity for any international peacekeepers who commit SEA or sex trafficking offenses against children and other victims. Another option the Code Blue Campaign suggests is to simply reinterpret the existing UN Immunities Convention to preclude immunity for UN international peacekeeper SEA.⁹⁶

This discussion turns next to a consideration of the apparent failure, to date, to consider the child victim's interest and right to participate more fully in accountability measures taken against (i) international peacekeeper perpetrators of SEA of children, and against (ii) the troop - contributing States that decline to investigate and, where warranted, prosecute these cases against their own nationals.

5. THE FAILURE TO CONSIDER THE CHILD VICTIMS' RIGHT TO MORE FULLY PARTICIPATE IN ACCOUNTABILITY MEASURES RELATING TO INTERNATIONAL PEACEKEEPER SEA

One striking aspect of certain of the various reports previously discussed⁹⁷ (regarding suggestions for reform to ensure greater peacekeeper perpetrator accountability for SEA) is that the suggestions do *not* discuss (i) the child victim's right to participate in accountability mechanisms beyond the investigation stage or (ii) the necessary supports for children in this regard. The child victims of international peacekeeper SEA, through their participation in judicial and quasi-judicial international legal mechanisms, could potentially have the opportunity to restore

⁹¹ *United Nations widens sex abuse inquiry into peacekeepers in CAR*, THE GUARDIAN (Mar. 31, 2016), <http://www.theguardian.com/world/2016/mar/31/united-nations-widens-sex-abuse-inquiry-peacekeepers-central-african-republic-car>.

⁹² Sneha Shankar, *UN Probes Allegations of Sexual Abuse by Peacekeepers in the Central African Republic; US Group Says 98 Girls Abused*, INT'L BUS. TIMES (Mar. 31, 2016), <http://www.ibtimes.com/un-probes-allegations-sexual-abuse-peacekeepers-central-african-republic-us-group-2345974>.

⁹³ *'Sickening' sex abuse alleged in CAR by UN peacekeepers*, AL JAZEERA (Mar. 31, 2016), <http://www.aljazeera.com/news/2016/03/sex-abuse-alleged-car-peacekeepers-160331183645566.html>.

⁹⁴ *Fact Sheet*, *supra* note 10.

⁹⁵ *Id.*; See also G.A. Res. 4, CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS at IV-VI, (Feb. 13, 1946), *supra* note 9.

⁹⁶ *Fact Sheet*, *supra* note 10.

⁹⁷ Reports or measures such as, for instance, the independent Deschamps Dec. 17, 2015 investigation report; the Code Blue Campaign Mar. 30, 2016 report on SEA in CAR as well as the UN Security Council Mar. 11, 2016 special measures in response to the Deschamps report (respectively *supra* notes 6, 88, and 59).

their dignity and reputation in their community as well as their sense of self-ownership (protected, in theory at least, under Article 16 (1) of the Convention on the Rights of the Child).⁹⁸ The child victims through participation in accountability mechanisms would be provided thereby the chance to set the record straight before an impartial judicial or quasi-judicial tribunal or human rights mechanism as to their sexual victimization by international peacekeepers that occurred during UN peacekeeping operations. Several weaknesses in the UN system regarding accountability for SEA by military and non-military peacekeepers on a UN mission, previously here discussed, however, serve to lessen the realistic chances for child participation beyond the investigation stage in accountability mechanisms. These factors include but are not limited to: (i) the criminal proceedings, if any, *not* occurring in the child's home country given the TCC holding host country immunity for its deployed troops (those proceedings often being a court martial in the *home country* of the UN international military peacekeeper); (ii) the ongoing reluctance, in the first instance, of TCCs to prosecute their own nationals who commit SEA against children and others in the country of UN mission deployment; and (iii) a likely breakdown, or at least significant weakness, in the judicial and quasi-judicial mechanisms in the host country given the conflict or post-conflict fragile situation such that, even if the TCC were to waive host country immunity, often no appropriate accountability mechanism exists in the host country;⁹⁹ and (iv) a failure, for the most part, by both UN and TCC authorities to consider child victim participation in the accountability process (beyond simply the investigation stage) as an aspect of the child's basic human right to effectively and fully access justice. Furthermore

Children ...are less likely than adults to be aware of opportunities for either redress or sources of support...As has been shown in CAR, peacekeeping missions and troop contributing countries have often failed to communicate with either victims of sexual violence or the local population about the status of investigations, allegations and reparations...Hundreds of victims of sexual violence perpetrated by peacekeepers have yet to receive reparations or care...Many victims have yet to see justice for the crimes of the peacekeepers who abused them ...When prosecutions in troop-contributing countries have taken place, victims have often not been kept informed.¹⁰⁰

⁹⁸ CRC, *supra* note 5, art. 16 (1). ("No child shall be subjected to ...unlawful attacks on his or her honour and reputation." SEA by an international peacekeeper tragically often results in an unjustified loss of honour for the child victim in their home community and/or family.)

⁹⁹ Press Release, Security Council, Unanimously Adopting Resolution 2239 (2017), Security Council Extends Arms Embargo, Other Sanctions on Central African Republic; Text Makes Sexual Violence Key Criterion for Listing Asset-freeze Targets, U.N. Press Release SC/12697 (Jan. 27, 2017), ("Armed groups continued to draw upon the weak justice systems to perpetrate crime, and some aimed to 'spoil' the national reconciliation process.").

¹⁰⁰ Child Rights International Network, *Sexual Violence by Peacekeepers Against Children and Other Civilians – A Practical Guide for Advocacy*, *supra* note 1, under section 8: Complaints at 14–15, and under section 10: Redress at p. 16. (For a detailed discussion of barriers to redress, including but not limited to regarding reparations and the opportunity for victims of peacekeeper SEA to pursue a criminal complaint in the TCC, see REDRESS, *Sexual Exploitation and Abuse in Peacekeeping Operations: Improving Victims Access to Reparations, Support and Assistance* (Sep. 14, 2017) <http://www.redress.org/downloads/publications/REDRESS%20peacekeeping%20report.pdf>.

The child victims' right to more fully participate in the accountability process regarding international peacekeeper SEA generally has *not* been acknowledged as a fundamental universal human right to equal recognition before the law and part and parcel of the right to a judicial criminal and/or civil law remedy.¹⁰¹ Nor has child participation in accountability mechanisms generally been properly understood and appreciated as a potential avenue contributing to the possibility of some modicum of psychological healing for child peacekeeper SEA victims and their families. For instance, as discussed, since the first CAR SEA allegations implicating international peacekeepers became publicly known in 2014, large numbers of additional alleged victims, mostly children, have come forward in the CAR region with such allegations. Accountability has been slow and infrequent. Three such alleged perpetrators of SEA in CAR from various States finally faced a hearing before a criminal tribunal. Specifically, three Congolese were tried before a military tribunal in the Democratic Republic of Congo (DRC), and all three pled not guilty.¹⁰² The charges included rape or attempted rape for certain of the accused before the tribunal in the DRC, and for eighteen others accused in the DRC who were international peacekeepers.¹⁰³ Eight-hundred Congolese troops were repatriated by the UN due to SEA allegations, suggesting a systemic problem within this particular State international peacekeeping military contingent.¹⁰⁴ It is an open question as to how many remaining of those individual peacekeepers alleged to have committed SEA against children and/or others while participating in UN peacekeeping operations will face criminal prosecution in their home country. Furthermore, it is noteworthy that to date, not uncommonly, there are no child participants in the criminal prosecution hearings concerning UN peacekeeper perpetrators of SEA while on mission.¹⁰⁵ For instance, this was the case in regards to the hearings for several of the accused Congolese peacekeepers who were alleged to have committed sexual violence, including against children, while on a UN mission in CAR.¹⁰⁶ That is; the children were not heard as witnesses giving oral testimony or as victim participants in the DRC hearings being held before a military tribunal:

Venance Kalenga, who attended the hearing as an observer for Congolese human rights charity ACAJ, said "*the absence of victims constitutes a major obstacle in the demonstration of truth* (emphasis added)."¹⁰⁷

¹⁰¹ G.A. Res. 217A (III), Universal Declaration of Human Rights, at 8 (Dec. 10, 1948) (stating that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"). Where such is not possible through a national legal forum, it may be possible, as here discussed, to pursue the matter through supranational legal mechanisms.

¹⁰² *UN peacekeepers go on trial for CAR sex abuse*, AL JAZEERA (Apr. 5, 2016), <http://www.aljazeera.com/news/2016/04/peacekeepers-trial-sex-abuse-car-160405040318812.html>.

¹⁰³ *Id.*

¹⁰⁴ Louis Charbonneau, *U.N. chief 'inept' on peacekeeper sex abuse: key U.S. senator*, REUTERS (Apr. 14, 2016, 4:59 PM), <http://www.reuters.com/article/us-un-peacekeepers-usa/u-n-chief-inept-on-peacekeeper-sex-abuse-key-u-s-senator-idUSKCN0XA2MK>.

¹⁰⁵ *UN peacekeepers go on trial for CAR sex abuse: Three Congolese peacekeepers appear before tribunal in first prosecutions for sex abuse crimes in the CAR*, AL JAZEERA (Apr. 5, 2016), <http://www.aljazeera.com/news/2016/04/peacekeepers-trial-sex-abuse-car-160405040318812.html>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

...many countries provide for the trial of military officers and personnel by military tribunals for offenses committed within the context of military duties. These courts might be difficult to access for private individuals and are not particularly suitable for trying sexual offenses.¹⁰⁸

The former UN Secretary-General, Ban Ki-moon, in certain “special measures” recommendations, suggested that military peacekeeping contingents participating in UN peacekeeping operations set up “on-site” court martial proceedings in the host country that is, in the country where allegations of SEA or other crimes have been credibly raised against certain of the TCC’s peacekeeping force-contingent members.¹⁰⁹ On-site court martial by the TCC is a notion intended to ensure better accountability for SEA and other crimes perpetrated by peacekeepers while participating in a UN peacekeeping operation in a host country. This recommendation arises in that TCCs have rarely adequately held their accused peacekeeper nationals accountable for alleged crimes once repatriated. Even if on-site court martial was feasible in what are often volatile conflict or post-conflict situations, again, the child victims would normally not testify at the proceedings given, in part, the lack of legal assistance and support available to them currently to do so, and fear of reprisal. In fact, such court martial proceedings in-theatre may arguably further jeopardize the safety of the child SEA victims. This is due to (i) the conceivable risks of reprisal by certain of the child’s own community members (i.e. if and where the community members tragically blame the child victims, based on cultural traditions, for the children being victims of peacekeeper SEA and/or retaliation due to fear by community members that there will be withdrawal of the peacekeeping forces if the child’s SEA allegations are heard); or (ii) risks posed by any particular persons with a vested interest of some sort to seek to intimidate and pressure the children to retract their SEA allegations against the international peacekeepers accused or to not lodge the allegations of peacekeeper SEA in the first instance.¹¹⁰ Thus the children, once again, would most likely only participate in an investigative interview(s) by the UN, allied NGO, and/or military investigators, too often cursory, as to the alleged SEA facts.

¹⁰⁸ 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, 153 (2009).

¹⁰⁹ Press Release, Security Council, Repatriation of Commanders, Units among Steps to Tackle Sexual Exploitation, Abuse by Peacekeepers, Secretary-General Tells Security Council, U.N. Press Release SC/12274 (Mar. 10, 2016). (“Stressing that Member States must bring to justice those who committed crimes while serving with the United Nations, he said he had asked them to establish *on-site court martial proceedings* and to ensure that their nationals serving in peace operations were subject to their respective domestic sex-crime laws”) (emphasis added).

¹¹⁰ Ndulo, *supra* note 107, at 159 (regarding discrimination against women and girls that serves to perpetuate SEA and impunity in conflict zones); see also *The Power These Men Have Over Us: Sexual Exploitation and Abuse by African Union Forces in Somalia*, HUMAN RIGHTS WATCH 1, 28 (Sept. 2014), https://www.hrw.org/sites/default/files/report_pdf/somalia0914_4up.pdf; see also Jenna Stern, *Reducing Sexual Exploitation and Abuse in UN Peacekeeping*, STIMSON 1, 10 (Feb. 2015), https://www.stimson.org/sites/default/files/file-attachments/Policy-Brief-Sexual-Abuse-Feb-2015-WEB_0.pdf (“Many victims face stigmatization and ostracism from their families and communities if they report instances of sexual abuse. Victims may also fear retaliation by the perpetrator, who in some cases carries a weapon. In countries where peacekeeping missions operate, there may be general mistrust of authority where the state’s own law enforcement is corrupt and ineffective... Many victims consider reporting to be futile because they believe the peacekeeping mission will believe the perpetrator’s word over the victim’s.”).

Ndulo suggests that, through a UN Security Council Resolution, the UN call upon States to enact domestic legislation that would provide for their national courts to have jurisdiction to hear cases concerning SEA crimes that were perpetrated by their international peacekeeper nationals beyond the borders of the particular home nation-state in question (prosecution of crimes committed extraterritorially by the State's own nationals).¹¹¹ Canada, for instance, already allows for prosecution in its domestic courts of its non-military and military nationals who commit sex offences against children and others outside of Canada.¹¹²

To date there appears to be an absence, beyond the investigation stage, of child victim participation in the prosecution of the small number of peacekeeper SEA cases that have been tried. Those cases invariably involved prosecution in the troop contributing country. This situation is certainly not consistent with respect for the child's right under Article 12 of the Convention on the Rights of the Child to be heard in judicial or quasi-judicial processes in matters that directly and significantly involve the child's rights and interests. Unless challenged, this very limited child participation (and then only at the investigation stage) in the accountability mechanisms employed in peacekeeper SEA cases will continue.

Let us consider next then the peacekeeper SEA child victim's potential participation in (i) investigation of international peacekeeper SEA of children, (ii) international law accountability measures against individual peacekeeper SEA perpetrators, and (iii) international legal mechanisms allowing for complaints against troop contributing countries that fail to hold peacekeeper SEA perpetrators (who are their nationals) accountable, and/or fail to take proactive reasonable, feasible and effective measures to help prevent such SEA of children and others by their international peacekeeper nationals while the latter are on a UN mission.

6. INTERNATIONAL LEGAL MECHANISMS FOR CHILD PARTICIPATION IN HOLDING PEACEKEEPER PERPETRATORS OF SEA ACCOUNTABLE

6.1 *The Investigation Stage*

Investigating allegations of international peacekeeper SEA in the country of deployment, in unstable armed conflict or post-conflict situations, is a major challenge. Yet, the practical obstacles need to be met to achieve accountability of those who commit SEA while participating in UN peacekeeping operations. There must be timely victim interviews, and, where possible, collection and preservation of evidence, including DNA evidence, properly and ethically obtained by qualified medical personnel. A 2015 UN special measures initiative established multidisciplinary immediate response teams to carry out such investigations.¹¹³ Foremost, child-sensitive procedures, respecting the child's needs and best interests, are required at all stages in these investigations.

It is suggested here that children who have suffered SEA by an international peacekeeper in the context of armed conflict or in the unstable post-conflict situation should consistently be

¹¹¹ Ndulo, *supra* note 107, at 159–60.

¹¹² Laura Barnett, *International Dimensions of Domestic Criminal Law: Extraterritoriality and Extradition*, PARLIAMENT OF CAN., LAW & GOV'T DIVISION, 7, 3 (Oct. 14, 2008), <http://www.loppar.gc.ca/content/lop/researchpublications/prb0117-e.htm>.

¹¹³ *Fact Sheet*, *supra* note 82; *see also* U.N. Dep't of Peacekeeping Operations, Military Aide Memoire – Commanders' guide on measures to combat Sexual Exploitation and Abuse in United Nations military, U.N. Doc. PG/G/SEA (Aug. 1, 2017).

considered victims of a sexual crime. The latter regardless of: (i) alleged claims of the child's informed voluntary consent, and (ii) whether or not the child (person under the age of eighteen) would be considered to be of age of sexual consent in the home country of the accused international peacekeeper or in the host-country. Sexual involvement of any sort between child and international peacekeeper, on the analysis here, amounts to a crime in all instances given the explicit and implicit coercive elements involved. These coercive elements include, but are not limited to, the power differential between an international peacekeeper and a child and the insecure and, not uncommonly, desperate living circumstances of the child residing in the country where international peacekeepers were deployed.¹¹⁴ Inquiring into alleged child "consent" thus would not, on the view here, be a proper aspect of an international peacekeeper SEA case investigation given the peacekeeper's *abuse of power* inherent in the situation. The UN Secretary-General's special bulletin of 2003 concerning SEA by international peacekeepers addressed, to some extent, the irrelevance of claims of alleged child consent as a defence to the human rights violations and crimes involving SEA of children by international peacekeepers contributing to a UN mission.¹¹⁵

Obstacles at the investigation stage may include, among other things, difficulties notifying the child's guardians of the peacekeeper SEA investigation where such would normally be the proper ethical protocol. For instance, the child may have been abandoned, or be on the street, and the guardian may not be locatable or alive. The guardian may be available but would pose a risk to the child should he/she discover that the child has been a victim of international peacekeeper SEA. Where in the child's best interest, and hopefully with the approval of the host country's relevant local authority where that authority is acting in accord with international human rights norms, it may be justified and ethical for children, in some instances, to be interviewed regarding peacekeeper child SEA without guardian notification. This possibly would occur where the lack of guardian notification is unavoidable for some compelling reason.

Each instance of alleged peacekeeper SEA of a child during UN peacekeeping operations needs to be investigated (i) taking into proper account the child's unique circumstances, and best interests, and (ii) with due consideration also given to, among possible other factors, any particular medical, psychological, legal or ethical concerns relating to the specific child's case. Foremost also in guiding the investigation into peacekeeper SEA of a child must be due regard to human rights and the interests of justice *for the child*.

It has been noted by the Code Blue Campaign that UN investigation into peacekeeper SEA is fraught with an inherent conflict of interest. Furthermore, interviews with selected child victims of peacekeeper SEA, for example in CAR, have revealed allegations of lack of psychological and

¹¹⁴ Such recognition of coercive elements, including *abuse of power*, led to incorporation of the notion that alleged consent of the victim is irrelevant, for instance, to charging and prosecution of the crime of human trafficking. Certainly, *abuse of power* is equally present in the context of sexual exploitation and abuse of children by international peacekeepers and of sexual contact of any sort involving international peacekeepers and children. It is here argued then that the issue of the alleged 'consent' of the child is irrelevant to criminalization of sexual contact with and sexual exploitation of children by international peacekeepers. Cf. G.A. Res. 55/25, art. 3(a) (Nov. 15, 2000); see generally Cassandra Mudgway, *Sexual exploitation by UN peacekeepers: the 'survival sex' gap in international human rights law*, 21 INT'L J. OF HUM. RTS. 1453 (July 2017).

¹¹⁵ See Matti, *supra* note 11, at 627 (prohibiting all sexual activity with children regardless of consent, or age of consent in the host state, or mistaken belief of age).

other support from the UN and lack of reparation for damages.¹¹⁶ The NGO Code Blue co-executive director Paula Donovan stated in April 2017 that:

The organization [referring to UNICEF] is faced with a fundamental conflict of interest... when it must probe such sensitive crimes that are allegedly committed by another branch of the U.N., or others acting in its name. That chore... should be taken on by an *independent* panel of experts (emphasis added).¹¹⁷

In addition, concerns have been raised regarding re-traumatizing of SEA child victims through repeated interviews without the adequate child-sensitive considerations and support provided.¹¹⁸

The advocacy of child rights by several stakeholders, including but not limited to select host country authorities and international NGOs (where possible and in the child's best interest), may be beneficial to promote the child's right to justice and participation in what is also *their* search for justice. In the best-case scenario, local authorities in the host country may also contribute to locating and interviewing key witnesses to the peacekeeper SEA, some of whom may be other children, and to encouraging the populace to refrain from ostracizing and stigmatizing the international peacekeeper SEA child victims or posing a threat to their security.

We turn next to a consideration of various international legal mechanisms that may allow for the child victims' participation in holding international peacekeeper SEA perpetrators accountable.

6.2 The Children's Convention Complaint Mechanisms

6.2.1 *Optional Protocol to the Convention on the Rights of the Child on a communications procedure (CRC-OP3)*

The SEA of children in CAR, and elsewhere, by individual international peacekeeper perpetrators who are nationals of States Parties to the Convention on the Rights of the Child (CRC) and operating in a host State (especially, but not limited to, a host State that has ratified the CRC) constitutes, it is here contended, a violation of the CRC by the troop contributing country (TCC) (a State Party to the CRC):

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

¹¹⁶ George Russell, *Is UNICEF helping all the child victims of peacekeeper sex abuse?*, FOX NEWS (Apr. 18, 2017), <http://www.foxnews.com/world/2017/04/18/is-unicef-helping-all-child-victims-peacekeeper-sex-abuse.html>.

¹¹⁷ *Id.*

¹¹⁸ Human Rights Watch, *supra* note 6.

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.¹¹⁹

The CRC thus, on the analysis here, imposes extraterritorial obligations on the TCC State Party to the CRC to also protect the rights and freedoms of children in the host country. This is the case since the TCC's international peacekeepers have in large part, in practice, effective jurisdiction over the civilian population in the host country where the international peacekeepers are deployed.¹²⁰

SEA of children by international peacekeepers during UN peacekeeping operations in the host country constitute, among other things, violations of the child victims' CRC right (i) to be protected by the State Party to the CRC from "all forms of sexual exploitation and sexual abuse" (Article 34), and (ii) to be protected against "torture or other cruel, inhuman or degrading treatment" (Article 37). Since the TCC retains sovereign jurisdiction over its international peacekeeper nationals while they are participating extraterritorially in UN peacekeeping operations, the State (the TCC) itself is also potentially liable for (i) the sexual misconduct of their peacekeeper nationals while deployed in the host country and for (ii) the TCC's failure to properly and timely hold the peacekeeper SEA perpetrators to account, if at all. This opens the opportunity for peacekeeper SEA child victims to advance complaints under the Third Optional Protocol to the Convention on the Rights of the Child (CRC-OP3), the CRC complaint mechanism¹²¹ against certain States Parties.¹²²

Consider then, as an example, that in the UN peacekeeping mission in CAR, many of the troops who allegedly committed SEA of children were French nationals under French day-to-day operational command. The French military contingent, known as the Sangaris, as part of the peacekeeping effort in CAR, operated under Security Council authorization but not as part of

¹¹⁹ CRC, *supra* note 5, at art. 34.

¹²⁰ This perspective is also consistent with the Additional Protocols I and II to the to the 1948 Geneva Conventions. Additional Protocol I concerns international armed conflict. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I) (June 8, 1977). Additional Protocol II requires that those in power during an armed conflict or immediate post conflict situation afford children special care, aid and protection; including protection against indecent assault. *See generally* PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) (June 8, 1977). *See also Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, INT'L COMMITTEE OF THE RED CROSS (1987), <https://ihldata.bases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/8e174bc1926f72fac12563cd00436c73>.

¹²¹ G.A. Res. 66/138, *supra* note 4.

¹²² A complaint under CRC-OP3 would be possible were the TCC a State party to the CRC-OP3 and either to the CRC and/or to one of the first two optional protocols to the CRC. *See generally* G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (May 25, 2000); *see also* G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (May 25, 2000).

MINUSCA.¹²³ The Sangaris contingent, however, acted as reinforcement to the MINUSCA UN peacekeeping troops and allied personnel.¹²⁴ The French contingent also then had a UN peacekeeping mandate which included, as a priority task, protection of CAR civilians over whom they too had effective jurisdiction.¹²⁵ Consequently, France's duty under the CRC, as a State Party to the CRC,¹²⁶ extended to the protection of the children in CAR through its agents, namely the Sangaris peacekeepers.

The UN Committee on the Rights of the Child would, under the view here, have jurisdiction to receive a communication (complaint) under CRC-OP3 about France's alleged violation of children's rights under the CRC resulting from (i) France's failure to prevent SEA of children in CAR by certain of France's peacekeeping nationals (particular members of the Sangaris), and, (ii) the State Party's (France's) alleged inadequate implementation of accountability measures in a timely and vigorous manner so as to prosecute French peacekeepers involved in SEA of children in CAR. This civil liability of the State under the CRC-OP3 arises thus in that the peacekeepers contributed by France to the UN peacekeeping operation in CAR were under the exclusive jurisdiction of France, a State Party to the CRC and the CRC-OP3. Further, CAR had ratified the CRC on April 23, 1992, thus indicating that CAR wished its children to be the beneficiaries of CRC protections and other rights. In addition, the international peacekeeping troops deployed to a host country are obligated, under the agreements between the host country and the troop contributing country, to adhere to relevant applicable international human rights and humanitarian law as well as the host country's domestic human rights and other laws insofar as the national laws are consistent with international human rights norms.¹²⁷

In sum, the UN peacekeeping mission State members in CAR (where State Parties to the CRC) and allied force contingents, such as the Sangaris, must be considered to have been responsible for ensuring that the CAR children's CRC protection rights were enforced. In respect of CAR, then, child victims of French international peacekeeper SEA perpetrators were and are, potentially in a position to file a CRC-OP3 complaint against France as individuals or as a group (the latter if members of the group are individually identified as is required under CRC-OP3 admissibility requirements).¹²⁸ The failure of France, or any State, to thoroughly investigate and prosecute its peacekeeper nationals for SEA offences against children in CAR or elsewhere sends

¹²³ Deschamps, *supra* note 6, at i; *see also* Tatiana Carayannis & Mignonne Fowles, *Lessons from African Union–United Nations cooperation in peace operations in the Central African Republic*, 26 AFRICAN SECURITY REVIEW 220, 225-26 (May 2017); *see generally* Maj. Rémy Hémez, French Army, *Operation Sangaris: A Case Study on Limited Military Intervention*, MIL. REV. 72 (Nov. 2016 - Dec. 2016).

¹²⁴ Deschamps, *supra* note 6, at i; *see also* Tatiana Carayannis & Mignonne Fowles, *Lessons from African Union–United Nations cooperation in peace operations in the Central African Republic*, 26 AFRICAN SECURITY REVIEW 220, 225-26 (May 2017); *see generally* Maj. Rémy Hémez, French Army, *Operation Sangaris: A Case Study on Limited Military Intervention*, MIL. REV. 72 (Nov. 2016 - Dec. 2016).

¹²⁵ *See id.*

¹²⁶ France ratified the CRC-OP3 on January 7, 2016, and the CRC on August 7, 1990. *See Convention on the Rights of the Child*, UN TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&lang=en (last visited May 18, 2018).

¹²⁷ *Principles and Guidelines*, UN DEP'T OF PEACEKEEPING OPERATIONS 1, 14-15 (2008), http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf; *see also id.* at 81.

¹²⁸ G.A. Res. 66/138, *supra* note 4, at art. 5(1). For a detailed discussion of CRC-OP3, *see generally* SONJA GROVER, CHILDREN DEFENDING THEIR HUMAN RIGHTS UNDER THE CRC COMMUNICATIONS PROCEDURE: ON STRENGTHENING THE CONVENTION ON THE RIGHTS OF THE CHILD COMPLAINTS MECHANISM (2015).

a message of impunity. The latter would no doubt serve to contribute to the perpetuation of SEA by international peacekeepers more generally.

Where the facts relating to the CRC-OP3 complaint¹²⁹ began prior to France's ratification of CRC-OP3 but persisted after France's ratification of CRC-OP3 in January 2016, the cases of peacekeeper child SEA may potentially be considered to involve a "continuing violation" of the particular child victims' CRC rights.¹³⁰ The CRC-OP3 allows for admissibility of a complaint where the facts relating to the human rights violation originated before CRC-OP3 entered into force for a particular State Party to the Optional Protocol but continued after entry into force for that State Party.¹³¹ On that basis then the complaint(s) - regarding any alleged SEA by certain Sangaris peacekeeping troops in CAR that occurred prior to France's ratification of CRC-OP3 and the failure of France to hold them accountable also after the CRC-OP3 entered into force for France - may still be admissible complaints under CRC-OP3.¹³² The CRC rights violated by international peacekeeper SEA where there is no accountability in substantiated cases include, but are not limited to: (i) the children's right to protection against sexual exploitation and abuse¹³³; (ii) their right to a remedy including prosecution of peacekeeper SEA perpetrators¹³⁴; and (iii) reparations from the State involved.¹³⁵ The right to a remedy for children sexually victimized by international peacekeepers is, on the view here, also part of the child's right to non-discrimination in the protection rights guaranteed under the Convention on the Rights of the Child, Article 2.¹³⁶ The right to a remedy, furthermore, is well established also in international law more generally.¹³⁷

¹²⁹ For instance, France's failure to prevent SEA of children in CAR by particular Sangaris peacekeepers prior to France's ratification of CRC-OP3, and its failure to hold those particular SEA perpetrators accountable after its ratification of CRC-OP3 would be a 'continuing violation' of the CRC. Allegations regarding Sangaris peacekeeper SEA of children in CAR dates back to December 2013, which is prior to the entry into force of CRC-OP3. Deschamps, *supra* note 6, at ii.

¹³⁰ For a discussion of the concept of a 'continuing violation' by the State of an international obligation, *see generally* Joost Pauwelyn, *The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems*, 66 BRITISH YEARBOOK OF INT'L L. 415 (Jan. 1, 1996); *see also* Case of the Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, 102 (June 15, 2005) (in which the Court applied the concept of 'continuing violation'); *see also* G.A. Res. 66/138, *supra* note 4, at art.7(7).

¹³¹ *See id.*

¹³² *See id.* Note that in January 2017, a review panel of French judges sitting in France decided to close, without charges, the cases against several Sangaris peacekeepers accused of SEA of children in CAR pending further evidence. The final decision whether the case was to be further investigated was yet to be made by the Prosecutor at that time. *See* Benoit Morenne, *No Charges in Sexual Abuse Case Involving French Peacekeepers*, N.Y. TIMES (Jan. 6, 2017) <https://www.nytimes.com/2017/01/06/world/africa/french-peacekeepers-un-sexual-abuse-case-central-african-republic.html> (stating that a 2014 United Nations investigation report about allegations of sexual and physical violence was leaked, thus making them a continuing violation).

¹³³ CRC, *supra* note 5, at art. 34.

¹³⁴ G.A. Res. 66/138, *supra* note 4, at Preamble ("Recognizing that the best interests of the child should be a primary consideration to be respected in pursuing remedies for violations of the rights of the child...") The Committee on the Rights of the Child under CRC-OP3 can recommend to the State any certain remedies it considers appropriate for violation of the child's CRC rights including proper investigation and prosecution by the State of human rights violations such as SEA by UN military and allied civilian peacekeepers and reparations to the child victim).

¹³⁵ *Id.*

¹³⁶ CRC, *supra* note 5, at art. 2.

¹³⁷ G.A. Res. 60/147, *supra* note 4.

The UN has set up victims' assistance units (VAUs) in countries where UN peacekeeping missions have been deployed ('host countries').¹³⁸ However, these VAUs do *not* offer reparations. Thus, the child peacekeeper SEA victims will not receive reparations for (i) the TCC's failure to prevent peacekeeper SEA by their nationals in the host country or (ii) the TCC's failure to ensure criminal accountability for SEA by the TCC's nationals participating in a UN peacekeeping operation in the host country. The UN VAUs may, among other support, provide assistance to the child peacekeeper SEA victim in pursuing a civil claim in the country where they wish to bring the claim.¹³⁹ This support may be provided also then, for example, when the child victim becomes pregnant because of sexual abuse by an international peacekeeper who was operating within or contributing to a UN mission in the child victim's home country.¹⁴⁰ Also, in March 2016, a trust fund for victims of peacekeeper SEA (whether children or adults) was established, but it also provides no reparations *per se*:

The Trust Fund will be used to support service providers who assist victims of sexual exploitation and abuse. Services provided to victims include medical care, psychosocial support, legal services, and immediate material needs, such as food, clothing, and safe shelter. All Member States have been requested to consider making voluntary contributions to the Trust Fund.¹⁴¹

Under the CRC-OP3 mechanism, however, the United Nations Committee on the Rights of the Child could determine through its formal decision on the merits of a particular CRC-OP3 complaint what would be a just remedy. This might include that the State Party to the CRC-OP3 pay reparations to the child victims of SEA by peacekeeper nationals of that State. Those reparations would be forthcoming in whole or in part based on: (i) the failure of the State Party in question to prevent the SEA of children (i.e. in CAR) by certain of its peacekeeper nationals while contributing to a UN peacekeeping mission; and/or (ii) the failure of the State Party to prosecute those peacekeeper perpetrators hence denying a criminal law remedy to the child victims and blocking the opportunity for the child victim complainants to obtain justice and, to some extent at least, closure and restoration of their dignity.

Further, the UN Committee on the Rights of the Child could monitor progress on (i) the State Party's (i.e. France's) investigation of alleged SEA by certain of its UN peacekeeping nationals against children in CAR, and (ii) progress of the State Party (here France) in holding its international peacekeeping perpetrators criminally accountable through an impartial, independent judicial process for the sexual victimization of children in CAR. The UN Committee on the Rights of the Child is well positioned to do this monitoring in a fair and balanced manner as a UN organ operating separately from the UN peacekeeping mission. Further, the Committee on the Rights of the Child has the competence to do on-site inquiries into systemic human rights violations against

¹³⁸ *Victim Assistance, CONDUCT IN UN FIELD MISSIONS*, <https://conduct.unmissions.org/remedial-victim-assistance> (last visited Feb. 24, 2018); see also *Paternity Claims, CONDUCT IN UN FIELD MISSIONS*, <https://conduct.unmissions.org/remedial-paternity> (last visited Feb. 24, 2018).

¹³⁹ *Paternity Claims, supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ Update on Allegations of Sexual Exploitation and Abuse in United Nations Peacekeeping Operations and Special Political Missions, U.N. Dep't of Field Support 1, 2 (May 17, 2016), <http://www.un.org/en/peacekeeping/documents/updatesea.pdf>; see also Deschamps, *supra* note 6, at 84 ("The trust fund is not intended to compensate individual victims in the form of reparations, but... assist in the provision of the specialized services victims of sexual violence require.")

children, if CAR permits. CAR may be conciliatory in allowing such on-site UN Committee on the Rights of the Child inquiries into SEA by international peacekeepers deployed in CAR. This as the lack of resolution regarding these cases contributes to and reinforces the breakdown in the rule of law and likely fosters social unrest in the region and distrust of authority generally.

In addition, the UN Committee on the Rights of the Child is well-equipped to do proper follow-up on the overall security situation for peacekeeper SEA child victims in CAR. That includes also those peacekeeper SEA child victims who advanced (in our hypothetical scenario) an admissible CRC-OP3 complaint against the State Party (France). The UN Committee on the Rights of the Child could conceivably also request the UN peacekeeping mission in CAR to provide for special protection of alleged child victims of French peacekeeper SEA through the CRC-OP3 "interim" procedures measures¹⁴² while the Committee on the Rights of the Child inquiries are ongoing, and the complaint is being considered.

6.2.2 African Charter on the Rights and Welfare of the Child (ACRWC)

Child victims abused and/or exploited sexually by international peacekeepers who are nationals of a State Party to the African Charter on the Rights and Welfare of the Child (ACRWC),¹⁴³ could potentially file a complaint with the body¹⁴⁴ implementing that children's rights treaty (also here referred to as the 'African Children's Charter'). These child victims could thus seek a remedy through this quasi-judicial process. However, the committee that implements the African Children's Charter - just as with the committee that oversees CRC-OP3 complaints - has no enforcement power. There is instead reliance on the State Party to comply with the judgment of the treaty monitoring body and provide the remedy determined by the monitoring committee to be just.

In certain cases, the Committee implementing the ACRWC can also receive inter-State communications from State Parties and, in some instances also non-State Parties to the African Children's Charter:

ACRWC have both subject matter and territorial jurisdiction on communications filed before it by either States that have *not* ratified the ACRWC *against a state that has ratified* the ACRWC, *victims or any other interested party* once it could be proven that it is in the best interest of the child (emphasis added).¹⁴⁵

As per the rules of procedure of the committee of experts administering the ACRWC then, CAR, which signed the African Children's Charter April 2, 2003 but did not ratify the Charter¹⁴⁶ (CAR thus being a non-State Party to the African Children's Charter), could file an inter-State

¹⁴² G.A. Res. 66/138, *supra* note 4, at art. 6.

¹⁴³ See generally OAU Doc. CAB/LEG/24.9/49, African Charter on the Rights and Welfare of the Child (1990).

¹⁴⁴ *African Committee of Experts on the Rights and Welfare of the Child*, INST. FOR HUM. RTS. & DEV. IN AFR., <http://www.ihrda.org/2012/10/african-committee-of-experts-on-the-rights-and-welfare-of-the-child-acerwc/> (last visited Dec. 30, 2016).

¹⁴⁵ *African Committee of Experts on the Rights and Welfare of the Child*, *supra* note 143.

¹⁴⁶ *Ratification Table: African Charter on the Rights and Welfare of the Child*, AFRICAN COMM'N ON HUM. AND PEOPLES' RTS., <http://www.achpr.org/instruments/child/ratification> (last visited May 18, 2018).

communication against a State Party to the ACRWC whose nationals, while on a UN peacekeeping mission, committed SEA against CAR children. For instance, SEA allegations have been made against international peacekeepers from Burundi and Gabon concerning child victims in CAR. Both of these States have ratified the ACRWC¹⁴⁷; Burundi ratified the ACRWC on June 28, 2004, and Gabon on May 18, 2007. Thus, under the ACRWC, inter-State complaints advanced by CAR, a non-State Party to the African Children's Charter, against Burundi and Gabon for the latter two States failing to prevent SEA of CAR children by their respective peacekeeper nationals and/or failing to hold these peacekeepers accountable through criminal prosecution is permissible.

In addition, under the ACRWC, the Committee administering the ACRWC can accept collective complaints that include child victims not yet identified by name. This affords the possibility of justice to a broader group of child victims of international peacekeeper SEA where there is an admissible and viable complaint under the ACRWC. In the aforementioned scenario, it would be the child victims themselves, likely through an NGO, who would advance the complaint under the African Children's Charter against a State Party to the ACRWC.

As previously here mentioned, the UN Security Council extended the UN peacekeeping mission in CAR to November 15, 2018.¹⁴⁸ This as the situation in CAR remains unstable and is considered a threat to international peace and security. At the same time, there is both persistent (i) inadequate protection for children in CAR against sexual exploitation and abuse by international peacekeepers or by others taking advantage of the precarious situation; and (ii) continuing widespread impunity for international peacekeeper and other perpetrators in this regard.

7. Prosecution Before the International Criminal Court (ICC)

The UN Security Council can refer situations to the International Criminal Court (ICC) involving alleged potential Rome Statute crimes having occurred or persisting in the territory of either State or non-State parties to the Rome Statute. The situation in the Central African Republic was, however, actually referred by CAR itself to the ICC in May 2014 with the ICC investigation beginning in September 2014 (CAR ratified the Rome Statute, the enabling statute of the ICC, on October 3, 2001).¹⁴⁹ To date no ICC indictments have been forthcoming against nationals of troop contributing countries for SEA of children in CAR while those troops were participating in UN peacekeeping in CAR.¹⁵⁰ The latter being the case even where the home States of those nationals have not investigated and/or prosecuted these international peacekeeper alleged perpetrators of SEA against children in CAR.

While some of these alleged peacekeeper SEA crimes against children and others may represent a systematic pattern of crimes amounting to crimes against humanity, they may also be indicators of an organized pattern of war crimes by certain segments within larger troop

¹⁴⁷ *'Sickening' sex abuse alleged in CAR by UN peacekeepers*, *supra* note 92.

¹⁴⁸ UN News, *supra* note 57.

¹⁴⁹ CAR's Status as a State Party to the Rome Statute (the enabling statute of the International Criminal Court), https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/central%20african%20republic.aspx (last visited Jan. 28, 2018).

¹⁵⁰ *Situations under Investigation*, ICC, <https://www.icc-cpi.int/pages/situations.aspx> (last visited Jan. 28, 2017); *see also* Central African Republic, ICC-01/05, <https://www.icc-cpi.int/car> (last visited Feb. 24, 2018).

contingents, rather than being isolated instances of war crimes as in CAR though, of course, SEA of civilians is not condoned by the troop contributing States.

Insofar as UN personnel who are covered by the Convention on the Privileges and Immunities of the United Nations¹⁵¹ are concerned, the UN has an obligation to waive immunity, per Article 19 of its agreement with the ICC where justice demands:

Article 19

Rules concerning United Nations privileges and immunities

If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court ... the United Nations undertakes... to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law.¹⁵²

Whether such a waiver by the UN would occur in practice in cases in which the ICC seeks to prosecute UN peacekeepers normally covered by the 'Convention on the Privileges and Immunities of the United Nations'¹⁵³ (UN- designated Experts and Officials on mission) is a pressing empirical question that remains unanswered.

Were the ICC to address such international peacekeeper sex-related international crimes; children would potentially have the opportunity to participate as victim witnesses, or as child victim participants, the latter with party status. Further, the ICC Prosecutor is required, under certain Articles of the Rome Statute to consider the interests of victims of Rome Statute-defined crimes in the initiation and conduct of a prosecution.¹⁵⁴ Article 53(1)(c) of the Rome Statute allows the ICC Prosecutor to decline to do an investigation of a case, for instance, where such would put the victims at grave risk and there is no possibility for the ICC to arrange for adequate protection:

Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.¹⁵⁵

Article 54(1)(b) of the Rome Statute requires the ICC Prosecutor, in considering the interests of a victim, to factor in the age of the victim.¹⁵⁶ This provision also requires the ICC Prosecutor in fulfilling his or her prosecutorial duties to pay special attention to the needs and best interests of child victims of sexual violence and gendered sexual violence:

The Prosecutor shall:

¹⁵¹ 33 U.N.T.S. 261, *supra* note 9, at IV-VI.

¹⁵² Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC, art. 19 (2004) [hereinafter Negotiated Relationship Agreement].

¹⁵³ 33 U.N.T.S. 261, *supra* note 9, at IV-VI.

¹⁵⁴ *See generally*, U.N. Doc. A/CONF.183/9, Rome Statute of the International Criminal Court (July 17, 1998).

¹⁵⁵ *Id.* at art. 53(1)(c).

¹⁵⁶ *Id.* at art. 54(1)(b).

- (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, *respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children;* and
- (c) Fully respect the rights of persons arising under this Statute.¹⁵⁷

While there are complicated jurisdictional issues regarding prosecution before the ICC of international peacekeepers for SEA, this avenue may still be a possibility in the proper case.¹⁵⁸

Next, we consider the value of an alternate forum for justice, namely a Special Criminal Court located in the country where the peacekeeper SEA crimes occurred during UN peacekeeping operations.

8. A Special Criminal Court

8.1 A Special Hybrid Criminal Court Within the National System

There is great value in the idea of establishing a Special Criminal Court to address, among other crimes, sexual exploitation and abuse and additional atrocities committed by international military peacekeepers and UN personnel, as well as by others against children and other victims. The previous UN Secretary-General Ban Ki-moon recommended that a special court be established to address prosecution of international peacekeeper perpetrators of SEA against civilians and others while participating in UN peacekeeping operations:

As widespread impunity continues to prevail for perpetrators of grave violations against children, I urge the Central African Republic authorities to take immediate steps to ensure accountability. I call upon the national authorities to strengthen the country's justice system and end the culture of impunity, including through the establishment and operationalization of the Special Criminal Court. I appeal to donors to provide financial and technical support to the authorities in this regard.¹⁵⁹

¹⁵⁷ U.N. Doc. A/CONF.183/9, *supra* note 155, at art. 51(b)-(c).

¹⁵⁸ See Melanie O'Brien, *Protectors on trial? Prosecuting Peacekeepers for War Crimes and Crimes Against Humanity in the International Criminal Court*, 40 INT'L J. OF L. CRIME & JUST. 223, 241 (2012). Note that the UN Security Council can pass resolutions (as it has done), operative for a specified time period, shielding from ICC prosecution certain international peacekeepers from States that are *not* a party to the Rome Statute, for SEA or other potential Rome Statute crimes perpetrated while on a UN peacekeeping mission. See, e.g., *UN peacekeepers exempted from war crimes prosecution for another year*, UN NEWS (June 12, 2003) <https://news.un.org/en/story/2003/06/71102-un-peacekeepers-exempted-war-crimes-prosecution-another-year>.

¹⁵⁹ U.N. Secretary-General, *Report of the Secretary-General on children and armed conflict in the Central African Republic*, ¶ 68, U.N. Doc. S/2016/133 (Feb. 12, 2016).

Where a State fails to prosecute their responsible international peacekeeper troop and other allied personnel SEA perpetrators once repatriated or before, it should be open to the Special Criminal Court (or potentially the ICC) to have jurisdiction in accord with the respective court's enabling statute. Further, host-country immunity should no longer apply in those cases where the TCC fails to hold its nationals accountable for SEA perpetrated as international peacekeepers.

In the same vein, UN personnel normally covered by UN immunity and privileges under the UN Convention on Immunities and Privileges¹⁶⁰ should not be so covered in terms of criminal or civil liability regarding SEA crimes or other human rights violations they have perpetrated as international peacekeepers against the very vulnerable persons they were charged to protect and serve. Such conduct *cannot* be considered as unforeseen, unavoidable, accidental or otherwise a purported inevitable collateral consequence of UN peacekeeping operations for which UN personnel are not to be held accountable. That lack of accountability is falsely premised on the proposition that such liability risks would *allegedly* hinder the operational needs of the UN peacekeeping mission. The proper legal interpretation of the UN Immunities and Privileges Convention, it is here contended, does not allow for such a false shield for UN peacekeeper SEA perpetrators who are Experts and Officials on a UN mission.¹⁶¹ Likewise, the UN as a legal entity should be civilly liable for such conduct of UN personnel and military directly under its authority or command.¹⁶²

Narrowing the scope of applicable immunities to preclude impunity for all peacekeeper SEA perpetrated while on UN peacekeeping operations will be realized only if the will of the international community is mobilized in that direction. The Code Blue Campaign is a step in the right direction in attempting to raise public awareness and expose the insupportable underlying reasons regarding the lack of accountability for international peacekeeper SEA of children and others during UN peacekeeping operations.

In June 2015, the Central African Republic adopted a law establishing such a Special Criminal Court within its own national legal system, to be located in CAR and to be staffed by national and international staff and jurists, thus making it a hybrid court, but it has not yet received sufficient international financial aid and logistical support to make the court operational.¹⁶³ Given sufficient funding, the CAR Special Criminal Court would be mandated under its enabling statute to “investigate and prosecute the gravest crimes committed in the country since 2003, including war crimes and crimes against humanity.”¹⁶⁴ It should be noted that peacekeeper SEA is an affront

¹⁶⁰ 33 U.N.T.S. 261, *supra* note 9, at IV-VI.

¹⁶¹ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, *supra* note 151.

¹⁶² Civil lawsuits are a possible vehicle, in some instances, for exposing the inadequate legal grounding of UN immunity in various cases where the UN is responsible for foreseeable and avoidable serious harms to a population. However, there are many obstacles to overcoming the notion of UN immunity as absolute unless waived by the UN itself. See *Cholera Litigation*, INST. FOR JUST. & DEMOCRACY IN HAITI, <http://www.ijdh.org/cholera/cholera-litigation/> (last visited Dec. 30, 2016) (regarding *Georges v. United Nations* and UN responsibility for a cholera outbreak in Haiti).

¹⁶³ *Central African Republic: Support the Special Criminal Court*, HUM. RTS. WATCH (Nov. 16, 2016), <https://www.hrw.org/news/2016/11/16/central-african-republic-support-special-criminal-court>.

¹⁶⁴ *Central African Republic: Progress on Special Court: More Efforts Needed to Get it Operating*, HUM. RTS. WATCH (Dec. 23, 2015), <https://www.hrw.org/news/2015/12/23/central-african-republic-progress-special-court>.

to the conscience and order of the international community and hence accountability through a fair judicial mechanism and process is imperative.

Such special criminal courts as the Special Criminal Court of CAR, for instance, will hopefully be empowered with special expertise to consider sexual exploitation and sexual abuse crimes against children and others, including SEA perpetrated by international peacekeepers. Given the sensitivity and widespread occurrence of SEA, including that committed by international peacekeeper perpetrators against children, proper procedure in presiding over and evaluating such cases must include special attention paid to ensuring the respectful treatment of the SEA victims- whether children or adults- at all stages of the Special Criminal Court judicial process.

The special criminal court could apply a mix of national and international law, as relevant and applicable, addressing the situation in a specific State such as CAR, as is the plan for the CAR Special Criminal Court. Such special criminal courts would most often likely have jurisdiction for a limited duration of time, and over crimes that occurred within a specified-period of time with due consideration also of "continuing violations."¹⁶⁵ Thus, the special criminal court would be able to prosecute international peacekeepers and others for SEA crimes against children or adults where the court has the required jurisdiction and where the international peacekeepers' home state is unable or unwilling to prosecute, or prefers to have the special criminal court address the matter. The domestic courts of the troop contributing country and its military tribunals would not then be over-extended by having to handle large volumes of such international peacekeeper SEA cases and could potentially refer some of the most serious cases to the special criminal court.

A special criminal court may also be able to fill the gap should the crimes committed constitute grave human rights violations, but not satisfy all the elements of the Rome Statute, or not otherwise fall under the jurisdiction of the existing permanent International Criminal Court located in The Hague. Further, where such special criminal courts can feasibly be and are in the territory in which the crimes took place, there is the greater possibility of the SEA child victims participating in the criminal accountability process. However, there may be instances where it is advisable that the special criminal court be located, for all, or just for selected cases, outside the territory in which the crimes took place (i.e. to better ensure security for child and other witnesses or parties during and after the trial, etc.).

Special criminal courts, such as that established for CAR, should, on the view of the current author, allow for both 'child witnesses' and 'child victim participants' (the latter being full parties to the process) as per the ICC model.¹⁶⁶ The latter, it is here respectfully suggested, is more consistent with full respect for children's Convention on the Rights of the Child Article 12 participation rights.¹⁶⁷

8.2 A Special Temporary Criminal Court Outside the National System

¹⁶⁵ See generally Pawelyn, *supra* note 129.

¹⁶⁶ Elisabeth Baumgartner, *Aspects of victim participation in the proceedings of the International Criminal Court*, 90 INT'L REV. OF THE RED CROSS 409, 425 (June 2008). See also ICC, RULES OF PROCEDURE AND EVIDENCE 33-38 (2d ed. 2013); see also Stephen Cody et al., *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court*, HUM. RTS. CTR., U.C. BERKELEY SCH. OF L. 1, 1 (2015).

¹⁶⁷ CRC, *supra* note 5, at art. 12.

A temporary, special, fully international, (or alternatively hybrid) criminal court outside the national system, in some situations, perhaps could better ensure that the children's interests are properly considered and represented, and that the adjudication process is truly fair, impartial, and independent. Such a court could also allow for child victims to participate and depending on the rules of procedure of the special criminal court, allow for "child victim participants" *as parties* to the proceedings.¹⁶⁸ The latter would require safeguards for the children and their families, to ensure that they do not suffer retaliation because of the child's participation in the prosecution as witness or "child victim participant." Various forms of support are required for the child victims at every stage from investigation, to prosecution of the accused and, even in some instances, after the court proceedings are concluded (as reflected for instance in ICC process in handling child victims cooperating with the ICC).¹⁶⁹

9. SUMMARY

The child and other victims of international peacekeeper sexual exploitation and abuse should no longer be treated as if they are, in effect, expected and tolerated "collateral damage" pursuant to UN peacekeeping missions. The "operational necessity" alleged justification for UN immunity of international peacekeepers who are UN staff or UN-designated Experts and Officials on-mission should not be considered applicable in relation to SEA of civilians and others. Rather, the UN's own personnel who engage in SEA of children and others, while on a UN peacekeeping mission, should be precluded from immunity under the UN Convention on Immunities and Privileges.¹⁷⁰ Neither should the nationals of troop contributing countries, whether civilian or military, in practice enjoy freedom from criminal liability for SEA of civilians and others perpetrated while participating in UN peacekeeping operations. Host country immunity should be null and void where the State (the TCC) concerned is unable or unwilling to hold its international peacekeeper nationals to account for such SEA related grave human rights violations. Further, it is here suggested that the international peacekeeper nationals of TCCs who perpetrate SEA of children and others while participating in UN peacekeeping operations should be subject to the risk of universal jurisdiction for prosecution of their crimes when their home State is unwilling or unable to properly investigate and, where warranted, prosecute.

Holding international peacekeeper SEA perpetrators accountable through various international law mechanisms would not undermine the UN's objectives as set out in the UN Charter Purposes.¹⁷¹ The purpose of the UN is, in large part, to secure peace and security based on a foundation of respect for every human person, including children. In fact, it would strengthen significantly the rule of international law, and thus contribute to stability, were the UN truly a shield against atrocity, no matter the vulnerability and lack of political power of the potential victims, a good proportion of whom are children. As has been discussed in this paper, that is

¹⁶⁸ "Child victim participants" as parties before the International Criminal Court ("ICC") can make representations to the court through their own counsel *separately* from the prosecution or defence, and their counsel are permitted to cross-examine witnesses. RULES OF PROCEDURE AND EVIDENCE, *supra* note 165.

¹⁶⁹ See generally *Policy on Children*, ICC 1 (Nov. 2016).

¹⁷⁰ 33 U.N.T.S. 261, *supra* note 9, at IV-VI.

¹⁷¹ U.N. Charter art. 1, ¶ 1-3.

currently not the case regarding peacekeeper SEA of children committed while the perpetrator participated in a UN peacekeeping operation.

The UN Charter preamble states that one of the objectives of the UN is “to save succeeding generations from the scourge of war.”¹⁷² That objective, on the analysis here, however, encompasses more than simply the obligation, for instance, of the international community to protect children, by various means, against armed conflict and its associated harms. The duty extends also, on the current author’s view, to that of alleviating the suffering of child victims post conflict. The latter necessitates, amongst other things, that child victims of SEA by international peacekeepers, amongst other victims of conflict, receive justice. That justice translates, furthermore, not only into peacekeeper SEA perpetrators being held accountable for their crimes, but also the child SEA victims being afforded, as rights holders with dignity and independent legal personality, and where in their best interests, the opportunity to meaningfully participate in the pursuit of that justice at every stage.

¹⁷² U.N. Charter at preamble.