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**ENSURING ACCOUNTABILITY OF PEACEKEEPING PERSONNEL FOR
HUMAN RIGHTS VIOLATIONS**

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Introduction

A major function of the United Nations (UN) is the deployment of peacekeeping forces around the world.¹ The complicated missions of peacekeepers depend heavily on the support of both the international community and the local population. Recent sexual abuse scandals have undermined the legitimacy of these missions and raised concerns about holding peacekeeping personnel to account.² Although there are no peremptory or international criminal norms prohibiting such conduct, individual peacekeepers may still be held criminally and civilly liable. Peacekeepers may still be violating the human rights of their victims, if non-state actors can be said to be violators of human rights.³ This paper will argue that in light of the current absence of clear mechanisms for accountability, the lack of clear international criminal status for abuse, and the concerns about protecting due process rights that underlie the system of immunities for UN personnel, the best way to ensure that victims are compensated and to bolster UN legitimacy is to create a UN-administered compensation mechanism which draws on complaints systems and cooperation between various UN agencies.

¹ In October 2006, 80,976 troops and military personnel and 15,000 civilians were serving in eighteen UN missions. Press Release, Department of Peacekeeping Operations, United Nations Military, Police Department Reaches All-Time High in October, U.N. Doc. PKO/152 (Nov. 10, 2006). The numbers continued to climb through the end of 2006. Department of Peacekeeping Operations, Uniformed Personnel in U.N. Peacekeeping: 1991-2006, U.N. Doc. DPI/2444 (Nov. 10, 2006).

² For further discussion of the scandal in the Democratic Republic of the Congo in particular, and the response of the U.S. Congress to failures to prosecute, see generally Susan A. Notar, Note, *Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo*, 14 Am. U.J. Gender Soc. Pol'y & L. 413 (2006).

³ Some commentators have assumed that human rights and international humanitarian law are aimed only at governments and quasi-governments. Chanaka Wikremasinghe & Guglielmo Verdirame, *Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 466 (Craig Scott, ed.)(2001). I elide such questions by assuming that non-state actors can commit human rights violations.

Despite an official ‘zero tolerance’ policy and a commitment to international humanitarian law and international human rights, stories of exploitation by peacekeeping troops and personnel continue to surface.⁴ From 2004 to 2006, the UN investigated 319 individual peacekeepers for sexual abuse and disciplined 179 soldiers, civilians, and police.⁵ Most recently, BBC investigators uncovered allegations of an assault on a fifteen-year-old girl in Liberia and of a number of assaults in Haiti.⁶ The UN also confined an entire contingent in the Ivory Coast to barracks following a number of sexual abuse allegations lodged over the past three years.⁷ The apparent lack of recourse for victims undercuts the legitimacy of UN efforts.

The question of legitimacy becomes one of efficacy for the UN in situations where missions are attempting to rebuild post-conflict societies and depend on the support of donors as well as of the local population. UN officials recognize that individual criminal acts have an effect on the ability of the UN to carry out its missions. The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, stated

⁴ *UN Troops Face Child Abuse Claims*, BBC News, <http://news.bbc.co.uk/1/hi/world/americas/6195830.stm>. Investigators and reporters continue to find a “wall of silence” and a “culture of dismissiveness”. Warren Hoge, *Report Finds U.N. Isn’t Moving to End Sex Abuse by Peacekeepers*, N.Y. TIMES, Oct. 19, 2005, at A5. No peacekeepers were prosecuted for acts of trafficking in Bosnia which may have constituted enslavement under international law. Jennifer Murray, Note: *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUM. RTS. L. REV. 475, 505 (quoting The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?: Hearing Before the Subcomm’n on Int’l Operations and Human Rights of the House Comm. On Int’l Relations, 107th Cong. 23 (2002), <http://www.internationalrelations.house.gov/archives/107/78948.pdf> (testimony of Martina Vandenberg, Human Rights Watch) (“United Nations Bosnia Mission Officials admitted that repatriation served as the only punishment for involvement in trafficking-related misconduct.”)).

⁵ *Peacekeeper sins tallied*, WINNIPEG SUN (Manitoba), Dec. 1, 2006, at 16.

⁶ *UN Troops Face Child Abuse Claims*, *supra* note 4.

⁷ Peter Murphy, *U.N. Suspends Moroccan Contingent in Ivory Coast*, REUTERS, <http://uk.reuters.com/article/worldNews/idUKN2130165820070721>.

that “[t]he United Nations will [lose] . . . its moral force if it fails to respond when those within the United Nations system violate human rights.”⁸ The work of peacekeepers and peacebuilders needs moral force to retain local support. In addition, the presences of a system which does not subject international forces and advisers to any known standards of law may undermine a country’s transition to democratic self-government through hindering the development of a culture of the rule of law. As UN Secretary General Kofi Annan said, “if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law.”⁹ Lack of accountability may also undermine the reputation of the UN as a whole and its leaders, particularly in countries with strong anti-internationalist factions.¹⁰ A comprehensive response which provides victims clear remedies will further the objectives of the UN.

The Group of Legal Experts, convened by the General Assembly to examine accountability for criminal acts, has recognized a right to due process that must be respected when dealing with UN personnel. All personnel have a right to fair trial and fair investigatory procedures, and there is debate over what criminal law applies to

⁸ The Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, ¶ 59, delivered to U.N. ESCOR, Comm'n on Hum. Rts., 56th Sess., P 1, U.N. Doc. E/CN.4/2000/68 (2000)*(“The Special Rapporteur is particularly concerned by reports of United Nations peacekeepers involvement in violence against women and calls on the United Nations to take measures to prevent such violence and to punish it when it arises.”).

⁹ The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies: Report of the Secretary General, ¶ 33, delivered to the Security Council, U.N. Doc S/2004/616 (Aug. 23, 2004)*.

¹⁰ The abuse scandals were used to denounce Annan in a spate of North American editorials at the time of the election of the new Secretary-General. See, e.g., *The U.N.: A Promise Never Fulfilled*, INVESTOR’S BUSINESS DAILY, Sept. 18, 2006, at A14; *A new chance*, ORLANDO SENTINEL (FLORIDA), Oct. 9, 2006, at A16; Salim Mansur, *UN Has Become a Charade; Departure of Incompetent Kofi Annan Offers Opportunity to Shake Things Up*, CALGARY SUN (ALBERTA), Dec. 2, 2006, at 15.

international personnel.¹¹ At the same time, there is little official recognition of a corresponding right of the victim to file a complaint and to have his or her complaint examined fairly, although the Group makes a number of suggestions for improving criminal accountability. The UN system must go beyond what the Legal Experts suggest to recognize its own legal and moral responsibilities for acts committed by its employees.

This Paper will focus on the same group of people that the Group of Legal Experts targeted: “peacekeeping personnel”, rather than deal with the more murky responsibility for troops acting under the UN banner. Such troops are often subject to very little if any control by the UN,¹² raising difficult questions for the responsibility of the UN toward violators. The term “peacekeeping personnel” encompasses officials of the United Nations—United Nations staff and United Nations Volunteers—and experts performing missions—United Nations police, military observers, military advisers, military liaison officers and consultants.¹³ Peacekeeping personnel operate as employees of the UN, and are subject to both functional immunities under the Privileges and Immunities Convention and more broad immunities under specific agreements with host states. As peacekeeping personnel are directly under the command of the UN, their behavior reflects most strongly on the organization. Perceived impunity around

¹¹ Group of Legal Experts, *Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations*, Terms of Reference, ¶ 4, U.N. Doc A/60/980 (Aug. 16, 2006); *see also id.* at ¶ 30 (discussing duty of UN to assure that perpetrators face legal system meeting international human rights standards).

¹² *See* Wikremasinghe & Verdirame, *supra* note 3, at 469 (“Where the Security Council has had to resort to direct delegation of enforcement powers . . . the UN has in practice retained little control over the command and control of the operation.”).

¹³ Group of Legal Experts, *supra* note 11, ¶ 7. Of 296 complaints in 2005, 84 were lodged against civilians and 19 against police, both of which fall into the category of peacekeeping personnel. Jean-Marie Guéhenno, Under-Secretary General for Peacekeeping Operations, Presentation to the Security Council: Remarks on Peacekeeping Procurement and Sexual Exploitation and Abuse by Peacekeepers (Feb. 23, 2006), available at <http://www.un.org/Depts/dpko/dpko/articles/article230206.htm>.

individual criminal liability and a lack of financial compensation or redress for criminal actions of peacekeeping personnel undermine the credibility of the UN. This paper will argue that the current UN response falls short if it does not include a civil remedy, and will discuss the possibility of a new claims mechanism to address victims' need for compensation.

Part I will discuss the current legal regime governing penalties for sexual abuse committed by peacekeeping personnel, explaining the gaps resulting both from immunity and from ongoing state practice. Part II will evaluate the current UN response to acts of abuse committed by peacekeeping personnel, focusing on ex post measures aiming to minimize violations. Part III will explore potential remedies for the victim of a rights violation, and argues for a compensation mechanism, examining various methods the UN uses to provide compensation and address individual complaints in other contexts.

I. Current Structure of Civil and Criminal Liability

Although criminal acts by peacekeepers may arguably be said to violate international human rights law through violating an individual's right to life or right to bodily integrity, international law does not provide universal jurisdiction in these situations. Individual sexual abuses by peacekeepers are not considered crimes violating peremptory norms, and peacekeepers are currently protected by Status-of-Forces Agreements giving them significant immunities within the country of the mission.¹⁴ Feminist commentators have argued that sexual abuse and trafficking should fall within peremptory norms of torture and slavery; yet if not part of a widespread and systematic

¹⁴ See *infra* Part I. B.

attack, isolated instances of abuse and exploitation may fail to rise to the level of crimes against humanity.¹⁵ In order to ensure legitimacy, the UN system must be poised to engage with each incident, whether or not the incident rises to the level of an international crime, as abuse by peacekeeping personnel is “no ordinary crime” and violates a “fundamental duty of care.”¹⁶

A. WHAT IS THE INTERNATIONAL CRIMINAL STATUS OF SEXUAL ABUSE BY CIVILIAN PEACEKEEPERS?

International criminal law does not address rape and sexual abuse committed by peacekeepers against those they are supposed to be protecting, although it occurs at the hands of officials with a special duty of care and inflicts suffering and bodily harm on the victim, violating their right to bodily integrity. Abuse does not necessarily rise to the level of torture and would not necessarily satisfy the ‘widespread and systematic attack’ component of international criminal tribunals. If such violations infringed on *jus cogens* norms, they would be subject to universal jurisdiction.¹⁷ This section demonstrates that the crimes do not rise to levels allowing for universal jurisdiction; it is thus imperative that the UN act to fill in gaps in liability.

Under a traditional analysis of torture, such crimes are not included. There is a strong “color of law” requirement which definitionally limits torture to acts of those

¹⁵ See *infra* Part II A.

¹⁶ See *infra* notes 76–79 and accompanying text.

¹⁷ In the United States, for example, violations of peremptory norms are judiciable under the Alien Tort Claims Act, but judicial recognition is limited to norms with a high level of specificity and general consensus. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (“[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”).

acting in an “official” capacity or with the consent or acquiescence of officials.¹⁸ This requirement may preclude the claim that sexual abuse constitutes torture when it is undertaken for personal motives and not as part of a widespread, systematic violation.¹⁹ Such requirements may be easier to meet in the case of a transitional administration like the United Nations Mission in Kosovo (UNMIK, or the Kosovo Mission) than in the more usual context of police and advisers sent to prevent conflict or provide technical support. As the UN system must be prepared to address those who engage in sexual abuse for personal motives rather than as part of their official duty, relying on a *jus cogens* definition of torture will probably not be helpful in the context of the majority of scandals that the UN faces.²⁰

Hilary Charlesworth and Christine Chinkin argue that the prohibition of rape and other forms of sexual abuse in times of war should be included among the *jus cogens* norms, and that the male gender of most of the major players in international law is the only reason that they are not generally listed as peremptory norms.²¹ In recent years, rape and sexual abuse are increasingly recognized as crimes against humanity by

¹⁸ Under the Convention Against Torture, Art. 1, torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Art. 1, Dec. 10, 1984, A/RES/39/46.

¹⁹ Rawski notes that officials have generally agreed to waive immunity in such cases. Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 118 (2002).

²⁰ For information about the majority of scandals the UN faces, see *supra* note 4.

²¹ HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 120, 218–19, 234 (2000).

international criminal tribunals.²² Nonetheless, recognition of sexual abuse as a war crime or a crime against humanity generally requires that the act be part of a widespread or systematic attack against a population, rather than an isolated incident.

The constituting Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) contains the broadest definition of when rape can be considered a crime against humanity. It includes any rape “committed in armed conflict” and “directed against any civilian population.”²³ To be a crime against humanity, the crime must have a nexus to the armed conflict, and it does not matter if the crime was for purely personal motives.²⁴ Even under the ICTY test, the post-conflict peacebuilding setting of missions will often not constitute an “armed conflict” for international criminal purposes.

Later tribunals took a more narrow approach to context while including a wider definition of sexual abuse. The Rome statute and the ICTR statute both stipulate that a crime against humanity must be “committed as part of a widespread or systematic attack . . . with knowledge of the attack.”²⁵ UN peacekeepers who intentionally traffic women, as in Bosnia, may knowingly be part of a widespread or systematic attack on civilians.²⁶ They may additionally be violating a *jus cogens* norm against slavery.²⁷ Nonetheless, in

²² See, e.g., Prosecutor v. Akayesu, Trial Chamber, International Criminal Tribunal for Rwanda, 1998 Case No. ICTR-96-4-T, ¶ 731, <http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (“With regard, particularly to... rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide”).

²³ Statute of the International Tribunal for the Former Yugoslavia, 14 HUM. RTS. L.J. 211, Art. 5 (1993).

²⁴ Prosecutor v. Tadic, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-AR72, Part. VI.A.1.

²⁵ Rome Statute of the International Criminal Court, Art. 7, 37 I.L.M. 999, 1004 (1998); see also Statute of the International Tribunal For Rwanda, Art. 3, 33 I.L.M. 1590 (1994).

²⁶ Murray, *supra* note 4, at 512.

²⁷ *Id.* at 499–500.

crafting a general system which corresponds to all sexual abuse by peacekeepers, UN officials cannot assume that all such crimes will fall into the category of crimes against humanity.

The Group of Legal Experts does not go so far as to label abuse by peacekeeping personnel a war crime or crime against humanity.²⁸ It does, however, emphasize that such crimes are “no ordinary crime.”²⁹ It notes the “special responsibility” which peacekeepers have toward the populations they are serving.³⁰ The Secretary General likewise emphasizes that “such abhorrent acts are a violation of the fundamental duty of care that all United Nations peacekeeping personnel owe to the local population that they are sent to serve.”³¹

The absence of preemptory or international criminal norms against such conduct does not remove the possibility of criminal and civil liability of individual peacekeepers. Peacekeepers may still be violating the human rights of their victims, if non-state actors can be said to be violators of human rights.³² Commentators have derived a right to bodily integrity from the Universal Declaration of Human Rights right to “life, liberty, and security of person” and the International Covenant on Civil and Political Rights

²⁸ Group of Legal Experts, *supra* note 11, ¶ 54.

²⁹ *Id.* at ¶ 55.

³⁰ *Id.*

³¹ The Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations In All Their Aspects, delivered to the General Assembly*, U.N. Doc A/59/710 (Mar. 24, 2005) [hereinafter Zeid Report], introductory letter by Kofi Annan, at 1.

³² Some commentators have assumed that human rights and international humanitarian law are aimed only at governments and quasi-governments. Wickremasinghe & Verdirame, *supra* note 3, at 466. I elide such questions by assuming that non-state actors can commit human rights violations.

(ICCPR) right to life.³³ The fact that such a violation does not rise to the level of *jus cogens* norms generating universal jurisdiction, and probably will not fall under the rubric of international criminal law, means that the UN must take positive steps to ensure that victims have a forum in which to file complaints and bring claims.

B. IMMUNITIES OF INDIVIDUAL PEACEKEEPERS

The current structure of immunities creates gaps in liability and adds to the climate of impunity. Although international human rights law is here relying on domestic legal systems for enforcement,³⁴ functional immunities attach to UN personnel while on mission.³⁵ Even when alleged violations fall outside a peacekeeper's given function, domestic courts on the ground may expect a waiver of immunity before a suit can be brought.³⁶

The International Court of Justice (ICJ) has held that the Secretary-General has a pivotal role to play in determining whether immunity attaches.³⁷ The power of the

³³ See, e.g., Dorothy Q. Thomas and Michele E. Beasley, *Symposium on Reconceptualizing Violence Against Women By Intimate Partners: Critical Issue: Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, n.28 and accompanying text (citing Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948), Art. 3; International Covenant on Civil and Political Rights, Art. 2, para. 1, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), Art. 6). Even if there is no concrete, treaty-based or customary hook for the instinct that sexual abuse is a severe violation of a person's human rights, the political context indicates that the UN should treat such a widespread instinct against sexual abuse as a serious component of international law.

³⁴ See *supra* Part I.A.

³⁵ See, e.g., Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 4 (Dec. 15); Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 6 [Hereinafter *Cumaraswamy*] (finding that Special Rapporteur could not be sued for slander on the basis of an interview given in his capacity as Special Rapporteur).

³⁶ See *infra* note 44 and accompanying text.

³⁷ *Cumaraswamy*, *supra* note 35, at ¶ 50 ("The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required."). Members of a military force have the official quality of their act determined by the Commander of their force. Wickremasinghe & Verdirame, *supra* note 3, at 482.

Secretary-General to deny waiver in the face of a serious crime thus hinges on the question of whether a human rights violation can constitute an official act of the UN or whether the protection of a violator can be functionally necessary for the operation of the UN.³⁸ The Secretary General may have even less power to deny waiver where countervailing human rights norms of due process do not apply as strongly. Under Sections 20 and 23 of the Immunities Convention, the Secretary General is under a duty to waive immunity when “in his opinion, failure to do so would impede justice without prejudicing the interests of the UN”.³⁹ In the case of human rights violations by individual peacekeepers, waiving immunity with regard to criminal and civil liability for serious crimes where due process protections exist would actually further the interests of the UN.⁴⁰ In addition, as discussed below, due process protections for civil liability can take place at the level of enforcement.

If functional immunity attaches only to official acts,⁴¹ functional immunity may not attach to any human rights violations. Commentators have argued that no waiver is necessary in the context of sexual abuse and other serious violations by individual peacekeepers.⁴² If the UN is considered liable for violations committed by peacekeeping

³⁸ See *supra* Part II.A; see also *infra* Part III.A.

³⁹ Rawski, *supra* note 19, at 114 (citing Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT’L L. 53, 94 (1995) (stating that only functional necessity can allow waiver to impede international human rights norms)).

⁴⁰ See *supra* Introduction.

⁴¹ Wickremasinghe and Verdirame argue that such a rule applies in the civil context. Wickremasinghe & Verdirame, *supra* note 3, at 482.

⁴² *Id.* (“[I]n principle the non-official acts of members of the force will be subject to the civil jurisdiction of the host State.”).

personnel in the course of official acts,⁴³ that may become strong pressure to determine that acts were unofficial and thus subject to local legal processes.

The ICJ has not yet found, however, that there is a customary international law ‘exception’ to jurisdictional immunity for gross human rights violations; nor is it clear that the crimes committed by peacekeeping personnel would rise to that level.⁴⁴ Whether or not human rights violations can fall within functional immunity, Status of Forces Agreements and Memorandums of Understanding with host states often give peacekeeping personnel increased immunities, so that all personnel deployed in the country must have a determination by the UN to waive immunity before being charged with a crime or subjected to a civil lawsuit.⁴⁵

The Group of Legal Experts has created a Draft Convention to ensure that states exercise criminal jurisdiction over their own nationals, but has purposely avoided altering the structure of immunities.⁴⁶ Under the Draft Convention, criminal jurisdiction shall be exercised by the country of nationality of the perpetrator or by the host State.⁴⁷ The Draft Convention is extremely concerned with protecting the due process rights of the perpetrator.⁴⁸ For criminal liability, the Draft Convention may provide the best

⁴³ *Id.* (“In relation to claims for compensation by private parties for damage arising out of official acts of members of the force, the UN has recognized that its own responsibility is engaged.”); *see also infra* notes 103–04 and accompanying text.

⁴⁴ Rawski, *supra* note 19, at 113 (citing *Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 121, para. 52 (Feb. 14), http://www.icj-cij.org/icjwww/idocket/icoBE/icobejudgment/icobe_judgment_20020214.PDF).

⁴⁵ Rawski, *supra* note 19, at 108–09.

⁴⁶ Group of Legal Experts, *supra* note 11, ¶ 68.

⁴⁷ Group of Legal Experts, *supra* note 11, Annex III, Draft Convention, Art. 4 (1).

⁴⁸ *See supra* note 11 and accompanying text.

framework to address due process concerns; yet it does nothing to provide for compensation of victims.

Due process protections may be stronger in the case of civil liability than criminal liability, due to the fact that an action will have to be brought to enforce the judgment in the place where assets are held, and thus a second layer of review will be mandatory.⁴⁹ Without countervailing considerations of due process, a waiver of civil immunity may be required by international law in the face of violations of the right to bodily integrity. Yet there is also the question of whether victims will have adequate access to courts in war-torn, impoverished situations. The creation of a compensation mechanism will resolve the issues of immunity and jurisdiction by creating an alternate administrative remedy in cases where victims cannot get a judgment enforced or where courts in the country are not functioning properly.

II. The Current UN Response to Human Rights Violations By Peacekeeping Personnel

A. ACTIONS TAKEN BY THE UN

The UN has responded to problems with peacekeeping personnel through gender mainstreaming⁵⁰ in decisionmaking and through including gender units with teams of

⁴⁹ Courts generally take due process concerns into account when deciding whether to enforce judgments. See generally John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695 (discussing different approaches to enforcement internationally).

⁵⁰ Gender mainstreaming refers to the attempt by UN personnel and committees to integrate talk of gender and evaluation of the disparate impacts of decisions into mainstream decisionmaking. The website of the Office explains, See Gender Mainstreaming, Office of the Special Advisor on Gender Issues and the Advancement of Women, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm> (last visited Mar.25, 2007) (“Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities - policy development, research, advocacy/ dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.”).

troops.⁵¹ It has also taken ex post measures on an ad-hoc basis, setting up investigations by the Office of Internal Oversight Services (OIOS) into scandals in the Congo, Liberia, and Haiti, creating Boards of Inquiry under transitional administrations, and setting up specific hotlines and complaints procedures for missions.⁵² The UN response will fail to provide an adequate remedy for abuse by employees unless ex post mechanisms to ensure financial compensation are included.

In October 2005, the UN Secretary General issued a plan designed only for ex ante prevention: increasing women's participation and gender mainstreaming.⁵³ The most specific and useful recommendation is that the DPKO assign fulltime gender advisers and gender units in peacekeeping operations.⁵⁴ Heads of mission in the field report that pressure has increased to have gender-balanced missions.⁵⁵ Although gender mainstreaming can play an important role in changing the culture of the mission, focusing on this aspect does not ensure good procedures for investigation and accountability.

Accountability requires a comprehensive response with clear recourse for victims, rather than sporadic investigations. To date, the UN has investigated missions on an ad-

⁵¹ See generally, The Secretary-General, *Report of the Secretary-General on Women and Peace and Security, delivered to the Security Council*, U.N. Doc. S/2005/636 (Oct. 10, 2005) [hereinafter *Report on Women and Peace and Security*] (discussing structural changes to protect women's rights).

⁵² The Secretary-General, *Report of the Secretary-General on Measures to Strengthen Accountability at the United Nations, delivered to the General Assembly*, ¶ 48, U.N. Doc A/60/312 (Aug. 30, 2005) [hereinafter *Report on Accountability*].

⁵³ See generally, *Report on Women and Peace and Security*, supra note 51 (outlining various measures to increase women's participation and consideration of women's rights within the UN).

⁵⁴ *Id.* at ¶ 25; see also *id.*, *Annex: System-wide Action Plan for Implementation of Security Council Resolution 1325 (2000)*, 19.

⁵⁵ Gender Links, *Mainstreaming a Gender Perspective in Multidimensional Peacekeeping Operations: South Africa Case Study 18*, available at www.genderlinks.org.za/docs/governance/sa-gender-peacekeeping.pdf.

hoc basis in response to international political pressure, although it is putting a specific Department of Peacekeeping unit into place to handle investigations.⁵⁶ In the context of transitional administrations like the Kosovo Mission, a Board of Inquiry or Ombudsperson offices are generally convened to conduct investigations when allegations have been lodged against specific employees and to make recommendations about immunity.⁵⁷ The OIOS has investigated particular scandals on an ad-hoc basis, particularly in the Congo, Liberia, and more generally UN High Commissioner for Refugees (UNHCR) activities in West Africa.⁵⁸ Such investigations have resulted in a strengthening of the local complaints system.

The MONUC scandal spurred the development of a complaints system; the OIOS implemented a hotline for complaints, an email address for complaints, a model complaint form, and a mailing address for complaint forms.⁵⁹ Although there is no evidence of how successful such complaints procedures were in raising legitimacy within

⁵⁶ Department of Peacekeeping Operations, About the Conduct and Discipline Units *available at* <http://www.un.org/Depts/dpko/CDT/about.html>.

⁵⁷ Rawski, *supra* note 19, at 114–115. The Board is composed of a small number of international staff appointed by a civilian commissioner. The Board then makes a recommendation on waiver of immunity to the Special Representative of the Secretary General (SRSG), who passes such recommendation on to the Secretary General. Ombudsperson offices have also been established at the mission level to resolve claims of abuse; although the Ombudsperson lacks enforcement power, they can similarly make recommendations to the SRSG or to the DPKO. *Id.*

⁵⁸ The Secretary-General, *Seventeenth Report of the Secretary General on the United Nations Organization Mission in the Democratic Republic of the Congo*, ¶¶ 61-69, *delivered to the Security Council*, U.N. Doc. S/2005/167, (Mar. 15, 2005) [hereinafter MONUC Report]. In the case of the Congo scandal, a headquarters-based task force met to address the issue and to work on “improving assistance to victims on the ground.” *Id.* at ¶62. Investigations of the UN Mission in Liberia were similarly handled by the OIOS, and followed up in the Office of Human Resources Management. *Liberia: UNMIL Clarifies Paynesville Shooting*, AFRICA NEWS, Dec. 1, 2006, <http://allafrica.com>. The OIOS also undertook a comprehensive investigation of the sexual exploitation of refugees in West Africa as a region. Office of Internal Oversight Services, *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa*, *delivered to the General Assembly*, U.N. Doc. A/57/465 (Oct. 11, 2002) (focusing only on UNHCR activities).

⁵⁹ Office of Internal Oversight Services, *supra* note 58, at ¶67.

the country, international news outlets included the news that a complaints procedure had been created when reporting on the scandal.⁶⁰ UNMIL also stressed that it had a complaints procedure in place in the face of recent accusations of sexual abuse and a shooting incident.⁶¹ A comprehensive complaints procedure as part of each local mission has been a key part of the UNHCR response to sexual exploitation.⁶²

In the August 2005 Report on Accountability, the Secretary-General instituted improved complaints mechanisms within individual missions, including telephone hotlines and in-person receipt of complaints.⁶³ Missions have a new mandate to ensure that victims are referred to existing emergency assistance.⁶⁴ Nonetheless, a referral “to medical and psychosocial services available in the host country, with costs to be covered from existing mission budgets”, is the only current remedy available to victims.⁶⁵

B. REPORTS ISSUED BY THE UN

Two influential reports have recently been released by the UN: the Report of the Group of Legal Experts⁶⁶ and the Report of Prince Zeid Ra'ad Zeid Al-Husseini, Special Advisor to the UN Secretary General on Sexual Exploitation and Abuse. The Group of

⁶⁰ *UN Troops Cautioned on Sex Abuse*, B.B.C. NEWS, Mar. 3, 2005, <http://news.bbc.co.uk/2/hi/africa/4313617.stm>.

⁶¹ *Liberia: UNMIL Clarifies Paynesville Shooting*, AFRICA NEWS, Dec. 1, 2006, <http://allafrica.com>.

⁶² See *infra* notes 89–94 and accompanying text.

⁶³ Report on Accountability, *supra* note 52, at ¶ 48(a).

⁶⁴ *Id.* See also The Secretary-General, *Comprehensive Report Prepared Pursuant to General Assembly Resolution 59/296 on Sexual Exploitation and Sexual Abuse, Including Policy Development, Implementation, and Full Justification of Proposed Capacity on Personnel Conduct Issues*, ¶¶23–24, delivered to the General Assembly, U.N. Doc. 1/60/862 (May 24, 2006).

⁶⁵ *Id.*

⁶⁶ The General Assembly in Resolution 59/300 authorized the creation of a Group of Legal Experts “to ensure that United Nations staff and experts on mission would never be effectively exempt from the consequences of criminal acts.” Group of Legal Experts, *supra* note 11, at 1.

Legal Experts has focused mainly on ensuring that states exercise jurisdiction over their own nationals, without altering the structure of immunities.⁶⁷ Zeid released a comprehensive report which outlined mechanisms by which to hold violators individually, criminally, and fiscally accountable.⁶⁸ He emphasized the need for UN-wide institutions which would provide organizational responsibility beyond ad-hoc, case-by-case responses and which would provide some form of compensation to victims.⁶⁹

In August of 2006, the Group of Legal Experts issued a report on accountability of UN staff and experts on mission, which focused on clearing up the criminal jurisdiction provisions for civilian UN peacekeeping personnel. Variations in the national laws of each state, particularly with regard to sexual offences, mean that there are no internationally accepted definitions of each crime.⁷⁰ The Group of Legal Experts has recommended a shared exercise of jurisdiction by the host State and other States (for example, the state of nationality of the offender), so that investigatory functions could be carried out by one state and prosecution by another.⁷¹ The UN can play a role by strengthening local capacity and performing administrative investigations in a more

⁶⁷ Group of Legal Experts, *supra* note 11, ¶ 68. See *infra* fns 39–44 (structure of immunities).

⁶⁸ Zeid Report, *supra* note 31.

⁶⁹ Zeid also suggested unifying standards against sexual exploitation and abuse for all peacekeeping personnel. *Id.* at ¶ 94. The UN released these unified rules in December of 2006. See generally, Group of Legal Experts, *Report of the Group of Legal Experts on Making the Standards Contained in the Secretary-General's Bulletin Binding on Contingent Members and Standardizing the Norms of Conduct So That They Are Applicable To All Categories of Peacekeeping Personnel, delivered to the General Assembly*, U.N. Doc 1/61/645 (Dec. 18, 2006)(laying out comprehensive standards and rules for peacekeeping personnel). The new standards provide an important basis for defining abuse; nonetheless, issuing standards is only the first preliminary step in ensuring individual accountability.

⁷⁰ *Id.* at ¶ 19.

⁷¹ *Id.* at ¶ 40-42.

rigorous way, so as to produce evidence that will be admissible in a criminal process.⁷² Zeid agreed that a permanent investigative mechanism should be a top priority.⁷³ The Group's recommendations provide important baseline procedures for investigating abuses, including hybrid criminal tribunals and procedures to determine evidentiary standards, without altering the structure of immunities.⁷⁴

The Zeid Report also emphasized making basic assistance available to victims.⁷⁵ The Secretary General must introduce new expedited procedures for both suspension without pay and potential garnishment of wages to pay child support and other compensation to victims.⁷⁶ Zeid proposed a Voluntary Fund for assistance to victims into which such staff fines and voluntary donations could be paid. The possible structure of a voluntary fund will be discussed further in Part II. As yet, the ex post assistance

⁷² Group of Legal Experts, *supra* note 11, at ¶ 84.

⁷³ *Id.* at ¶¶ 31–32. In the Memorandum of Understanding, the country of nationality should agree that if a Department of Peacekeeping Operations (DPKO) investigation finds evidence that abuse occurred, it will forward the case to its civilian or military authorities to be considered for prosecution, and will report the results of any prosecutorial investigations and decisions to the Secretary General. *Id.* at ¶ 92. Currently, administrative proceedings could result in impunity where the alleged offender is repatriated to a country where he or she will not be prosecuted or extradited. Group of Legal Experts, *supra* note 11, ¶ 84(i). Reporting requirements imposed on countries of nationality could minimize the risk that removing perpetrators from a tense situation would lead to a lack of accountability. Such measures could go a long way towards eliminating impunity, as they would require greater effort and generate greater political pressure on the country of nationality to take affirmative action.

⁷⁴ The Group has recommended that hybrid tribunals be set up to facilitate the exercise of jurisdiction by the host State and avoid problems of due process for peacekeeping personnel. *Id.* at ¶ 33–37. The Group has also recommended that evidence must take into consideration elements of the crime which need to be established and to do so in a manner maintaining a chain of custody and following the evidentiary rules of potentially prosecuting states. *Id.* at 84(f).

⁷⁵ Zeid Report, *supra* note 31, at ¶¶ 52–56.

⁷⁶ *Id.* at ¶ 91. This fund was only one of the measures he aimed at victims. He also suggested that the UN prosecute or court-martial offenders in the host State, where there is more access to witnesses and victims can recognize what is being done, rather than abroad in their country of nationality. *Id.* at ¶ 35.

aspects of the Zeid report have not been implemented, although the DPKO will refer victims to emergency assistance.⁷⁷

The current UN response addresses the problem of peacekeeping personnel abuses by restructuring UN institutions and crafting a new treaty to improve criminal jurisdiction. Out of scandals around MONUC, UNMIL, and UNHCR have come a focus on complaints procedures and recognition that there is currently no real recourse for victims. In response, the UN has improved complaints procedures in all missions, on a local basis. The Group of Legal Experts and Zeid have proposed a shared agency-cooperation model whereby countries will be required to report on the results of investigations and prosecutions, and where the DPKO and OIOS will share the outcomes of their investigations with national institutions. Such improvement of infrastructure and encouragement of cooperation between agencies provides an important basis from which the UN could conceivably provide victims with remedies for violations. With a more rigorous complaints process in place and a Draft Convention providing for criminal trials in the country of nationality, the creation of a compensation mechanism becomes a feasible and compelling option.

III. Providing a Remedy to Victims

In this section I propose two alterations to the current UN system for addressing violations. First, I examine the issues surrounding a blanket waiver of civil immunity: the legal system must be functioning and the mission must not be unduly hindered by such a waiver. Second, I note that in order to ensure that all situations and victims are covered, the UN should have a system in place to adjudicate complaints and provide civil compensation in addition to the minimal remedies already provided by the DPKO. A

⁷⁷ See *supra* notes 24–36 and acc. text.

compensation mechanism will address egalitarian and practical concerns surrounding the waiver.

A. A BLANKET CIVIL IMMUNITY WAIVER FOR SERIOUS CRIMES IS NOT SUFFICIENT

A blanket waiver of civil immunity from legal process in the case of grave breaches of human rights obligations or crimes which are “no ordinary crime” would increase legitimacy of the operation without infringing on the rights of individual peacekeepers. In the case of civil suits, human rights norms of due process and concerns about protecting alleged perpetrators may not attach to the same degree as in the criminal context.⁷⁸ Those found civilly liable in one country have a second layer of protection, as courts in the country where their assets are held will be able to evaluate the process and to choose whether to enforce the judgment.⁷⁹ Although certification of waiver is often formally required by national courts, some commentators think waiver is not even necessary under international law.⁸⁰

The question arises, however, whether a blanket waiver would hinder peacekeeping personnel in the commission of their duties. Frederick Rawski notes that subjecting peacekeepers to local courts could have a “devastating impact on staff recruitment.”⁸¹ The complicated nature of peacekeeping today, where consent to

⁷⁸ See *supra* Part I.B.

⁷⁹ Under Art. 28 of the Draft Hague Convention on the Recognition and Enforcement of Foreign Judgments, states can refuse to recognize judgments if the decision is incompatible with the fundamental principles of the enforcing court, including impartiality and independence, if the judgment was obtained by fraud, or if it is incompatible with the public policy of the enforcing court. Edward C.Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments*, 6 ANN. SURV. INT'L & COMP. L. 13, 22–23.

⁸⁰ Anthony J. Miller, *Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations*, 39 CORNELL INT'L L.J. 71, 87 (2006).

⁸¹ Rawski, *supra* note 19, at 128.

intervention is no longer so unequivocally necessary, creates conditions in which governments may often wish to hinder the activities of international observers in their country.⁸² In cases like Sudan, governments may only consent to an international presence reluctantly, if at all.⁸³ In such situations, sectors of the populace or the government itself could seriously hinder the work of peacebuilding and undermine the legitimacy of the UN through frivolous litigation, if a Secretary-General determination of functional immunity did not stand in the way. In addition, leaving compensation up to a contentious tort system will give better access to victims who have the resources already for such litigation. It might also feature unequal compensation for those who are wronged by relatively wealthy individuals as opposed to those whose rights are violated by individuals without the resources to pay compensation. A claims commission model, on the other hand, could increase equality across victims who have filed complaints.

The UN should implement a default policy of waiving civil immunity for serious crimes and gross human rights violations, while creating an alternative forum for victims to file complaints, such as a compensation commission, for situations in which a waiver might impair the efficacy of the mission or where victims cannot bring suits. Where immunity applies, provision of an alternative forum like a compensation commission can

⁸² See Michael W. Doyle et. al, *Introduction* to KEEPING THE PEACE: MULTIDIMENSIONAL UN OPERATIONS IN CAMBODIA AND EL SALVADOR (Michael W. Doyle, Ian Johnstone & Robert C. Orr, eds., 1997) (discussing shift from traditional peacekeeping to more complex peace enforcement and multidimensional missions).

⁸³ Sudan has consistently refused to admit UN troops, although it now says that it will allow the UN to play a supporting role in an AU-led mission. Warren Hoge, *Bush and Sudan's Leader at Odds Over Sending UN Troops to Calm Darfur*, N.Y. TIMES, Sept. 20, 2006, at A14; *World Briefing; Africa; Darfur Force Extended for Six Months*, N.Y. TIMES, Dec. 1, 2006, at A12; *U.N. Accuses Sudan of Delaying Aid Efforts*, N.Y. TIMES, Nov. 23, 2006, at A4.

be a significant step toward legality and legitimacy.⁸⁴ When the U.N. is currently being attacked for failing to create a culture of accountability,⁸⁵ and the organization itself enjoys immunity from suit in national courts,⁸⁶ it is crucial that the U.N. take affirmative action to demonstrate responsibility for people sent abroad under its command.⁸⁷ A compensation mechanism will demonstrate responsibility and concern at an organizational level, rather than just at the individual level of suits against particular violators.

B. A UN SYSTEM THAT REDRESSES INDIVIDUAL COMPLAINTS THROUGH COMPENSATION

Although financial compensation cannot truly restore a survivor of abuse to his or her former state, it can make a crucial difference to vulnerable populations in a post-conflict or ongoing conflict situation. Prince Zeid notes in his report that “[m]any victims, especially those who have ‘peacekeeper babies’ and who have been abandoned by the fathers, are in a desperate financial situation.”⁸⁸ In addition to child support, compensation can be important for those who have contracted HIV/AIDS and who will

⁸⁴ Rawski, *supra* note 19, at 115 (citing Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121, para. 52 (Feb. 14), http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_judgment_20020214.PDF)). Rawski also notes that the European Court of Human Rights has held that “‘a reasonable alternative means’ of protecting a right is ‘a material factor’ in determining the permissibility of immunity.” *Id.* at 115–16 (citing Waite and Kennedy v. F.R.G. [GC], App. No. 26083/94, Eur. Ct. H.R. 1999-1, para. 68 (1999)). If UN officials want to retain the possibility of denying waiver, they should provide an alternative forum for victims.

⁸⁵ *See supra* note 3.

⁸⁶ *See generally* Ved P. Nanda, *Accountability of International Organizations: Some Observations*, 33 *Denv. J. Int’l L. & Pol’y* 379 (discussing intergovernmental organizations’ immunity from suits).

⁸⁷ As discussed above, peacekeeping personnel are under the command and control of the U.N. *See supra* notes 11–12 and accompanying text.

⁸⁸ Zeid Report, *supra* note 31, ¶ 72.

be in need of long term health care.⁸⁹ Compensation by the UN can also contribute toward building local capacity and development in a war-torn country. It provides not only a useful alternative forum, thus enabling a principled denial of waiver of immunity, but ensures recognition and concern for victims at an organizational, not just individual, level.

The UN has given financial compensation in the past, thus potentially recognizing some form of liability when peacekeeping personnel under its command and control commit illegal acts.⁹⁰ In 1965, the UN paid compensation to the Congo in the face of claims for damage to persons and property.⁹¹ In recent years, the UN has generally considered compensation a responsibility of the state of nationality, at least where troops are not under the control of the UN.⁹² In *Gashi*, however, the Kosovo Mission paid compensation through a Commission on Compensation to Wrongfully Accused/Convicted and/or Detained Persons.⁹³

⁸⁹ For a discussion of HIV/AIDS infection caused by peacekeepers, see Alexandra R. Harrington, *Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing Them in the Future*, 12 ILSA J Int'l & Comp. L. 125, 136–37 (2005).

⁹⁰ August Reinisch, Note and Comment, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 A.J.I.L. 851, 858–859 (calling the exchange an “early important incident” based on “the duty not to harm foreign nationals”) (citing Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals (Feb. 20, 1965), 1965 UN JURID. Y.B. 39).

⁹¹ See also Wickremasinghe & Verdirame, *supra* note 3, at 474 (citing J. Salmon, “Les Accords-Spaak U.Thant du 20 ferrier 1965”, 11 AEDI 468 (1965) (“In a series of global settlements with the victims’ states of nationality, the UN settled claims for excesses committed by ONUC troops against persons and property in Congo.”)).

⁹² Wickremasinghe & Verdirame, *supra* note 3, at 474 (discussing Canadian government’s settlement of claims brought by Somalian victims’ family members). Command and control is, of course, not a problem within our given population of “peacekeeping personnel”. See *supra* note 13 and accompanying text.

⁹³ See *infra* Part III.C.1 for analysis of this case.

Such compensation by the UN for unlawful acts by UN personnel has come on a case-by-case basis which seems largely contingent on international pressure or litigation by the victim's state.⁹⁴ It thus does not systematically establish confidence of victims in the UN system. It also privileges those victims who have the resources to bring their own lawsuits or who live in a state which has the functional capacity and political will to act on their behalf.

The Zeid Report on eliminating abuse proposes both a voluntary trust fund for victims and individual financial accountability.⁹⁵ First, Zeid suggests that staff be encouraged to donate to a trust fund with simplified procedures for compensation. Second, the UN Staff Rules permit imposition of fines on staff members found guilty of misconduct, and such fines could be paid to the trust fund.⁹⁶ He suggests that the UN have a procedure for deducting child support from salary or severance packages.⁹⁷ While such procedures could be eminently valuable, the history of Voluntary Funds in the United Nations suggests that donations may not be forthcoming. To guarantee the Fund an assured income, I suggest that the Fund be created as a small fraction of the peacekeeping budget.

The only precedent for a compensation commission addressed to individuals in the peacekeeping context is the Kosovo Mission's Commission on Compensation to

⁹⁴ Even within the developed Kosovo system, victims were more likely to be compensated if they could rally international concern around their case. Elizabeth Abraham, *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in Its Mission in Kosovo*, 52 *Am. U. L. Rev.* 1291, 1298-1336 (2003) (discussing several cases where people were not compensated for unlawful detentions).

⁹⁵ Zeid Report, *supra* note 31, at ¶¶ 56, 72-77.

⁹⁶ *Id.* at ¶ 73.

⁹⁷ *Id.* at ¶ 77.

Wrongfully Accused/Convicted and/or Detained Persons.⁹⁸ Voluntary Funds, like the United Nations Voluntary Fund for Victims of Torture, generally make grants through NGOs.⁹⁹ Such a remedy makes more sense in the case of systematic violations, not individual occurrences, and might lessen legitimacy by providing less ex post recourse to individuals. This section examines three existing systems of dealing with individual complaints of human rights violations: the Kosovo Mission's Commission on Compensation, the Voluntary Fund for Victims of Torture, and UN Human Rights and UNHCR complaints mechanisms. It concludes that current mechanisms do not provide remedies to individual victims, but that a compensation mechanism could both a valuable resource to the U.N. if established as part of the peacekeeping budget.

1. Compensation of Victims for Wrongdoing by UN Police Officers in the Kosovo Mission

The Kosovo Mission is one of the only missions to provide compensation through a claims mission to individuals wronged by UN peacekeeping personnel. The example of the *Gashi* case shows that where strong administrative procedures exist, legitimacy can be strengthened and international pressure dealt with gracefully. Procedures as used in *Gashi* could be greatly beneficial to the UN.

In August 2005, three UN police officers were arrested by the Kosovo Mission's civilian police force (UNMIK Civpol) and the Kosovo Police Service for human trafficking.¹⁰⁰ However, under the enabling resolution, acts of the Kosovo Mission

⁹⁸ See *infra* Part II.B.1.

⁹⁹ G.A. Res 36/136, ¶ 1(a), U.N. Doc. A/RES/36/136 (Dec. 16, 1981), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/407/77/IMG/NR040777.pdf?OpenElement>; see *infra* Part II.B.2.

¹⁰⁰ United Nations Interim Administration Mission in Kosovo (UNMIK), *Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights*

cannot be attributed to Serbia and Montenegro, and the Kosovo Mission is not a party to the European Convention on Human Rights.¹⁰¹ Mission administration, in consultation with the Council of Europe, has decided to create a Human Rights Advisory Panel to “issue non-binding determinations of violations of human rights by UNMIK.”¹⁰² The decision to create a non-binding panel defers to the Kosovo Mission’s objections to any sort of binding judicial body; the mission administration claims that a binding judicial body would interfere with liberal interpretation of the mandate and with the privileges and immunities of personnel.¹⁰³ No uniform procedure for waiving immunity is detailed in the report, nor is any uniform policy of compensation provided.¹⁰⁴

The UN has compensated victims of human rights violations by Kosovo Mission personnel in the past. In the *Gashi* case, three Kosovar men detained by the Kosovo Mission under an Executive Order were held without being indicted for twelve months after being arrested by the NATO Kosovo Force.¹⁰⁵ The European Court of Human

Situation in Kosovo since June 1999, ¶ 32, U.N. Doc. CCPR/C/UNK/1 (Mar. 13, 2006) [hereinafter UNMIK Report to HR Committee].

¹⁰¹ United Nations Interim Administration Mission in Kosovo (UNMIK), *Core Common Document Forming a Part of the Reports Submitted by United Nations Interim Administration Mission in Kosovo to Human Rights Treaty Bodies*, ¶ 131, U.N. Doc. CCPR/C/UNK/1 (Mar. 13, 2006) [hereinafter UNMIK Core Common Document].

¹⁰² *Id.* at ¶ 132.

¹⁰³ *Id.* (“The creation of a judicial body that would issue binding decisions on UNMIK would be problematic from the perspective of the privileges and immunities of UNMIK and its personnel, their possible exposure to liability and the importance of not compromising the discretion of the institutions of the United Nations to interpret the mandate of UNMIK under UNSCR 1244.”)

¹⁰⁴ *See generally*, UNMIK Report to HR Committee, *supra* note 100.

¹⁰⁵ Organization for Security and Co-operation in Europe Legal Systems Monitoring Section, *Kosovo: A Review of the Criminal Justice System: Sept. 1, 2000- Feb. 28, 2001*, at 80, http://www.osce.org/documents/mik/2001/07/969_en.pdf.

Rights has held that such detentions violate defendants' right to due expedition.¹⁰⁶ The case was finally dropped due to lack of evidence, and the Commission on Compensation to Wrongfully Accused/Convicted and/or Detained Persons offered an undisclosed amount to the three detainees.¹⁰⁷

The *Gashi* detainees were fortunate in that strong administrative procedures for investigation existed in Kosovo, current domestic law mandated compensation by the government in the case of arbitrary detention or wrongful conviction, and a compensation mechanism was already in place. The Kosovo Mission has a Constitutional Framework which allows for review of administrative decisions.¹⁰⁸ The Ombudsman Institution investigates human rights complaints and reports to the Special Representative to the Secretary General.¹⁰⁹ Nonetheless, no mention is made of the Claims Commission or any attempt to compensate for Civpol wrongdoing in the Kosovo Mission report to the HR Committee. Although compensation was a response to outside pressure from the Organization for Security and Co-operation in Europe (OSCE), it was not part of the UN inquiry.

The Kosovo Mission, as a transitional administration, is the effective government in Kosovo and thus has both heightened responsibility and a greater range of resources at its disposal. In the face of intensified international pressure and a ruling by a panel of

¹⁰⁶ Specifically, the European Court in a past case found that eleven months of detention violated Art. 5(3) of the European Convention on Human Rights. *Id.*

¹⁰⁷ *Id.* at 81. ("LSMS [the Legal Systems Monitoring Section of the OSCE] is informed by ADoJ [the Administrative Department of Justice] that the *Commission on Compensation for Wrongfully Accused/Convicted and/or Detained Persons* has made a financial offer to the *Gashi*'s.")

¹⁰⁸ UNMIK Core Common Document, *supra* note 101, at ¶¶ 125–160 (outlining complaints system for employment rights, acts of Municipal Assembly, and administrative decisions more generally).

¹⁰⁹ *Id.* at ¶ 161.

international judges in Pristina, the Kosovo Mission chose voluntarily to use a Commission to compensate the three men who were detained in violation of their human rights.¹¹⁰ The fact that domestic law, as set up by the UN administration, mandated compensation of precisely this kind of indefinite detention enabled the choice to compensate.¹¹¹ Although the victims of trafficking are entitled to certain temporary social services and may be given financial assistance at administrative discretion,¹¹² no such regular compensation is available for victims of sexual abuse or trafficking by Kosovo Mission personnel.

In addition, *Gashi* appears to be an institutional wrong, where slow investigation by the prosecutor combined with a potentially wrongful arrest to produce a human rights violation. *Gashi* may not constitute a precedent for compensation in cases of violations of human rights by individual UN personnel, but it shows that where compensation procedures have already been established, the UN can and will utilize such procedures to reestablish international legitimacy. Creation of a compensation mechanism can, as in the *Gashi* case, provide more resources for UN decisions and discretion in cases where the UN is held responsible through international pressure.

2. UN Voluntary Funds Provide Aid Through “Established Channels of Assistance”

¹¹⁰ Rawski, *supra* note 19, at 122 n.93.

¹¹¹ The Provisional Criminal Procedure Code for Kosovo provides for compensation for arbitrary or unlawful detention, as well as for those wrongly charged, indicted, or convicted. UNMIK Report to HR Committee, *supra* note 100, at ¶¶ 42, 162.

¹¹² Victims of trafficking are provided free legal counsel and temporary safe housing, psychological, medical, and welfare assistance under Regulation 2001/4. *Id.* at ¶ 29.

The United Nations currently administers a large number of voluntary funds which provide aid to countries and NGOs,¹¹³ and so the question arises whether any of these funds could simply be expanded to provide compensation to individuals, and whether the Voluntary Trust Fund model is a good one for reformers to pursue. Two of the Voluntary Trust Funds currently indirectly provide victim assistance to individuals: the United Nations Voluntary Fund for Victims of Torture (Fund for Torture Victims) and the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery (Slavery Fund). Nonetheless, the Voluntary Funds, due to their narrow mandates, could probably not be expanded to provide assistance to victims. In addition, they have struggled to retain enough funding. The example of the Funds shows that cooperation with other mechanisms and some receipt of donations is possible for a new compensation mechanism, but that it needs to be part of the established budget.

The original resolution of the Fund for Torture Victims expanded the mandate to all “individuals whose human rights have been severely violated by torture and to relatives of such victims...”¹¹⁴ On its face, the fund sounds like a way to compensate individuals, but all money shall go through “established channels of assistance.”¹¹⁵ Only applications by non-governmental organizations are admissible under the Fund

¹¹³ See, e.g., United Nations Democracy Fund, *Situating the Democracy Fund in the Global Arena* <http://www.un.org/democracyfund/XSituatingDemocracy.htm> (describing work of UN Democracy Fund); Benedict Kingsbury, “*Indigenous Peoples*” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414, 447 (discussing how existence of UN Voluntary Fund for Indigenous Populations embodies current perceptions of what ‘indigenous’ means).

¹¹⁴ G.A. Res 36/136, ¶ 1(a), U.N. Doc. A/RES/36/136 (Dec. 16, 1981), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/407/77/IMG/NR040777.pdf?OpenElement>.

¹¹⁵ *Id.*

guidelines.¹¹⁶ The fund shows the preference of voluntary donors for providing social assistance like micro-projects, training, and necessary health care, rather than disbursing traditional, financial compensation.¹¹⁷ The Fund for Torture Victims guidelines state explicitly, “The Fund does not provide financial compensation to victims.”¹¹⁸

The result of the narrow mandate of the Fund for Torture Victims is that it probably cannot be used to help victims of peacekeeper abuses. The Fund for Torture Victims definition of torture is limited to the definition from Article 1 of the UN “Declaration against Torture”; organizations assisting victims of domestic violence cannot apply.¹¹⁹ Rape and other sexual abuse probably do not constitute torture under the definition of the Convention Against Torture, although the effects on the victim can be as damaging.¹²⁰ Victims of violence by peacekeeping personnel thus will be unable to use the Fund for Torture Victims to recover their claims. The Slavery Fund, on the other hand, regularly addresses issues of sexual abuse and exploitation. Over half of the projects funded in 2003 by the Slavery Fund were projects dealing with sexual abuse,

¹¹⁶ United Nations Voluntary Fund for Victims of Torture, Guidelines of the Fund for the Use of Organizations, ¶ 1, http://www.ohchr.org/english/about/funds/torture/docs/guidelines_E.pdf [hereinafter Fund for Torture Victims Guidelines].

¹¹⁷ Office of the United Nations Commissioner for Human Rights, United Nations Voluntary Fund for Victims of Torture: Type of Assistance, <http://www.ohchr.org/english/about/funds/torture/assistance.htm>.

¹¹⁸ Fund for Torture Victims Guidelines, *supra* note 116, ¶ 6.

¹¹⁹ *Id.* at ¶ 3–4.

¹²⁰ *See supra* Part I.

exploitation or trafficking.¹²¹ Yet the Slavery Fund must also work through “established channels of assistance,” following the example of the Fund for Torture Victims.¹²²

The use of the Fund for Torture Victims is limited to micro-projects, a strict definition of torture, and “established channels of assistance” rather than direct aid to victims because of the political climate in which it was created. Governments were concerned at the time of the expansion of the fund to cover torture globally that vague criteria left the Fund’s decisions open to use “for propaganda purposes,” if grants of funds were construed as “implicit allegation of such violations.”¹²³ The Fund for Torture Victims’ grants, conditioned on a determination that torture had occurred, were highly threatening to governments. In the context of violations by UN peacekeeping personnel, governments are not directly threatened, as specific individuals will be responsible.¹²⁴ A fund built into the peacekeeping budget may thus be entirely politically feasible. When combined with a complaints system, an agency-cooperation model of investigation, and with the newly created Conduct and Discipline Units, a new fund will be in a position to determine what allegations deserve compensation.¹²⁵

¹²¹ The Secretary-General, *Status of the Voluntary Trust Fund on Contemporary Forms of Slavery*, Annex IV 20-21, U.N. Doc. A/58/306 (Aug. 22, 2003).

¹²² G.A. Res. 46/122, ¶ 1(b), (e) U.N. Doc. A/RES/46/122 (Dec. 17, 1991) [hereinafter *Fund on Contemporary Forms of Slavery Resolution*].

¹²³ NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 167 (1999).

¹²⁴ Governments have been extremely receptive to processes whereby the UN names specific individuals: the Counterterrorism Committee of the Security Council, for example, creates lists of individuals whose assets should be frozen.

¹²⁵ In doing so, the fund may conceivably be taking on a ‘law-determining’ role in which it must assess evidence and apply international standards. RODLEY, *supra* note 123, 171–72 (noting that the UN Voluntary Fund for Torture Victims avoids such issues by allowing the ‘channels’ to determine the qualifications of each victim).

A Fund can be a useful administrative tool to raise funds and provide support for other parts of the UN in promoting accountability. Part of the mission of both the Fund for Torture Victims and the Slavery Fund is to solicit donations from governments, non-governmental organizations, and private individuals.¹²⁶ The Fund for Torture Victims also successfully worked with the UNHCR to develop programs in refugee camps.¹²⁷ Experience shows that the structure of a trust fund can be useful to encourage donor and local support of other UN agency operations.

Voluntary Trust Funds can probably not be expanded to cover compensation, but the experience of them shows that the UN has had some success in handling victim assistance and managing funds. Voluntary Trust Funds have not to date operated as mechanisms determining the extent of liability, nor have they paid out funds to individuals directly. To create a true atmosphere of accountability, any Trust Fund established should be paired with a claims mechanism. It should also be built into the peacekeeping budget to ensure that it avoids the ongoing funding struggles of Voluntary Funds.¹²⁸

3. Current International Complaints and Claims Mechanisms

The trust fund of the International Criminal Court (ICC), which has not yet but will soon be formed and administered, provides a good potential model for a compensation mechanism in the peacekeeping context. The UNHCR and DPKO are

¹²⁶ Hans Danelius, *The United Nations Fund for Torture Victims: The First Years of Activity*. 8 HUM. RTS. Q. 294, 296 (1986); Fund on Contemporary Forms of Slavery Resolution, *supra* note 122, ¶ 1(c). The Fund for Torture Victims has been more successful at fundraising than the Fund on Contemporary Forms of Slavery, which is chronically underfunded. A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 352 n.170 (1999).

¹²⁷ Danelius, *supra* note 126, at 298.

¹²⁸ I am grateful to Professor Philip Alston for this suggestion.

increasing and strengthening complaints procedures, which do not in and of themselves provide remedies, but which can be built on in the creation of a compensation mechanism. Where a claim is brought against a country or against the UN during a military operation, a claims review board may be formed. These ad-hoc mechanisms are slow and costly, but show that the UN already has experience in compensating for claims against peacekeeping personnel. The UN should follow the model of the ICC in creating a Trust Fund from which to compensate victims and tying it to existing complaints and investigatory mechanisms.

The UNHCR has a local complaints procedure, similar to the complaints system created during the MONUC scandal, under which refugees can file complaints about abuses.¹²⁹ Local complaints mechanisms were generated for the UNHCR, following the recommendations of an OIOS task-force.¹³⁰ It is unclear, however, whether refugees have effective access to these complaints, as individual complaints are only 1% of the total complaints received.¹³¹ Having a limited number of local offices can limit refugee access, as “emailing or telephoning Geneva directly is almost impossible.”¹³² Refugees also often do not have knowledge of their rights or confidence in the system.¹³³ The

¹²⁹ Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms*, 37 N.Y.U. J. INT'L L. & POL. 869, 896–98.

¹³⁰ *Id.* at 896.

¹³¹ *Id.* at 897 (citing U.N. GAOR, Executive Comm. Of the High Commissioner's Programme, *Report on UNHCR's Oversight Activities*, 19 fig. 4, U.N. Doc. A/AC.96/976 (Aug. 5, 2003)).

¹³² Pallis, *supra* note 129, at 897.

¹³³ *Id.*

establishment of local complaints mechanisms increased the number of complaints to the point where UNHCR needed extra funding to address all of them.¹³⁴

As discussed above, the UN Department of Peacekeeping Operations is in the process of putting into place local complaints mechanisms in its major missions.¹³⁵ The Conduct and Discipline Units will be in charge of receiving and handling complaints;¹³⁶ the OIOS, meanwhile, will be in charge of overseeing the handling of serious allegations of crimes.¹³⁷ The agency-cooperation model espoused in the Group of Legal Experts' report can provide fact-finding and evidence admissible at the claims commission level.

The UN envisioned a standing claims commission in the 1946 Convention on the Privileges and Immunities of states; however, in practice UN claims review boards have operated on a mission by mission basis, to handle claims brought against the UN itself or against a troop-contributing country.¹³⁸ In these claims review boards, a statute of limitations of six months has been imposed, and liability has been limited to US\$50,000.¹³⁹ These claims review boards, or claims commissions, are formed where military contingents of troop-contributing countries are involved.¹⁴⁰ They have been

¹³⁴ *Id.* at 896 (citing U.N. High Comm'r for Refugees, *Enhancing Oversight and Accountability in UNHCR: A Joint Supplementary Funding Appeal for UNHCR's Inspector General's Office, Division of Human Resources Management and Legal Affairs Section*, at 2 (Aug. 2003–Dec. 2004)).

¹³⁵ *See supra* notes 59–62 (complaints procedures in MONUC and UNMIL), 63–65 (complaints procedures currently being developed), and accompanying text.

¹³⁶ Report on Accountability, *supra* note 52, ¶ 48.

¹³⁷ Miller, *supra* note 80, at 85 (2006) (citing G.A. Res. 59/287, ¶3, U.N. Doc. A/Res/59/287 (Apr. 21, 2005)).

¹³⁸ Daphna Shraga, *U.N. Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AM. J. INT'L L. 406, 409 (2000).

¹³⁹ Such restrictions were imposed through a General Assembly resolution, a liability clause in the status of forces agreement and the terms of reference of the claims review boards. *Id.* at 411.

¹⁴⁰ Miller, *supra* note 80, 88.

criticized as too slow and costly, they must be reconvened for each mission, and in practice ad-hoc mechanisms have been preferred.¹⁴¹ The failure of the claims review boards to work for victims not championed by states argues for a new, more centralized structure to provide compensation.

The importance of financial compensation has been recognized by the Rome Statute, which created a Trust Fund in addition to the ICC.¹⁴² The Trust Fund is limited to those who were the victims of crimes “within the jurisdiction of the Court.”¹⁴³ The Trust Fund will compensate not only individual victims whose claims are proven in the Criminal Court, but mass victims in need of justice, using administrative solutions like sampling and balancing needs.¹⁴⁴ The Court will develop processes for the filing of claims early on, beginning as soon as an individual is accused of crimes before the Court.¹⁴⁵ The Trust Fund of the ICC represents an increasing movement to tie criminal to civil liability and to ensure that victims are compensated.¹⁴⁶ It also represents an important precedent in the use of fines paid into a Trust Fund, which then pays victims.¹⁴⁷ Relying on other investigative agencies for evidence will not only facilitate

¹⁴¹ *Id.* at 96 fn 114 and accompanying text.

¹⁴² Dinah L. Shelton, *Reparations to Victims at the International Criminal Court*, http://www.pict-pecti.org/publications/PICT_articles/REPARATIONS.pdf, 6.

¹⁴³ Thordis Ingadottir, *The International Criminal Court: The Trust Fund for Victims (Article 79)*, http://www.pict-pecti.org/publications/ICC_paprs/Trust_Fund.pdf, 9.

¹⁴⁴ Shelton, *supra* note 142, at 10. Shelton cites the *Marcos* litigation in the United States as an example of the mass settlement of torture victims and families of the executed and the disappeared. *Id.* at 10–11.

¹⁴⁵ *Id.* at 11.

¹⁴⁶ Peter G. Fischer, Note, *The Victims' Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187.

¹⁴⁷ Ingadottir, *supra* note 143, at 18.

the work of a new claims commission; it will further the new norm of agency cooperation as a mechanism for compensation of victims and ensuring that violations of rights are accompanied by remedies. Through linking criminal and administrative investigations to a claims commission, the UN will avoid some of the litigation problems, bureaucracy, and cost that plague the current claims review board system for peacekeeping troops in the military context.

The experience of the claims review boards shows both that a claims mechanism in the context of peacekeeping can be successfully administered by the UN and that a specialized body with streamlined procedures may be necessary. A claims mechanism which deals specifically with civilian peacekeeping personnel could avoid some of the problems of the claims review boards because it would not have the requirement of two new members appointed by the troop-contributing country and needing education and training in UN rules and structure. It could also use the efforts provided by other investigative and administrative agencies in determining claims, particularly if one complaints form was used to begin both criminal and civil processes. Using disciplinary measures to garnish salaries and enforce penalties for misconduct which would be paid into the Trust Fund,¹⁴⁸ and then using such funds to compensate victims for human rights violations, would be in accordance with the strong human rights norm that there should be a remedy for violations of rights.¹⁴⁹

¹⁴⁸ Miller, *supra* note 80, at 89.

¹⁴⁹ For a discussion of rights and remedies in the human rights and international criminal context, see Sonja Starr, *The Perverse Consequences of the Full Remedies Rule: Remedial Deterrence in International Courts* (forthcoming, N.Y.U. L. Rev., June 2008).

IV. Conclusion

The UN should continue to recognize liability for harm inflicted by peacekeepers.¹⁵⁰ Given the widespread nature of such crimes, it seems that the UN should perhaps recognize that such abuses are and may continue to be incident to peacekeeping personnel's protective functions.¹⁵¹ Such recognition is not to minimize the nature of the activity or to fail to recognize that it can be better prevented through improved policies and a culture which in fact does *not* accept the crimes as natural incidents to the work peacekeepers do. It is simply to recognize that the UN must occasionally act as insurance for victims in host countries that need the services that peacekeepers can provide but that due to immunities, lack of political will, or lack of domestic capacity cannot provide meaningful restitution to victims.

Although the UN can invoke its immunity as an international organization, member states should recognize that the parallel between the UN and a regular employer indicates that the UN should bear some financial responsibility for wrongdoing. Thus, a blanket rejection of financial compensation, as in the UN Voluntary Fund for Victims of Torture, seems misplaced. While appropriate for torture victims (defining torture narrowly with a color of law requirement), who are potentially part of a wider segment of local society persecuted under a specific regime, victims of human rights violations by

¹⁵⁰ The distinction in US domestic law between a frolic and a hazard incident to the work may be relevant here. If abuse of power by peacekeepers is seen as a hazard incident to the work, it would fall under the tort doctrine of *respondeat superior*.

¹⁵¹ In June 2006, Kofi Annan issued a statement saying that the sexual abuse scandals were an "almost inevitable" consequence of rapid growth in peacekeeping capacity. Sergei Ordzhonikidze, Opening Remarks At a Panel Discussion on the Occasion of the International Day of United Nations Peacekeepers, available at [http://www.unog.ch/unog/website/dg.nsf/\(httpSpeechesByYear_en\)/971583C641A6B776C12571810039DE38?OpenDocument&year=2006](http://www.unog.ch/unog/website/dg.nsf/(httpSpeechesByYear_en)/971583C641A6B776C12571810039DE38?OpenDocument&year=2006) (June 1, 2006).

peacekeeping personnel will often be part of a global rather than local pattern. Their individual needs will not easily be addressed by local or situation-specific NGOs.

There may be specific pitfalls, as indicated by the procedures employed to handle individual complaints in the UN. When processes are not transparent and open to the public, it is likely that they will simply amount to a cursory examination. Second, the UNHCR experience shows the importance of local offices and hotlines, even when not proceeding on an ad-hoc basis. Local offices provide resources for refugees who cannot afford to call or email OIOS in New York directly. They also are better positioned to forward complaints to the local authorities. The UN is already moving in this direction. The establishment of a complaints procedure provides an administrative basis for the formation of a claims commission to support victims.

Violations of human rights by peacekeepers have a major impact on the legitimacy of the UN. Legitimacy is bolstered when victims are given rights of due process and mechanisms for complaints. A default position of waiver of civil immunity in the face of accusations of the most serious crimes, a thorough investigation, and a trust fund for potential compensation upon filing a substantiated complaint will not only protect the rights of populations whom peacekeepers are supposedly serving, but will also increase the effectiveness of the UN's mission.