

PROVIDING EFFECTIVE REMEDIES TO VICTIMS OF ABUSE BY PEACEKEEPING PERSONNEL

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This Note argues for a compensation mechanism in cases where United Nations peacekeepers have violated the rights of those whom they should be protecting, focusing in particular on cases of sexual abuse. In light of the current absence of clear mechanisms for accountability, the United Nations must take action to compensate victims in order to preserve its organizational immunity and its discretion in waiving the immunity of peacekeepers. This Note examines the current legal regime and current responses by the United Nations, reviews the pressing need for greater victim compensation, and evaluates theories of employer liability and state responsibility as they apply in the peacekeeping context. It concludes that current international law supports a compensation mechanism that is normatively (if not legally) required.

INTRODUCTION

As the United Nations deploys troops and civilian personnel in peacekeeping missions around the world,¹ it relies heavily on the support of both the international community and local populations. Recent sexual abuse scandals² have undermined the legitimacy³ of

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¹ In October 2006, 80,976 military troops, personnel, and police, in addition to 15,000 civilians, were serving in 18 U.N. peacekeeping missions. Press Release, Dep't of Peacekeeping Operations, United Nations Military, Police Deployment Reaches All-Time High in October, U.N. Doc. PKO/152 (Nov. 10, 2006), available at <http://www.un.org/News/Press/docs/2006/pko152.doc.htm>. In May 2008, there were a total of 88,418 personnel serving in peacekeeping missions alone, 15,000 of which were police and observers. FLORIN STANCIU, DEP'T OF PEACEKEEPING OPERATIONS, MONTHLY SUMMARY OF MILITARY AND POLICE CONTRIBUTIONS TO UNITED NATIONS OPERATIONS (2008), <http://www.un.org/Depts/dpko/dpko/contributors/Yearly06.pdf>.

² For further discussion of the scandals—in particular, in the Democratic Republic of the Congo—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 I use “legitimacy” in the sense in which it is used in the peacekeeping literature: as a shorthand for popular support and acceptance along with the requisite political capital to pursue the mission successfully. For an example of such use, see Michael Mersiades,

these missions and raised concerns about holding peacekeeping personnel accountable.⁴ Although international criminal law does not prohibit such abuse, international human rights law does.⁵ Currently, victims do not have the effective remedy to which they are entitled under international human rights law.⁶

Despite an official zero-tolerance policy on abuse by peacekeeping personnel and a commitment to international humanitarian⁷ and human rights law, reports of exploitation by U.N. peacekeeping troops and personnel in the field continue to surface.⁸

Peacekeeping and Legitimacy: Lessons from Cambodia and Somalia, 12 INT'L PEACEKEEPING 205 *passim* (2005).

⁴ For a definition of "peacekeeping personnel," see *infra* text accompanying note 10. Peacekeeping personnel are separate from military troops serving under national command. See *infra* notes 12–16 and accompanying text.

⁵ International criminal law imposes criminal norms on individuals, who are generally prosecuted in international criminal tribunals. International human rights law, on the other hand, decrees that some conduct is impermissible without imposing particular sanctions on violators. Some commentators have assumed that human rights law and international humanitarian law are aimed only at the behavior of governments and quasi-governments. See, e.g., Chanaka Wickremasinghe & 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 465, 466 (Craig Scott ed., 2001). Other commentators insist that non-state actors should be included in the list of human rights violators. See, e.g., Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-state Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 92–95 (1999). I elide such questions by assuming that non-state actors can commit human rights violations.

⁶ For a discussion of the guarantee in international human rights law of an effective remedy, see Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 698–702 (2008).

⁷ International humanitarian law is the law that applies to armed conflict. Emily Ann Berman, Note, *In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals*, 80 N.Y.U. L. REV. 241, 261 n.99 (2005) (citing 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 249 (1983)).

⁸ Warren Hoge, *Charity Finds Child Sexual Abuse by Peacekeepers and Aid Workers*, N.Y. TIMES, May 28, 2008, at A13; *UN Troops Face Child Abuse Claims*, BBC NEWS, Nov. 30, 2006, <http://news.bbc.co.uk/1/hi/world/americas/6195830.stm>. Moreover, it is unclear what the official proclamation of "zero tolerance" actually entails. *Id.* Investigators and reporters continue to encounter a "wall of silence" and a "deep-seated culture of tolerating sexual exploitation" at the United Nations. Warren Hoge, *Report Finds U.N. Isn't Moving To End Sex Abuse by Peacekeepers*, N.Y. TIMES, Oct. 19, 2005, at A5. Investigators say they were pressured from above and that internal reporting is often a "whitewash." Matthias Basanisi, *Who Will Watch the Peacekeepers?*, N.Y. TIMES, May 23, 2008, at A25. For example, no peacekeepers were prosecuted or punished by the United Nations 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 (2003) (citing *The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations*, 107th Cong. 26 (2002) (statement of

From 2004 to 2006, the United Nations disciplined 179 people for sexual abuse, including not only U.N. soldiers but also civilians and police.⁹ Peacekeeping personnel include U.N. officials (both staff and official volunteers) and “experts performing missions,” a technical term that includes military observers, military advisers, military liaison officers, and consultants.¹⁰ Although the media have focused on peacekeeping troops, complaints have also been lodged against peacekeeping personnel. In fact, of 296 complaints in 2005, 84 were lodged against civilians and 21 against police, groups contained in the category of peacekeeping personnel.¹¹

Rather than dealing with the murkier institutional responsibility for peacekeeping troops acting in the name of the United Nations, this Note will focus on peacekeeping personnel. Peacekeeping troops, composed of national military contingents,¹² are often subject to minimal, if any, control by the United Nations,¹³ raising difficult questions of U.N. responsibility. In contrast, peacekeeping personnel operate as U.N. employees and thus are subject to functional immunities (a doctrine of international law that protects officials of the United Nations from being subject to local legal regimes)¹⁴ as well as other broad immunities under specific agreements with host states.¹⁵ Since

Martina Vandenberg, Europe Researcher, Women’s Rights Division, Human Rights Watch), available at <http://www.internationalrelations.house.gov/archives/107/78948.pdf>.

⁹ Reuters, *Peacekeeper Sins Tallied*, WINNIPEG SUN, Dec. 1, 2006, at 16. Most recently, BBC investigators uncovered allegations of an assault on a fifteen-year-old Liberian girl as well as multiple assaults in Haiti. *UN Troops Face Child Abuse Claims*, *supra* note 8.

¹⁰ 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*, ¶ 7, U.N. Doc. A/60/980 (Aug. 16, 2006).

¹¹ 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>.

¹² Department of Peacekeeping Operations, Meeting New Challenges, <http://www.un.org/Depts/dpko/dpko/faq/q8.htm> (last visited Aug. 20, 2008) (“Peacekeeping troops, popularly known as Blue Helmets, participate in UN peacekeeping under terms that are carefully negotiated by their Governments and remain under the overall authority of those Governments while serving under UN operational command.”).

¹³ See Wickremasinghe & Verdirame, *supra* note 5, at 469 (“[When] 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.”).

¹⁴ Convention on the Privileges and Immunities of the United Nations art. V, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 [hereinafter Privileges and Immunities Convention]. Functional immunities are immunities covering only activities performed in the course of or incidental to official duties, as opposed to the absolute immunities enjoyed by higher-ranking officials. See *infra* note 56 and accompanying text.

¹⁵ See *infra* note 63 and accompanying text. The Model Status of Forces Agreement, however, only provides for the level of immunities specified in the Convention. The Secretary-General, *Model Status of Forces Agreement for Peace-Keeping Operations*:

peacekeeping personnel are directly under U.N. command, their behavior reflects most directly on the organization.¹⁶

All peacekeeping personnel have a recognized right under minimum human rights standards to due process and fair trial when they are accused of wrongdoing.¹⁷ 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. The United Nations must take steps to ensure that victims have an effective remedy for violations committed against them.

The Group of Legal Experts, a U.N. body appointed to study the problem of abuse by peacekeepers,¹⁸ has made a number of crucial suggestions for improving accountability through criminal prosecution. Although these suggestions, detailed below in Part I, are important and may eventually be effective, they are insufficient on their own. This Note will argue that, in light of the current absence of clear mechanisms for redress, the best way both to ensure that victims have some remedy and to preserve U.N. immunities in national courts and its legitimacy in public opinion is to create a U.N.-administered compensation mechanism.¹⁹ Such a mechanism will serve to address the most pressing needs of victims while signaling that the United Nations

Report of the Secretary-General, Annex, ¶¶ 24–26, delivered to the General Assembly, U.N. Doc. A/45/594 (Oct. 9, 1990).

¹⁶ The United Nations also occasionally hires independent contractors to provide personnel. Such contractors may also be given functional immunities under mission regulations. See, e.g., On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, UNMIK Reg. No. 2000/47 (Aug. 18, 2000), available at <http://www.unmikonline.org/regulations/2000/reg47-00.htm>. See *infra* note 164 for further discussion of independent contractors.

¹⁷ See Group of Legal Experts, *supra* note 10, ¶ 30 (suggesting that United Nations should work with host states to ensure that perpetrators face legal systems that satisfy international human rights standards); see also *id.* ¶ 35 (arguing that hybrid tribunals will ensure legal processes meeting those standards and eliminate bias).

¹⁸ In October 2006, U.N. Secretary-General Kofi Annan appointed the Group of Legal Experts, which is composed of four legal experts from Australia, Nigeria, Singapore, and the United States. See Press Release, Secretary-General, Secretary-General Appoints Legal Expert Group Aimed at Strengthening Peacekeeping Zero Tolerance Policy on Sexual Exploitation, U.N. Doc. SG/A/1023 (Oct. 13, 2006), available at <http://www.un.org/News/Press/docs/2006/sga1023.doc.htm>.

¹⁹ In this Note, I have made a conscious decision to use the word “victim,” since survivors of abuse are usually referred to as victims in both domestic liability literature and U.N. reports. See, e.g., Douglas S. Miller, *Off Duty, Off the Wall, but Not Off the Hook: Section 1983 Liability for the Private Misconduct of Public Officials*, 30 AKRON L. REV. 325 *passim* (1997) (referring to plaintiffs as victims); The Secretary-General, *A Comprehensive Strategy To Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, *passim*, delivered to the General Assembly, U.N. Doc. A/59/710 (Mar. 24, 2005) (prepared by Prince Zeid Ra’ad Zeid Al-Hussein) [hereinafter Zeid Report]. I am aware of the problematic nature of compelling survivors to tell their story as victims, but I see it as unavoidable to some extent in a complaints system.

takes seriously abuses committed by U.N. personnel against host nations.

This Note will proceed in three parts. Part I evaluates the current U.N. response to acts of abuse committed by peacekeeping personnel and will discuss the current legal regime, highlighting the gaps in accountability that result from immunity and from obstacles arising in practice. Part II shows that compensation is not unprecedented by examining various methods the United Nations uses to provide compensation and by drawing lessons from past compensatory mechanisms. Part III argues that the United Nations as an organization is responsible for ensuring compensation, under both traditional theories of employer liability and evolving standards requiring provision of administrative remedies in order for international organizations to preserve immunity in national courts. This Note concludes that an administrative remedy providing compensation is a feasible and desirable solution to the current gaps in redress for victims.

I

THE CURRENT U.N. RESPONSE AND LEGAL FRAMEWORK

As described above, there is a very real problem with peacekeepers, both troops and personnel, abusing the local population in countries to which they are deployed. This problem not only wrongs victims but also impairs the efficacy of peacekeeping operations. U.N. officials recognize that individual criminal acts have an effect on the United Nations' ability to carry out its missions. The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, has stated that the organization will lose "its moral force if it fails to respond when those within the United Nations system violate human rights."²⁰ The work of peacekeepers needs moral force to retain local and donor support. Lack of accountability may also undermine the reputation of the United Nations as a whole, particularly in countries with strong anti-internationalist factions.²¹ In contrast, a comprehensive response that provides victims clear remedies will further U.N. objectives by demonstrating to the international

²⁰ Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, ¶ 59, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000).

²¹ The abuse scandals were used to denounce Kofi Annan in a spate of North American opinion pieces at the time of the election of the new Secretary-General. See, e.g., Editorial, *A New Chance*, ORLANDO SENTINEL, Oct. 9, 2006, at A16 (denouncing U.N. lack of action); Editorial, *The U.N.: A Promise Never Fulfilled*, INVESTOR'S BUS. DAILY, Sept. 18, 2006, at A14 (same); Salim Mansur, *UN Has Become a Charade; Departure of Incompetent Kofi Annan Offers Opportunity To Shake Things Up*, CALGARY SUN, Dec. 2, 2006, at 15 (same).

community and to local populations that the United Nations takes such abuse seriously and has the capacity to prevent and remedy it.

The United Nations' current *ex ante* preventative stance with respect to peacekeeper abuse focuses on gender mainstreaming,²² the addition of gender units in missions, and the strengthening of guidelines and standards for peacekeepers. It does not provide *ex post* redress for wrongs in the form of criminal accountability and compensation for victims. The United Nations has restructured the Department of Peacekeeping Operations, created complaints systems, and issued reports recommending further actions. Nonetheless, this Part demonstrates that a gap still exists in remedies for violations of the victim's right to bodily integrity, given the structure of immunities for personnel under Status of Forces agreements,²³ the fact that universal jurisdiction will not extend to these offenses,²⁴ and the United Nations' organizational immunity.²⁵

A. *U.N. Actions and Reports Addressing Abuse by Peacekeeping Personnel*

The United Nations has attempted to address the factors that have led to the abuse of residents of host countries by peacekeeping troops and personnel.²⁶ U.N. action has focused on *ex ante* structural and decisionmaking problems that may contribute to abuse and on *ad hoc* measures to address the problem.²⁷ As yet, no systematic mechanism has been formed to ensure redress to victims of abuse.

1. *Institutional Changes*

The United Nations responded to early reports of sexual harassment and abuse by peacekeepers with an attempted change in culture:

²² Gender mainstreaming refers to the attempt by U.N. personnel and committees to integrate talk of gender and evaluation of the disparate impacts of decisions on women into mainstream decisionmaking. See Office of the Special Advisor on Gender Issues and the Advancement of Women, Gender Mainstreaming, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm> (last visited Aug. 20, 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.").

²³ See *infra* Part I.B.

²⁴ Universal jurisdiction is jurisdiction in any court anywhere in the world. See *infra* Part I.C.

²⁵ See *infra* Part I.D.

²⁶ In this Note, I will use the term "host country" to refer to the country in which the peacekeeping mission is located. U.N. documents also use this term. See, e.g., *infra* note 40 and accompanying text (discussing provision of medical assistance in host country).

²⁷ The Secretary-General, *Report of the Secretary-General on Measures To Strengthen Accountability at the United Nations*, ¶ 48, delivered to the General Assembly, U.N. Doc. A/60/312 (Aug. 30, 2005) [hereinafter *Report on Accountability*].

gender mainstreaming²⁸ in decisionmaking and the establishment of gender units within peacekeeping missions.²⁹ The Secretary-General recommended that the Department of Peacekeeping Operations assign full-time gender advisers and gender units to peacekeeping operations.³⁰ Heads of mission in the field report that pressure increased to have gender-balanced missions.³¹

Gender mainstreaming and women's participation can play important roles in changing a mission's culture, but an exclusive focus on ex ante decisionmaking does not ensure effective ex post procedures for investigation and accountability once actual abuse has occurred. Ex post investigation of complaints about specific missions has been sporadic and has not provided appropriate recourse for victims. In the context of transitional administrations, such as those in East Timor or Kosovo, a board of inquiry may be convened, or an ombudsperson assigned, to conduct investigations when allegations have been lodged against specific employees and to make recommendations about immunity.³² The Office of Internal Oversight Services (OIOS) has also investigated scandals on an ad hoc basis, particularly in West Africa.³³ The United Nations is establishing a specific unit

²⁸ See *supra* note 22 (defining gender mainstreaming).

²⁹ In October 2005, the U.N. Secretary-General issued a plan designed for ex ante prevention of gender-based crimes by peacekeepers: increasing women's participation in peacekeeping and gender mainstreaming. 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) (discussing structural changes to protect women's rights).

³⁰ *Id.* ¶ 25; see also *id.*, Annex, at 19 (detailing objective of full-time gender advisers and gender units with workplans and guidelines in most missions). A gender unit is a team of people at headquarters who can advise and coordinate gender advisers deployed with missions. NGO WORKING GROUP ON WOMEN, PEACE, & SECURITY, PEACEWOMEN, BACKGROUND AND POSITION PAPER ON GENDER UNIT AT DPKO (2002), available at <http://www.peacewomen.org/un/ngo/ngopub/DPKOgenderunit.html>.

³¹ 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.

³² Frederick Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 116–17 (2002) (examining particular investigations into staff conduct and procedures for waiver of immunity from East Timor and Kosovo). A civilian commissioner appoints a small number of international staff to the board of inquiry, which then makes a recommendation on waiver of immunity to the Special Representative of the Secretary-General. *Id.* at 114. The Special Representative of the Secretary-General is the person appointed to run the mission. Department of Peacekeeping Operations, *supra* note 12. Ombudsperson offices have also been established at the mission level to resolve claims of abuse. Although the boards of inquiry and ombudsperson offices lack enforcement power, they can make recommendations to the Special Representative or to the Department of Peacekeeping Operations. Rawski, *supra*, at 115–16.

³³ E.g., 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). In the case of the

within the Department of Peacekeeping to handle investigations in a more consistent manner.³⁴

Such ad hoc investigations have helped to strengthen complaints systems for victims. The United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) scandal, which involved widespread reports of rape and “survival sex,”³⁵ spurred the development of an organization-wide complaints system (including a hotline, email address, model complaint form, and mailing address for complaint forms).³⁶ The system featured prominently in news reporting, helping to improve the United Nations’ image internationally.³⁷ The U.N. Mission in Liberia (UNMIL) also emphasized to the public and the news media that it had a complaints procedure in place following accusations of sexual abuse and a shooting incident.³⁸

In August 2005, the Secretary-General reported the institution of improved, localized complaints mechanisms within individual missions, including telephone hotlines and in-person receipt of complaints.³⁹ Missions have a new mandate to ensure that victims are referred to “medical and psychosocial services available in the host country, with costs to be covered from existing mission budgets.”⁴⁰

Congo scandal, a headquarters-based task force of the OIOS met to address the issue and to work on “improving assistance to victims.” *Id.* ¶ 62. Investigations of the U.N. Mission in Liberia were similarly handled by OIOS and followed up in the Office of Human Resources Management. *Liberia: UNMIL Clarifies Paynesville Shooting*, AFR. NEWS, Dec. 1, 2006. OIOS also undertook a comprehensive investigation of the sexual exploitation of refugees in West Africa. 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, ¶¶ 1–7, U.N. Doc. A/57/465 (Oct. 11, 2002) (focusing only on UNHCR activities).

³⁴ Department of Peacekeeping Operations, About the Conduct and Discipline Units, <http://www.un.org/Depts/dpko/CDT/about.html> (last visited Aug. 19, 2008) (“The headquarters conduct and discipline team maintains global oversight on the state of discipline in all peacekeeping operations The units in peacekeeping operations act as principal advisers to heads of mission on all conduct and discipline issues . . .”).

³⁵ The Democratic Republic of the Congo had many charges of rape and “survival sex,” where peacekeepers would ask starving minors to perform sexual acts with them in return for food. Notar, *supra* note 2, at 417. For discussion of the scandal, and the response of the U.S. Congress to failures to prosecute, see generally *id.*

³⁶ Office of Internal Oversight Services, *supra* note 33, ¶ 67.

³⁷ International news outlets noted that a complaints procedure had been created when reporting on the scandal. See, e.g., *UN Troops Cautioned on Sex Abuse*, BBC NEWS, Mar. 3, 2005, <http://news.bbc.co.uk/2/hi/africa/4313617.stm> (highlighting complaints system).

³⁸ *Liberia: UNMIL Clarifies Paynesville Shooting*, *supra* note 33.

³⁹ *Report on Accountability*, *supra* note 27, ¶ 48(a).

⁴⁰ 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. A/60/862 (May 24, 2006). See also *Report on Accountability*, *supra* note 27, ¶ 48(a) (recommending referrals within mission area).

Nonetheless, despite the growing establishment of improved complaints systems, such referral is currently the only remedy available to victims.⁴¹

2. Reports

In addition to the above reforms, the United Nations has undertaken studies of the legal and institutional factors that create an environment in which abuse may occur. The two most influential and comprehensive reports—the Report of the Group of Legal Experts⁴² and the Report of Prince Zeid Ra’ad Zeid Al-Hussein, Special Advisor to the U.N. Secretary-General on Sexual Exploitation and Abuse⁴³—have called for countries to ensure prosecution of their nationals and have examined the need for compensation of victims.

The Group of Legal Experts has focused mainly on ensuring that states exercise jurisdiction over their own nationals in order to improve factfinding capability and enforcement.⁴⁴ It recommends a shared exercise of jurisdiction by the host state and other states (for example, the state of nationality of the alleged offender, henceforward referred to as the “state of nationality”), so that investigatory functions can be carried out by one state and prosecution by another.⁴⁵ The report suggests that the United Nations can strengthen local capacity and perform administrative investigations in a more rigorous way so as to produce evidence that will be admissible in a criminal process.⁴⁶ The report concludes that cooperative investigative mecha-

⁴¹ See The Secretary-General, *supra* note 40, ¶¶ 23–24 (discussing need to finalize policy of victim assistance).

⁴² The General Assembly in Resolution 59/300 authorized the creation of a Group of Legal Experts “to ensure that United Nations staff . . . would never be effectively exempt from the consequences of criminal acts.” Group of Legal Experts, *supra* note 10, at 1.

⁴³ Zeid Report, *supra* note 19.

⁴⁴ The convention on states’ jurisdiction over their own nationals that the Group of Legal Experts drafted (Draft Convention) does not alter the existing structure of immunities. Group of Legal Experts, *supra* note 10, ¶ 68.

⁴⁵ *Id.* ¶¶ 40–42.

⁴⁶ The Group examined the possibility of criminal prosecution in either the host state or the state of nationality. Group of Legal Experts, *supra* note 10, ¶¶ 60–61. If evidence-gathering does not meet the criminal procedure standards of the prosecuting state, evidence may be inadmissible in the ultimate court proceedings. *Id.* ¶¶ 80, 84.

nisms, possibly based out of the OIOS,⁴⁷ could strengthen accountability and factfinding capability in later investigations.⁴⁸

Prince Zeid released a comprehensive report (Zeid Report), which outlines mechanisms by which to hold individual human rights violators criminally and fiscally accountable.⁴⁹ He emphasizes the need for U.N.-wide institutions⁵⁰ and focuses on fiscal accountability, such as making basic emergency assistance available to victims.⁵¹ His proposals to increase such accountability include new expedited procedures for both suspension without pay and potential garnishment of wages to pay child support and other compensation.⁵² Zeid also proposes a voluntary fund for victim assistance consisting of staff fines and voluntary donations.⁵³ Such proposals are designed to use the fiscal resources of individual personnel and outside donors to address current gaps in accountability.

Both reports suggest significant reforms to address the need for accountability. However, their suggestions have not yet been implemented in a meaningful way. The United Nations is still in need of a mechanism that can redress abuses by its personnel.

B. Problems of Individual Immunity in the Peacekeeping Context

The current structure of immunities within international law creates gaps in liability and fosters an environment in which peacekeepers can act with perceived impunity.⁵⁴ Although international human rights law relies on domestic legal systems for enforce-

⁴⁷ Group of Legal Experts, *supra* note 10, ¶ 84(h). Prince Zeid agreed with the Group of Legal Experts that a permanent professional investigative mechanism should be a top priority. Zeid Report, *supra* note 19, ¶¶ 31–32. 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 10, ¶ 84(i).

⁴⁸ The Group's recommendations provide important baseline procedures for investigating abuses, including hybrid criminal tribunals and procedures to determine evidentiary standards for specific investigations. See Group of Legal Experts, *supra* note 10, ¶¶ 33–37, 84(f).

⁴⁹ Zeid Report, *supra* note 19.

⁵⁰ Prince Zeid also suggested unifying standards prohibiting sexual exploitation and abuse for all peacekeeping personnel. *Id.* ¶ 94. The United Nations released such 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*, U.N. Doc. 1/61/645 (Dec. 18, 2006) (laying out comprehensive standards and rules for peacekeeping personnel).

⁵¹ Zeid Report, *supra* note 19, ¶¶ 52–56.

⁵² *Id.* ¶ 91.

⁵³ See *infra* note 141 (discussing Prince Zeid's compensation proposals).

⁵⁴ Thus far, U.N. bodies have avoided altering the legal structure of immunities attaching to U.N. personnel. See, e.g., Group of Legal Experts, *supra* note 10, ¶ 68 (“[T]he draft convention . . . does not in any way detract from any applicable immunity . . .”).

ment,⁵⁵ functional immunities attach to U.N. personnel while they are on missions. Thus, peacekeepers are immune from prosecution for crimes they commit in the course of their peacekeeping functions (or crimes that accompany official acts).⁵⁶ Even when alleged violations fall outside a peacekeeper's official function, domestic courts may require a waiver of immunity—a determination by the United Nations that immunity does not attach in this instance—before a victim may bring suit.⁵⁷

Commentators have argued that immunity does not attach in the context of sexual abuse by individual peacekeepers because such abuse will always fall outside their official function,⁵⁸ though the vague definition of “function” means that domestic courts often construe it broadly.⁵⁹ The International Court of Justice has not yet found any customary international law⁶⁰ exception to immunity for gross human rights violations.⁶¹ Moreover, it is not clear that if such

⁵⁵ For a discussion of how international courts or universal jurisdiction cannot be used as a catch-all for these crimes when host-country courts fail due to immunities or practical problems, see *infra* Part I.C.

⁵⁶ See 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, ¶¶ 42–52 (Dec. 15) (discussing applicability and range of immunities for “experts on mission”); Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (*Cumaraswamy*), Advisory Opinion, 1999 I.C.J. 4, ¶¶ 10, 67 (Apr. 29) (finding that Special Rapporteur could not be sued for slander on basis of interview given in his capacity as Special Rapporteur).

⁵⁷ See 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) (explaining safeguards designed “to ensure that the proceedings do not interfere with the official functions of the defendant”); Rawski, *supra* note 32, at 112–13 (discussing Secretary-General's authority in waiving immunity).

⁵⁸ Wickremasinghe & Verdirame, *supra* note 5, at 482 (“[I]n principle the non-official acts of members of the force will be subject to the civil jurisdiction of the host State.”). In the judgment of Wickremasinghe and Verdirame, an “official act” is one within the peacekeeping function. See also Miller, *supra* note 57, at 87 (explaining legal structure of immunities as based on whether acts “relate to official duties”). If the United Nations is considered liable for violations committed in the course of official acts, pressure may build to declare the acts unofficial and thus subject to local legal processes. See Wickremasinghe & Verdirame, *supra* note 5, at 482 (“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.”).

⁵⁹ For discussion of the ambiguity and possible meanings of “functional immunity,” see Rawski, *supra* note 32, at 111–12.

⁶⁰ Customary international law is law that arises both from state practice and from *opinio juris*, the belief of states that such practice is a matter of legal obligation. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757–58 (2001) (discussing bases for customary international law).

⁶¹ Rawski, *supra* note 32, at 113 (citing Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 52 (Feb. 14)). If functional immunity attaches only to official acts, functional immunity may not attach to any human rights violations.

an exception were adopted, all crimes committed by peacekeeping personnel would rise to the level of gross human rights violations.⁶² Regardless of whether such abuse may fall within functional immunity, other agreements between the United Nations and host states often provide for expansions of functional immunity. As a result, virtually all personnel must have a U.N.-issued determination of waiver of immunity before being charged with a crime or subjected to a civil lawsuit.⁶³

The Secretary-General of the United Nations is charged with determining whether to waive immunity for peacekeeping personnel.⁶⁴ Under Sections 20 and 23 of the Privileges and Immunities Convention—the treaty defining the scope of immunity—the Secretary-General has a duty to waive immunity when, “in his opinion, failure to do so would impede justice”⁶⁵ and waiver could occur “without prejudicing the interests of the UN.”⁶⁶ In other words, the Secretary-General arguably does not have the legal ability to deny waiver when he finds that human rights have been violated and norms of due process for defendants⁶⁷ do not weigh heavily against waiver.⁶⁸

Wickremasinghe and Verdirame argue that such a rule applies in the civil context. Wickremasinghe & Verdirame, *supra* note 5, at 482.

⁶² See Rawski, *supra* note 32, at 113 (“[C]ases implicating serious human rights violations are not necessarily clear-cut.”).

⁶³ *Id.* at 108–09 (discussing immunities under Status of Forces Agreements and Military Technical Agreements).

⁶⁴ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (*Cumaraswamy*), Advisory Opinion, 1999 I.C.J. 4, ¶ 50 (Apr. 29) (“The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required.”). The commander of a military force determines the character of the peacekeeper’s act—in other words, whether it was inside the “peacekeeping function.” Wickremasinghe & Verdirame, *supra* note 5, at 482 n.59. In transitional administrations, bureaucratic adjudicators—boards of inquiry or ombudspersons—recommend action to the Secretary-General, and the Special Representative of the Secretary-General then makes a determination. See *supra* note 32 and accompanying text.

⁶⁵ Rawski, *supra* note 32, at 114 (emphasis omitted).

⁶⁶ *Id.* (emphasis omitted). 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 United Nations. See *supra* notes 20–21 and accompanying text (noting that lack of accountability undermines organizational legitimacy).

⁶⁷ As mentioned by the U.N. Group of Legal Experts, a significant concern exists that personnel may be sent to countries where the legal systems do not provide defendants with a fair trial or that they will be unable to navigate a foreign legal system. See Group of Legal Experts, *supra* note 10, ¶ 35.

⁶⁸ Miller, *supra* note 57, at 87. Miller notes due process concerns “in areas where there are doubts about the impartiality of the local courts that would adjudicate the claims against U.N. agents.” *Id.* at 90.

It may thus be argued that, given the Secretary-General's mandate to waive immunity in those cases, a blanket waiver of peacekeeping personnel's civil immunity from legal processes would be justified in the case of grave breaches of human rights obligations or criminal abuse of the local population. Such a blanket waiver would not infringe on the rights of individual personnel. Overall, due process protections will probably be stronger in civil cases than in criminal cases. Although criminal law in national systems often provides more due process protections for defendants than civil law, in the international context the opportunity for collateral attack on enforcement in civil cases reduces the fear of bias in domestic courts.⁶⁹ Courts in the country where assets are held will generally evaluate whether the defendant received due process when choosing whether to enforce the judgment.⁷⁰ Due process concerns about fairness to peacekeeping personnel may thus be exaggerated in civil cases.

Nonetheless, the question arises whether a blanket waiver of immunity would hinder peacekeeping personnel in the execution of their duties. Frederick Rawski notes that subjecting peacekeepers to local courts could have a "devastating impact on staff recruitment."⁷¹ U.N. intervention no longer unequivocally requires the consent of

⁶⁹ Under Article 28 of the Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, 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. Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, art. 28 (1999), <http://www.hcch.net/upload/wop/jdgmpr11.pdf>; see also 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 (2000). Although this convention has not been ratified and the Hague Conference has since turned its attention purely to a convention on choice-of-court agreements and arbitration, the draft convention does show that many countries consider it legitimate to refuse to enforce judgments based on due process concerns. See generally Hague Conference on Private International Law, Publications, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=35&cid=98 (last visited Sept. 2, 2008) (providing links to all preliminary documents, drafts, and reports on subject).

⁷⁰ 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 (1993) (discussing different international approaches to enforcement).

⁷¹ Rawski, *supra* note 32, at 129. Allowing suits that deter participation in U.N. missions has been recognized as contrary to human rights norms and to the U.N. Charter. *Behrami v. France* [GC], App. No. 71412/01, ¶ 111 (E.C.H.R. May 2, 2007), available at <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; then select "Decisions" and "Judgments" under "ECHR Document Collections" heading at left, and enter case title in "Case Title" field; then click "Search" button).

both parties to the conflict.⁷² This change in the nature of peacekeeping means that governments and rebel groups may often wish to impede or to stir up popular resentment of the activities of international observers in their country, and litigation could be one means to this end. In addition, a blanket waiver that leaves compensation up to a contentious tort system will restrict effective redress to victims who have the resources to bring such litigation and to those victims who were wronged by relatively wealthy individuals. Both pragmatic and egalitarian considerations point to an administrative remedy.

C. Human Rights Violations by Peacekeeping Personnel Do Not Rise to the Level of Jus Cogens

While immunities or ongoing conflict may prevent individual prosecution within the host country, national courts in other countries might have jurisdiction over tort claims if the crime rises to a level that provides for universal jurisdiction—jurisdiction in any court anywhere in the world.⁷³ But international criminal law does not address rape and sexual abuse committed by peacekeepers (that is, troops and personnel) against those they are supposed to be protecting, despite the fact that such actions go beyond ordinary crimes and constitute a violation of victims' human rights.⁷⁴ If such violations infringed on *jus*

⁷² See Michael W. Doyle et al., *Introduction to KEEPING THE PEACE: MULTIDIMENSIONAL UN OPERATIONS IN CAMBODIA AND EL SALVADOR 1* (Michael W. Doyle et al. eds., 1997) (discussing shift from traditional peacekeeping to more complex peace enforcement and multidimensional missions). Governments might only consent to the international presence reluctantly, if at all. For example, Sudan has consistently refused to admit U.N. troops, although it now says that it will allow the United Nations to play a supporting role in an African Union–led mission. *Africa: Darfur Force Extended for 6 Months*, N.Y. TIMES, Dec. 1, 2006, at A12; Warren Hoge, *Bush and Sudan's Leader At Odds over Sending UN Troops to Calm Darfur*, N.Y. TIMES, Sept. 20, 2006, at A14; Reuters, *U.N. Accuses Sudan of Delaying Aid Efforts*, N.Y. TIMES, Nov. 23, 2006, at A4.

⁷³ The International Law Commission's Special Rapporteur on the Obligation to Extradite or Prosecute has defined universal jurisdiction as: "the ability of the prosecutor . . . of any state to investigate or prosecute persons for crimes committed outside the State's territory which are not linked to that state by the nationality of the suspect or the victim or by harm to the state's own national interests." Special Rapporteur, Int'l Law Comm'n, *Preliminary Report on the Obligation to Extradite or Prosecute*, ¶ 19, delivered to the General Assembly, U.N. Doc. A/CN.4/571 (June 7, 2006) (citing AMNESTY INT'L, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION 1 (2001)). The existence of universal jurisdiction is not unanimously lauded. In general, objections center around infringements on sovereignty that come when one nation indicts another nation's leaders. See, e.g., Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July–Aug. 2001, at 86 (arguing that public officials should not be subject to court sanctions).

⁷⁴ See *infra* notes 86–88 and accompanying text (discussing position of Group of Legal Experts on status of such crimes).

cogens norms⁷⁵—norms that are universally accepted and binding on all states—peacekeepers arguably would be subject to universal jurisdiction.⁷⁶ This Section will demonstrate, however, that the majority of the crimes committed by peacekeeping personnel do not rise to levels allowing for universal jurisdiction. Since neither domestic courts nor international criminal tribunals will be able to hear tort claims arising from these crimes, U.N. compensation of victims is imperative.

First, abusive acts committed by peacekeeping personnel probably will not rise to the level of torture, a recognized *jus cogens* violation.⁷⁷ A strong color-of-law requirement limits torture to acts committed in an official capacity or with the consent or acquiescence of officials.⁷⁸ This requirement may preclude the claim that sexual abuse constitutes torture when it is undertaken for personal motives.⁷⁹ Thus, relying on a *jus cogens* definition of torture does not address the majority of scandals that the United Nations faces, as they involve isolated incidents and personal motives.⁸⁰

Second, there is probably no universal jurisdiction for an isolated incident of rape or sexual abuse. Rape and sexual abuse are not tradi-

⁷⁵ *Jus cogens* norms are norms of international law that are nonderogable and peremptory and should be accepted and enforced by every state. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; *see also* OPPENHEIM'S INTERNATIONAL LAW 7–8 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (explaining that *jus cogens* violations are “acts . . . in the suppression of which every state is called upon to cooperate”). A comprehensive list of *jus cogens* violations has been produced by the International Law Commission; it includes aggression, slavery and the slave trade, piracy, torture, and racial discrimination. Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 33, U.N. Doc. A/CN.4/L.702 (July 18, 2006). 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. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 120, 218–20 (2000).

⁷⁶ Universal jurisdiction, the potential enforcement of a norm in courts anywhere in the world, acts as an important sanction for violations of *jus cogens* norms. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 304 (2006). In the United States, for example, violations of peremptory norms by noncitizens are judiciable under the Alien Tort Claims Act, although judicial recognition is limited to norms with a high level of specificity and general consensus. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (“[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.”).

⁷⁷ *See supra* note 75 for list of *jus cogens* violations, including torture.

⁷⁸ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113.

⁷⁹ Of course, this very characteristic may lead to a waiver of immunity by officials. Rawski, *supra* note 32, at 118.

⁸⁰ For information about the majority of scandals the United Nations faces, *see supra* note 8.

tional *jus cogens* violations.⁸¹ Yet international criminal tribunals increasingly recognize them as crimes against humanity; it is thus possible that such crimes could give rise to universal jurisdiction.⁸² However, 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 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.⁸³ Under that definition, if a sufficient connection to the armed conflict exists, the abuse is considered a crime against humanity, even if it was committed for personal motives.⁸⁴ Nonetheless, the post-conflict peacebuilding setting of U.N. missions probably would not constitute an “armed conflict” for international criminal law purposes.

Later tribunals took a narrower approach to intent while adopting a wider definition of sexual abuse. The founding statutes of the International Criminal Court (ICC) and the International Criminal Tribunal for Rwanda (ICTR) both stipulate that a crime against humanity must be “committed as part of a widespread or systematic attack.”⁸⁵ The widespread and systematic attack requirement for rape and sexual abuse means that individual incidents are unlikely to rise to the level of crimes against humanity.

U.N. policy nonetheless emphasizes the severity of these crimes. The Group of Legal Experts does not go so far as to label abuse by peacekeeping personnel a war crime or a crime against humanity.⁸⁶ It

⁸¹ See *supra* note 75 (discussing *jus cogens* and feminist objections to exclusion of sexual violence from list of violations).

⁸² If they are *jus cogens* violations or crimes against humanity, they can be prosecuted by international criminal tribunals and national courts. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998) (“With regard, particularly to . . . rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide . . .”).

⁸³ It includes any rape “committed in armed conflict” and “directed against any civilian population.” Statute of the International Tribunal art. 5, May 25, 1993, 32 I.L.M. 1192.

⁸⁴ Prosecutor v. Tadic, Case No. IT-94-1, Opinion and Judgment, ¶ 573 (May 7, 1997) (finding that with sufficient nexus, it is not necessary that acts be committed for specific purpose of furthering hostilities).

⁸⁵ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, 93; Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994). U.N. peacekeepers who intentionally traffic women, as in Bosnia, may knowingly be part of a widespread or systematic attack on civilians. Murray, *supra* note 8, at 512. They may additionally be violating a *jus cogens* norm against slavery. *Id.* at 499–500. Nonetheless, in crafting a general system that addresses all sexual abuse by peacekeepers, U.N. officials cannot assume that all such crimes will fall into the category of crimes against humanity.

⁸⁶ Group of Legal Experts, *supra* note 10, ¶ 57; see also *id.* ¶¶ 63(e), 71(a).

does, however, emphasize that such crimes are not “merely ordinary crimes.”⁸⁷ It notes the special responsibility that peacekeeping personnel have toward the populations they are serving.⁸⁸ The Secretary-General likewise emphasizes that “[s]uch 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.”⁸⁹

The absence of peremptory or international criminal norms does not preclude the possibility of criminal and civil liability of individual peacekeeping personnel. Peacekeeping personnel may still be violating the human rights of their victims, if non-state actors can be said to be violators of human rights.⁹⁰ Commentators have derived a right to bodily integrity from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.⁹¹ U.N. treaty bodies⁹² have also increasingly recognized the problem of violence against women as encompassed by human rights treaties.⁹³ But because such violations still do not rise to the level of *jus cogens* violations generating universal jurisdiction, the United Nations must take positive steps to ensure that victims have a forum for redress.

D. *The United Nations Enjoys Organizational Immunity in National Courts*

The previous Sections have dealt with the lack of remedies for victims against individual peacekeeping personnel. Additionally, since immunity also attaches to the organization as a whole, the

⁸⁷ *Id.* ¶ 57.

⁸⁸ *Id.* ¶ 55.

⁸⁹ The Secretary-General, *Introduction to Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, at 1, delivered to the General Assembly, U.N. Doc. A/59/710 (Mar. 24, 2005).

⁹⁰ I assume in this Note that non-state actors can violate human rights. See *supra* note 5.

⁹¹ See, e.g., Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1126 n.28 (1995) (citing “right to life, liberty, and security of person” of Universal Declaration of Human Rights art. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) and “right to life” of International Covenant on Civil and Political Rights art. 6, ¶ 1, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171). 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 international public outcry over abuse by peacekeepers indicates that the United Nations should treat such a widespread norm against sexual abuse as a serious component of international law.

⁹² Treaty bodies are committees charged with interpretation and monitoring of human rights treaties. Thomas Buergenthal, *The Evolving Human Rights System*, 100 AM. J. INT’L L. 783, 789 (2006).

⁹³ E.g., Human Rights Comm., *General Comment No. 28: Equality of Rights Between Men and Women (Article 3)*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

United Nations cannot be sued in national courts for the behavior of its personnel. International organizations have traditionally enjoyed such immunity from suit.⁹⁴

The United Nations itself enjoys immunity under the Privileges and Immunities Convention. The Convention states: “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity”⁹⁵ The European Court of Human Rights (ECHR) has called immunity “an essential means of ensuring the proper functioning of such [international] organisations.”⁹⁶ The ECHR reasoned that international organizations would not be able to carry out their mandates if they faced potential lawsuits on a wide range of activities in numerous countries’ courts.⁹⁷ International organizational immunity forecloses the possibility of a remedy based on employer liability through suit in national courts, although it may be challenged if it results in a total absence of remedies for victims of abuse.⁹⁸ Part II will discuss how an administrative remedy can fill the gap in redress for victims.

⁹⁴ For a discussion of the immunity of international organizations, see generally Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT’L L. 53 (1995). In the U.S. context, that immunity is codified in the International Organizations Immunity Act, 22 U.S.C. § 288a(b) (2000).

⁹⁵ Privileges and Immunities Convention, *supra* note 14, art. II, § 2; see also Rawski, *supra* note 32, at 107–08 (discussing provisions of Convention related to immunity and obligations of international organizations); August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals* 3–4 (Inst. for Int’l Law & Justice Global Admin. Law Series, Working Paper No. 2007/11, 2007), available at <http://iilj.org/publications/documents/2007-11.GAL.Reinisch.web.pdf> (same).

⁹⁶ *Waite v. Germany* [GC], App. No. 26083/94, 1999-I Eur. Ct. H.R. ¶ 63. The United Nations is not a High Contracting Party and could not itself be sued before the ECHR. *Cf.* Convention for the Protection of Human Rights and Fundamental Freedoms arts. 45–53, Nov. 4, 1950, 213 U.N.T.S. 221 (granting jurisdiction over High Contracting Parties to Court). Nonetheless, as in *Waite*, the ECHR can dictate when it is appropriate for national authorities to use immunity as a “procedural bar” to the enforcement of rights. See *infra* note 175–177 and accompanying text.

⁹⁷ See *Waite*, 1999-I Eur. Ct. H.R. ¶¶ 61, 63 (“[I]nternational organisations . . . were able to function only if they adopted uniform internal regulations . . . and if they were not forced to adapt to differing national regulations and principles.”).

⁹⁸ See *infra* Part III.

II

AN ADMINISTRATIVE REMEDY PROVIDING COMPENSATION CAN ADEQUATELY FILL THE GAP IN REDRESS FOR VICTIMS

Because the United Nations is under attack for failing to create a culture of accountability,⁹⁹ and the organization itself enjoys immunity from suit in domestic courts,¹⁰⁰ it is crucial that the United Nations take responsibility for personnel sent abroad under its command.¹⁰¹ A compensation mechanism will demonstrate responsibility and concern at the highest organizational levels, rather than just at the level of suits against particular violators. This Section will discuss the need for compensation, current U.N. practice, and lessons learned from past mechanisms. It will show that a compensation mechanism, established as part of the peacekeeping budget, may be a valuable resource to the United Nations and to victims.

A. *Compensation Is Crucial for Victims*

Not all victims may seek compensation when wronged; some may focus on symbolic measures like an apology or on criminal accountability alone. Although increased criminal accountability is pivotal to the provision of effective remedies,¹⁰² the United Nations should not neglect to provide compensation as well. Other international bodies have recognized financial compensation to victims as a crucial component of human rights practices.¹⁰³ The current mission mandate of

⁹⁹ See *supra* notes 2–11 and accompanying text.

¹⁰⁰ See generally Ved P. Nanda, *Accountability of International Organizations: Some Observations*, 33 DENV. J. INT'L L. & POL'Y 379 (2005) (discussing intergovernmental organizations' immunity from suits and accountability).

¹⁰¹ As discussed above, peacekeeping personnel are under the command and control of the U.N. See *supra* notes 14–16 and accompanying text.

¹⁰² See *supra* notes 44–53 and accompanying text (discussing U.N. criminal accountability reforms and Draft Convention).

¹⁰³ For example, the importance of financial compensation in addition to criminal liability is recognized by the Rome Statute—founding statute of the International Criminal Court (ICC)—which created a Trust Fund in addition to the ICC. Rome Statute of the International Criminal Court art. 79, July 17, 1998, 2187 U.N.T.S. 90, 136; Thordis Ingadottir, *The Trust Fund for Victims (Article 79 of the Rome Statute)—A Discussion Paper 1* (Project on Int'l Courts & Tribunals, ICC Discussion Paper No. 3, 2001), available at http://www.pict-pcti.org/publications/ICC_paprs/Trust_Fund.pdf (“The establishment of the Trust Fund is an important component of the Rome Statute’s overall goal: restoring peace by dispensing retributive justice to criminals and restorative justice to victims.”). The Trust Fund of the ICC represents a movement to tie criminal to civil liability and to ensure that victims are compensated. See Peter G. Fischer, Comment, *The Victims’ Trust Fund of the International Criminal Court: Formation of a Functional Reparations Scheme*, 17 EMORY INT’L L. REV. 187, 196–201 (2003) (discussing right to reparations under international law and lobbying based on that right during formation of ICC).

referring victims to available medical and psychosocial assistance in the host country¹⁰⁴ is a step in the right direction but does not go far enough.

Some might argue that compensation should not be provided because it cannot fully rectify the crime, but this argument relegates survivors to the status of perpetual victims.¹⁰⁵ Human rights advocates must be careful not to allow their clients to be retraumatized or revictimized during investigation and litigation.¹⁰⁶ Treating rape or abuse as something so serious that one will never recover or return to his or her former state can be a self-fulfilling prophecy.¹⁰⁷

Compensation, in contrast, will give survivors support necessary to rebuild their lives, both post-conflict and post-trauma.¹⁰⁸ The Zeid Report points out that “[m]any victims, especially those who have ‘peacekeeper babies’ and who have been abandoned by the fathers, are in a desperate financial situation.”¹⁰⁹ Compensation will also be crucial for those who have contracted HIV/AIDS and will need long-term healthcare.¹¹⁰ In addition, compensation may be of symbolic importance to the victim: It represents recognition and concern for victims by the international organization, rather than merely the individual wrongdoer. Although financial compensation alone may not be able to truly restore a survivor of abuse to his or her former state, it

¹⁰⁴ See *supra* notes 40–41 and accompanying text (explaining provision of assistance).

¹⁰⁵ The readers who raise this argument recall the traditional criticism of tort law that money can never fully compensate for injury. For an overview of the philosophical debate over the value of compensation in tort, see generally Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993).

¹⁰⁶ The victim-survivor dichotomy becomes especially salient in the human rights context, in which remedies may fall short. See Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379, 389–91 (2006) (discussing potential revictimization of clients).

¹⁰⁷ See generally Brenda Cossman, Dan Danielson, Janet Halley & Tracy Higgins, *Gender, Sexuality and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601 (2003) (discussing marital-abuse tort case through lens of Janet Halley’s suggestion that traditional feminism causes courts to view rape survivors as perpetual victims).

¹⁰⁸ Catherine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 138 (2000) (arguing that in context of sexual assault, civil remedies may be more empowering to women than criminal remedies because civil remedy allows private action); see also Catherine MacKinnon, *Women’s Status, Men’s States*, 17–18 (Jan. 24, 2008) (unpublished paper), available at <http://iilj.org/courses/documents/2008Colloquium.Session2.MacKinnon.pdf> (same).

¹⁰⁹ Zeid Report, *supra* note 19, ¶ 72.

¹¹⁰ 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).

can make a crucial difference to vulnerable populations in a post-conflict or ongoing conflict situation.¹¹¹

B. Past Compensation Paid in the Peacekeeping Context

The United Nations has given victims financial compensation in the past, thus establishing precedent for some form of liability when peacekeeping personnel under its command and control commit illegal acts.¹¹² Past practice constitutes important precedent for a compensation mechanism.

In 1965, the United Nations paid compensation to the Congo in the face of claims for damage to persons and property.¹¹³ In recent years, the United Nations has more often considered compensation a responsibility of the state of nationality, at least where troops are not under U.N. control.¹¹⁴ U.N. compensation for unlawful acts by U.N. personnel has come on a case-by-case basis, which appears to be largely contingent on international pressure or litigation by the victim's state.¹¹⁵

¹¹¹ In an ongoing conflict, the United Nations will have to determine on a case-by-case basis the most appropriate methods of compensation and of ensuring the security of victims. Some questions to be answered in each case will be whether payments should be continuous rather than lump sum and whether compensation should include assistance in obtaining goods or gaining security. Nonetheless, money and/or compensation in the form of goods can make a concrete difference to survivors of conflict. For example, Rwandan genocide survivors who were raped now need money to address diseases contracted and to raise the resulting children. Jonathan Torgovnik, *Intended Consequences: Rwanda's Living Legacy of Violence*, AMNESTY INT'L, Spring 2008, at 16, 16 ("Although the women . . . struggle with ambivalent feelings toward their children, they expressed a desire that their children have access to education—a basic human right not available to them now because they cannot afford school fees.").

¹¹² August Reinisch, Note, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 858–59 (2001) (calling payment of compensation "early important incident" based on "the duty not to harm foreign nationals") (citing Exchange of Letters Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals, Feb. 20, 1965, 535 U.N.T.S. 198).

¹¹³ See Wickremasinghe & Verdirame, *supra* note 5, at 474 ("[I]n 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." (citing Jean J.A. Salmon, *Les accords Spaak–U Thant du 20 février 1965*, 11 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 468 (1965)).

¹¹⁴ See Wickremasinghe & Verdirame, *supra* note 5, at 474 & n.29 ("[W]here the UN does not have command and control of the troops in question, it will . . . expect the State of nationality [to settle claims]."). Command and control is, of course, not an issue within our given population of "peacekeeping personnel." See *supra* note 16 and accompanying text.

¹¹⁵ Even within the developed Kosovo system, victims were more likely to be compensated if they could rally international concern around their case. See Elizabeth Abraham, Comment, *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.

Claims review boards are the current mechanism by which the United Nations processes requests for compensation. The United Nations envisioned a standing claims commission in the Privileges and Immunities Convention, but in practice, U.N. claims review boards have operated on a mission-by-mission basis to handle claims brought against the United Nations itself or against a troop-contributing country, not against individual peacekeepers.¹¹⁶ In these claims review boards, there is a six-month statute of limitations and a cap of U.S. \$50,000.¹¹⁷ These claims review boards must be reconvened for each mission, and thus have been criticized as too slow and costly.¹¹⁸ A centralized, standing claims mechanism, one that would not need to be reconvened and would be easier for individuals to access, would be a substantial improvement on the claims review boards.¹¹⁹

The example of the Gashi brothers, who were compensated for arbitrary detention by the U.N. Mission in Kosovo (UNMIK), demonstrates both that claims review boards are not always convened when needed and that compensation can be effective in responding to international pressure or loss of legitimacy. In this instance, three Kosovar men were detained by UNMIK and held without indictment for twelve months.¹²⁰ The ECHR has held that such detentions violate defendants' right to due expedition guaranteed under the European Convention on Human Rights.¹²¹ The men were finally released due to lack of evidence, and the Commission on Compensation for

U. L. REV. 1291, 1298–1337 (2003) (discussing several cases in which people were subject to unlawful detentions without meaningful accountability mechanisms or redress).

¹¹⁶ Daphna Shrager, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AM. J. INT'L L. 406, 409 (2000). Section 29 of the Privileges and Immunities Convention only says that the United Nations must provide some measure of compensation, but there is history indicating that the drafters envisioned a standing commission. *Id.*; see also Privileges and Immunities Convention, *supra* note 14, art. VIII, § 29.

¹¹⁷ 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.” Shrager, *supra* note 116, at 411.

¹¹⁸ *Id.* at 88 n.114; see also *supra* note 32 and accompanying text.

¹¹⁹ A centralized mechanism would avoid the costs of training new members with no prior experience in precedent or methods of investigations upon reconvening. Regularly scheduled sessions could also minimize bureaucratic costs and increase the speed of decisionmaking. See *infra* text accompanying note 138.

¹²⁰ DEP'T OF HUMAN RIGHTS & RULE OF LAW, ORG. FOR SEC. & CO-OPERATION IN EUROPE, KOSOVO: A REVIEW OF THE CRIMINAL JUSTICE SYSTEM 1 SEPT. 2000–28 FEB. 2001, at 79 (2001), available at http://www.osce.org/documents/mik/2001/07/969_en.pdf.

¹²¹ Specifically, the ECHR in a past case found that eleven months of detention violated Article 5(3) of the European Convention on Human Rights. *Id.* at 80 (citing *Toth v. Austria*, App. No. 11894/85, ¶¶ 76–78 (E.C.H.R. Dec. 12, 1991), available at <http://www.echr.coe.int/echr/en/hudoc>). For instructions on locating documents within “HUDOC Database,” see *supra* note 71.

Wrongfully Accused/Convicted and/or Detained Persons offered an undisclosed amount to the three detainees.¹²²

UNMIK chose to compensate the three men in light of a ruling by a panel of international judges in Pristina.¹²³ The *Gashi* case was not ideal: No formal adjudication occurred,¹²⁴ no uniform procedure for waiving immunity was detailed in the report, and no uniform policy of compensation across various types of potential violations by peacekeepers was provided.¹²⁵ The *Gashi* detainees were fortunate in that strong administrative procedures for investigation existed in Kosovo, domestic law mandated compensation by the government in the case of arbitrary detention or wrongful conviction, and, as a result, a compensation mechanism was already in place.¹²⁶ The *Gashi* case shows that where compensation procedures have already been established, the United Nations can and will utilize such procedures to reestablish international legitimacy, but the availability of such measures may depend on local conditions.

C. Models, Partner Mechanisms, and Structure of a Claims Mechanism

Because compensation is crucial for victims and is a feasible mechanism for making victims whole, the United Nations should

¹²² DEP'T OF HUMAN RIGHTS & RULE OF LAW, ORG. FOR SEC. & CO-OPERATION IN EUROPE, *supra* note 120, at 81.

¹²³ *Id.*; Rawski, *supra* note 32, at 122 & n.92.

¹²⁴ An adjudicative body was later set up to determine whether human rights violations had occurred. In August 2005, three U.N. police officers were arrested by UNMIK's civilian police force and the Kosovo Police Service for human trafficking. UNMIK, *Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo Since June 1999*, ¶ 32, U.N. Doc. CCPR/C/UNK/1, pt. 2 (Mar. 13, 2006) [hereinafter UNMIK Report]. Mission administration, in consultation with the Council of Europe, later decided to create a Human Rights Advisory Panel to "issue non-binding determinations relating to complaints of violations of human rights by UNMIK." UNMIK, *Core Common Document Forming a Part of the Reports Submitted by United Nations Interim Administration Mission in Kosovo to Human Rights Treaty Bodies*, ¶ 132, U.N. Doc. CCPR/C/UNK/1, pt. 1 (Mar. 13, 2006) [hereinafter UNMIK Core Common Document]. This was in stark contrast to the absence of an adjudicative body in the *Gashi* case.

¹²⁵ See UNMIK Report, *supra* note 124, ¶ 42 (discussing compensation for arbitrary detention but not compensation for other sorts of wrongs).

¹²⁶ The Provisional Criminal Procedure Code of Kosovo provides for compensation for arbitrary or unlawful detention, as well as for those wrongly charged, indicted, or convicted. UNMIK Report, *supra* note 124, ¶¶ 42, 162; Provisional Criminal Procedure Code of Kosovo arts. 534–38, U.N. Doc. UNMIK/REG/2003/26 (July 6, 2003). UNMIK also has a constitutional framework that allows for review of administrative decisions. UNMIK Core Common Document, *supra* note 124, ¶¶ 125–60 (outlining complaints system for employment rights, acts of Municipal Assembly, and administrative decisions more generally). The Ombudsman Institution investigates human rights complaints and reports to the Special Representative to the Secretary-General. *Id.* ¶¶ 161–63.

develop a claims mechanism that will facilitate compensation by receiving complaints of abuse, investigating them, and determining the amount of compensation. A compensation mechanism can build on lessons from the claims review boards and partner with extant complaints systems and investigatory mechanisms to compensate individuals whose human rights have been violated. By linking criminal and administrative investigations to a compensation mechanism, the United Nations will avoid some of the litigation problems, bureaucracy, and other costs that plague the current claims review board system for peacekeeping troops.

The U.N. High Commissioner for Refugees (UNHCR) has a local complaints procedure—similar to the complaints system created during the MONUC scandal—under which refugees can file complaints about abuses.¹²⁷ This procedure was generated for the UNHCR, following the recommendations of an Office of Internal Oversight Services (OIOS) task force.¹²⁸ It is unclear, however, whether refugees have effective access to these complaint mechanisms, as complaints by individuals compose only one percent of the total complaints received.¹²⁹ Having a limited number of local offices can restrict refugee access, as “emailing or telephoning Geneva directly is almost impossible.”¹³⁰ Additionally, refugees often have neither knowledge of their rights nor confidence in the system.¹³¹ Nonetheless, the establishment of local complaints mechanisms increased the number of complaints so much that UNHCR needed extra funding to address all of them.¹³²

As discussed above, the U.N. Department of Peacekeeping Operations is also in the process of establishing local complaints mechanisms in its major missions.¹³³ The new Conduct and Discipline Units are charged with receiving and handling complaints,¹³⁴ while the OIOS will take charge of serious criminal allegations.¹³⁵ Further, if these organizations follow the agency-cooperation model espoused in

¹²⁷ Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms*, 37 N.Y.U. J. INT'L L. & POL. 869, 892–98 (2005).

¹²⁸ *Id.* at 896.

¹²⁹ *Id.* at 897 (citing Executive Comm. of the High Comm'r's Programme, *Report on UNHCR's Oversight Activities*, ¶ 71 & fig.4, U.N. Doc. A/AC.96/976 (Aug. 5, 2003)). Other complaints come from NGOs, OIOS, and UNHCR itself. *Id.* at 897.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 896.

¹³³ See *supra* notes 35–39 and accompanying text (discussing complaints procedures in MONUC and UNMIL).

¹³⁴ *Report on Accountability*, *supra* note 27, ¶ 48.

¹³⁵ Miller, *supra* note 57, at 85 (citing G.A. Res. 59/287, ¶ 3, U.N. Doc. A/Res/59/287 (Apr. 21, 2005)).

the Group of Legal Experts' report, they can provide fact-finding and evidence admissible in the adjudication of complaints by commissioners.

In addition to building on these local complaint mechanisms, a claims mechanism dealing specifically with civilian peacekeeping personnel could avoid some of the problems of the current claims review boards by having permanent experts adjudicating claims.¹³⁶ The panel could include a representative of the alleged perpetrator's state of nationality or of the mission, as missions in the past have expressed concerns about interference with interpretation of their mandate.¹³⁷ The panel could also include a representative from the victim's country of origin who would be familiar with local customs and the cultural implications of the crime. Having a majority of the members appointed for terms of years, as in the U.N. Administrative Tribunal,¹³⁸ will enable the judges to develop expertise and will decrease the individual institutional costs and inertia of each case.

Any compensation mechanism will build on the efforts provided by other investigative and administrative agencies in determining claims, particularly if one complaint form is used to begin linked criminal investigations and civil processes. Civil processes are currently linked to criminal jurisdiction in international organizations such as the ICC.¹³⁹ The experience of creating a UNHCR complaints system should be used to strengthen a parallel and permanent Department of Peacekeeping Operations complaints system. Such a mechanism would provide an effective means for victims to access financial compensation.

D. The Mechanism Should Be Part of the Peacekeeping Budget

By funding such a complaints mechanism, the peacekeeping budget would comply with the strong human rights norm that there

¹³⁶ See *supra* notes 116–18 and accompanying text for a discussion of the claims-review-board structure.

¹³⁷ Cf. UNMIK Core Common Document, *supra* note 124, ¶ 132. (“The creation of a judicial body that would issue binding decisions on UNMIK would be problematic from the perspective of . . . the importance of not compromising the discretion of the institutions of the United Nations to interpret the mandate of UNMIK under UNSCR 1244.”).

¹³⁸ United Nations Administrative Tribunal, Membership, <http://untreaty.un.org/UNAT/Membership.htm> (last visited Aug. 20, 2008).

¹³⁹ Where “victims of the crimes being prosecuted have critical needs,” the ICC Victims Trust Fund provides for compensation during the process itself. In cases of particularly “compelling need,” compensation may be paid even in the absence of an ICC criminal prosecution. International Criminal Court Victims Trust Fund, Who We Are, <http://www.icc-cpi.int/vtf.html> (last visited Aug. 20, 2008).

should be a remedy for violations of rights.¹⁴⁰ Disciplinary measures to garnish salaries and enforce penalties for misconduct could supplement the budget of a compensation mechanism,¹⁴¹ but the historic scarcity of donations to voluntary funds in the United Nations suggests that donations may be an unreliable source of funding. The United Nations currently administers a large number of voluntary funds that provide aid to countries and nongovernmental organizations (NGOs),¹⁴² but none of these funds could be used to provide victim assistance due to constraints on their use.¹⁴³ Thus, in order to guarantee funding for the claims mechanism, this Section suggests that the claims mechanism should be drawn from the peacekeeping budget.

Currently, two U.N. voluntary funds indirectly provide assistance to individual victims: the U.N. Voluntary Fund for Victims of Torture (Fund for Torture Victims) and the U.N. Voluntary Trust Fund on Contemporary Forms of Slavery (Slavery Fund).¹⁴⁴ Nonetheless, the Fund for Torture Victims guidelines explicitly state that “[t]he Fund

¹⁴⁰ For a discussion of this norm and its influence on compensation as a remedy for defendants in the international criminal context, see generally Starr, *supra* note 6.

¹⁴¹ See Miller, *supra* note 57, at 89. The Zeid Report proposes both a voluntary trust fund for victims and individual financial accountability. Zeid Report, *supra* note 19, ¶¶ 56, 72–77. First, Prince Zeid suggests that staff be encouraged to donate to a trust fund with simplified procedures for compensation. *Id.* ¶ 56. Second, the U.N. Staff Rules permit imposition of fines on staff members found guilty of misconduct, and such fines could be paid to the trust fund. *Id.* ¶ 73. Prince Zeid suggests that the United Nations have a procedure for deducting child support from salary or severance packages. *Id.* ¶ 76.

¹⁴² See, e.g., Benedict Kingsbury, “Indigenous Peoples” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414, 447 (1998) (discussing how existence of U.N. Voluntary Fund for Indigenous Populations embodies current perceptions of what “indigenous” means); United Nations Democracy Fund, *Situating the UN Democracy Fund in the Global Arena*, <http://www.un.org/democracyfund/XSituatingDemocracy.htm> (last visited June 19, 2008) (describing work of U.N. Democracy Fund).

¹⁴³ I hypothesize that voluntary funds are probably so constrained because the founders assumed that donors would be more willing to give to NGOs than to individuals. In addition, they did not want funds to become adjudicators of individual claims. See *infra* notes 147, 152 and accompanying text.

¹⁴⁴ The original resolution of the Fund for Torture Victims mandated assistance to “individuals whose human rights have been severely violated as a result of torture and to relatives of such victims.” G.A. Res. 36/151, ¶ 1(a), U.N. Doc. A/RES/36/151 (Dec. 16, 1981). The Slavery Fund has similar provisions for victim assistance. G.A. Res. 46/122, ¶¶ 1(b), (e), U.N. Doc. A/RES/46/122 (Dec. 17, 1991). Over half of the projects funded in 2003 by the Slavery Fund were projects dealing with sexual abuse, exploitation, or trafficking. The Secretary-General, *Status of the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery*, Annex IV.B, delivered to the General Assembly, U.N. Doc. A/58/306 (Aug. 22, 2003).

does not provide financial compensation to victims.”¹⁴⁵ Only applications by NGOs are admissible under the Fund for Torture Victims guidelines, though such funds ultimately may be disbursed to victims by the NGOs.¹⁴⁶ This limitation illustrates donors’ preference for providing social assistance like micro-projects, training, and necessary health care, rather than disbursing traditional financial compensation.¹⁴⁷

In addition, U.N. voluntary funds chronically lack sufficient donations and support. While the Fund for Torture Victims has a compelling mandate,¹⁴⁸ and countries occasionally use contributions to show their commitment to stopping torture,¹⁴⁹ its budget remains small.¹⁵⁰ The Slavery Fund, which focuses its efforts on sexual abuse and trafficking, has struggled as well.¹⁵¹

More political will may exist for a claims mechanism in the context of peacekeeper abuse than in the context of torture. The Fund for Torture Victims does not make individual determinations that torture under color of law has occurred, as such determinations are considered politically threatening to national governments.¹⁵² In contrast,

¹⁴⁵ UNITED NATIONS VOLUNTARY FUND FOR VICTIMS OF TORTURE, GUIDELINES OF THE FUND FOR THE USE OF ORGANIZATIONS ¶ 5 (2007), available at <http://www.ohchr.org/Documents/Issues/UNVFTguidelines2008EN.pdf>.

¹⁴⁶ *Id.* ¶ 1.

¹⁴⁷ See Office of the High Commissioner for Human Rights, UN Voluntary Fund for Victims of Torture: Assistance, <http://www.ohchr.org/EN/Issues/Pages/TortureFundMain.aspx> (follow “psychological, medical, social, legal and economic assistance” hyperlink) (last visited Aug. 20, 2008) (identifying types of assistance provided).

¹⁴⁸ See *supra* note 144.

¹⁴⁹ See HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAWS, POLITICS, MORALS 757 (3d ed. 2008) (noting Saudi Arabia’s use of contributions to Fund for Torture Victims to deflect criticism).

¹⁵⁰ See United Nations, Voluntary Fund: UN Support to Victims of Torture, <http://www.un.org/events/torture/fund.htm> (last visited Aug. 20, 2008) (“This inadequacy of available resources is a limiting factor in the field of assistance to victims; as a consequence, programmes of assistance are subjected to interruptions.”); see also The Secretary-General, *United Nations Voluntary Fund for Victims of Torture: Report of the Secretary-General*, ¶ 48, delivered to the General Assembly, U.N. Doc. A/62/189 (Aug. 6, 2007) (“The General Assembly and the Board have also urged regular donors to increase their contributions if possible in order to provide the Board with the resources to meet the growing needs of torture victims and members of their families.”).

¹⁵¹ Over half of the projects funded in 2003 by the Slavery Fund were projects dealing with sexual abuse, exploitation, or trafficking. See *supra* note 144. A typical appeal to donors reads: “Taking into consideration the requests received in 2004 and that the Board recommended for expenditure almost all money available at its 9th session, in the Board’s view, in order to be able to fulfill its mandate satisfactorily, the Fund would need an amount of US\$325,000 before its 10th session” Office of the High Commissioner for Human Rights, Voluntary Trust Fund on Contemporary Forms of Slavery, <http://www.unhchr.ch/html/menu2/9/vfslaver.htm> (last visited Aug. 20, 2008).

¹⁵² 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

in the context of violations by U.N. peacekeeping personnel, governments are not directly threatened, since specific individuals (or the United Nations) will be held responsible. A claims mechanism built into the peacekeeping budget may thus be politically feasible.

The success of the United Nations Administrative Tribunal (UNAT) demonstrates the feasibility of a claims mechanism built into the peacekeeping budget. UNAT is an independent body composed of seven members that issues binding judgments in employment disputes¹⁵³ and awards compensation from the United Nations to individual employees.¹⁵⁴

In UNAT cases, payment may come from the United Nations as a whole or from the specialized agency, and a future claims mechanism would face a similar choice.¹⁵⁵ Thus, in order to avoid cuts in essential peacekeeping programs, an item would have to be added to the peacekeeping budget to fund a claims mechanism. Factoring such money into a budget paid from state dues¹⁵⁶ comports not only with the norm that remedies be available to those whose rights have been violated, but also with theories of employer liability addressed in Part III.

III PROVISION OF COMPENSATION IS NORMATIVELY REQUIRED

This Part addresses theoretical bases for compensation that are drawn from current legal structures at the national and international levels. First, the United Nations acts as an employer and directly con-

purposes," if grants of funds were construed as "implicit allegation[s] of such violations." NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 167 (1999).

¹⁵³ United Nations Administrative Tribunal, http://untreaty.un.org/UNAT/main_page.htm (last visited Aug. 20, 2008).

¹⁵⁴ Statute of the Administrative Tribunal of the United Nations, G.A. Res. 351(IV), art. 10(1), U.N. Doc. A/RES/351(IV) (Nov. 24, 1949), *as amended through* G.A. Res. 59/283, U.N. Doc. A/RES/59/283 (Apr. 13, 2005), *available at* <http://untreaty.un.org/UNAT/Statute.htm>.

¹⁵⁵ *Id.* art. 10(3). Although the original wrongful act adjudicated was performed by an individual supervisor and may have involved personal motives such as sexual harassment, the claim is paid by the United Nations. Such payments comport with theories of employer liability. *See infra* Part III.A.

¹⁵⁶ The United Nations is funded by payments from individual states, which are assessed dues based on their ability to pay. *E.g.*, The Secretary-General, *Implementation of General Assembly Resolutions 55/235 and 55/236*, Annex III, *delivered to the General Assembly*, U.N. Doc. A/61/139 (July 13, 2006) ("[The] Government [of the Philippines] requests that the Philippines be allowed to return to Category I of the peacekeeping scale of assessments in keeping with the fundamental principle of 'capacity to pay.'"). For an overview of how financing assessments work, see generally *id.*

trols the actions of peacekeeping personnel. Therefore, were it not for organizational immunity, the doctrine of *respondeat superior* would be binding on the United Nations in many countries. Under this doctrine, an employer is liable for the acts of its employees committed in the course of employment.¹⁵⁷ Deterrence considerations weigh in favor of this form of liability. Second, in light of recent ECHR decisions, the United Nations may be required to provide an administrative remedy for human rights violations in order to preserve its organizational immunity.¹⁵⁸ Under both legal structures, U.N. legitimacy as an international actor with special legal status hinges on providing victims with an adequate remedy.

A. Employer Liability and Deterrence

Because other remedies are inadequate to redress crimes committed by U.N. personnel, the United Nations should be subject to *respondeat superior* liability for the crimes of its personnel. Peacekeeping personnel, unlike peacekeeping troops, are direct employees of the United Nations and are under U.N. jurisdiction and control.¹⁵⁹

Further, because the United Nations is empowered through state delegation of authority, this liability may extend to states in the form of higher dues. Eric Posner and Alan Sykes have compared the law of state responsibility for citizens' actions to employer liability for employees' actions.¹⁶⁰ The analogy between employer liability and U.N. responsibility is more direct: The United Nations acts as an

¹⁵⁷ Although this paper deals mainly with the application of employer liability in the United States, the principle of *respondeat superior* is recognized by other countries as well, and may occasionally be replaced by accomplice liability and other measures of complicity. See Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 138, 163 (2004) (cataloging doctrines of *respondeat superior* in Western Europe); Eric Mongelard, *Corporate Civil Liability for Violations of International Humanitarian Law*, 88 INT'L REV. RED CROSS 665, 677–82 (2006) (discussing use of *respondeat superior* and accomplice liability to hold corporations liable for employee wrongs); Valerie Oosterveld & Alejandra C. Flah, *Holding Leaders Liable for Torture by Others: Command Responsibility and Respondeat Superior as Frameworks for Derivative Civil Liability*, in TORTURE AS TORT, *supra* note 5, at 454–56 (explaining doctrine of enterprise liability in Canada).

¹⁵⁸ See *infra* Part III.B.

¹⁵⁹ Peacekeeping personnel, as defined above, are officials of the United Nations (U.N. staff and volunteers) and experts performing missions (U.N. police, military observers, military advisers, military liaison officers, and consultants). See *supra* note 10 and accompanying text.

¹⁶⁰ They argue that the need for deterrence should be taken into account when studying international law. Eric A. Posner & Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility Under International Law*, 9 AM. L. & ECON. REV. 72, 75–76 (2007).

employer, not just as a monitoring state. But Posner and Sykes's observations about state responsibility help to explain why state dues should be used for a compensation mechanism.

First, the imposition of *respondeat superior* is effective at deterring violations when the ability to monitor citizens' behavior exists. Posner and Sykes point out that states should be responsible for the acts of their citizens when they can monitor their citizens' behavior and when individual liability is inadequate.¹⁶¹

The United Nations' power is delegated to it by states, and states collectively act through the United Nations. The United Nations thus is in the best position to monitor the behavior of its personnel. As shown above, current remedies are insufficient to deter abuse, particularly when host countries' court systems are weak and the state of nationality does not prosecute offenders. In these situations, the imposition of employer-like responsibility on the United Nations as a collective of states is appropriate.

The United Nations is made up of states; they vote on U.N. actions to determine policy and delegate day-to-day decisions to U.N. officials and bureaucracy.¹⁶² Applicants in the ECHR have considered the fact that countries voted in favor of deployment of forces by international organizations relevant to whether jurisdiction exists to review state actions during participation in an international force.¹⁶³ Given that states collectively control the United Nations, the idea that they should not be responsible collectively for U.N. error seems odd. If the United Nations operates as the employer of peacekeeping personnel, states are the ultimate employers, and liability is a budgetary expense.

Second, employer liability is most effective at deterring violations when it provides a financial motive to monitor actions.¹⁶⁴ Posner and

¹⁶¹ *Id.* at 75.

¹⁶² For a discussion of the dynamics of voting in the United Nations, see Erik Voeten, *Outside Options and the Logic of Security Council Action*, 95 AM. POL. SCI. REV. 845, 845 (2001) ("Largely neglected is the important role of international organizations as forums for bargaining . . .").

¹⁶³ *Behrami v. France* [GC], App. No. 71412/01, ¶ 75 (E.C.H.R. May 2, 2007), available at <http://www.echr.coe.int/echr/en/hudoc>. For instructions on locating documents within "HUDOC Database," see *supra* note 71.

¹⁶⁴ Although vicarious liability for actions of independent contractors is rare under domestic law, the United Nations might consider giving such contractors a further financial incentive to monitor actions. The terms of the contract generally require contractors to warrant that they have taken measures to prevent sexual abuse and to explicitly prohibit sexual activity with any person under the age of eighteen, the exchange of goods or services for sex, and "exploitative or degrading" sexual activities. CHRISTOPHER MCCRUDDEN, *BUYING SOCIAL JUSTICE* 380 (2007). Currently, the only mechanism for enforcement of this provision is termination of the contract. *Id.* In cases in which peacekeeping personnel are provided through contracting, bond provisions or other safe-

Sykes use economic analysis to show that requiring state compensation for violations of international law can act as a deterrent by forcing international actors to internalize costs.¹⁶⁵ Opponents of a compensation scheme might argue that states will be the ones paying, while U.N. officials and the Department of Peacekeeping Operations are directly in charge of policies and have control over employee supervision.¹⁶⁶ There are two responses to this argument. First, states are ultimately responsible for overseeing the U.N. bureaucracy and for change in Department of Peacekeeping Operations policies. For example, the Sixth Committee of the General Assembly, comprising all voting member states of the United Nations, sets standards for U.N. operation and policy and is currently in charge of any further action on the draft convention proposed by the Group of Legal Experts on states' jurisdiction over their own nationals.¹⁶⁷

Second, if the compensation mechanism becomes part of the peacekeeping budget,¹⁶⁸ two possible structures could incentivize individual missions to reduce abuse by peacekeeping personnel. Money could be paid by individual missions involved in overseeing the perpetrators, whether taken from their budgets or paid prospectively into an operating budget for claims payments.¹⁶⁹ It is also possible for

guards could be used to bolster the budget of any compensation mechanism, and the contract could provide for administrative adjudication of claims.

¹⁶⁵ Posner & Sykes, *supra* note 160, at 76, 80–84.

¹⁶⁶ Similar arguments could be made against the Federal Tort Claims Act in the United States. In that context, one might wonder why taxpayers should shoulder the cost of damage inflicted by particular government individuals. For a discussion of tort versus administrative remedies in the Federal Tort Claims context, see James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1569 (2000) (“In the government context, no owners or shareholders bear the loss. The closest analogue is the taxpayers, upon whom the impact is too diffuse to have an appreciable effect.”). The current fifteen largest payers to the U.N. peacekeeping budget are the United States, Japan, Germany, the United Kingdom, France, Italy, Canada, Spain, China, Mexico, South Korea, the Netherlands, Australia, Switzerland, and Brazil. Global Policy Forum, *Debt of 15 Largest Payers to the Peacekeeping Budget 2007*, <http://www.globalpolicy.org/finance/tables/pko/du2007.htm> (last visited Aug. 20, 2008).

¹⁶⁷ See *supra* notes 44–48 and accompanying text (discussing U.N. criminal accountability reforms and Draft Convention). All member states are eligible to be voting members of the Sixth Assembly. United Nations General Assembly, Sixth Committee (Legal), <http://www.un.org/ga/sixth/> (last visited Aug. 19, 2008). For a summary of the work of the Sixth Committee and its failure to move forward with the draft convention during 2007, see United Nations General Assembly, Criminal Accountability of United Nations Officials and Experts on Mission (Agenda Item 80), <http://www.un.org/ga/sixth/62/CrimAcc.shtml> (last visited Sept. 2, 2008).

¹⁶⁸ The peacekeeping budget is passed separately from the general budget proposals. See UN General Assembly 60th Session, About the Fifth Committee, <http://www.un.org/ga/60/fifth/> (last visited Aug. 20, 2008).

¹⁶⁹ The United Nations Administrative Tribunal, for example, is allocated a budget by Secretary-General proposals to the Fifth Committee. See Press Release, General

claims to be paid from the peacekeeping reserve fund.¹⁷⁰ In either case, extra money not needed to pay claims could be used elsewhere to strengthen peacekeeping operations. The Department of Peacekeeping Operations as a whole would then internalize compensatory costs.

Some U.N. officials have implied that they consider some rights violations by personnel in the field to be naturally incident to the deployment of peacekeeping missions.¹⁷¹ These remarks are reminiscent of cases in U.S. law holding the government responsible for personal torts committed by soldiers living on military bases.¹⁷² Where the United Nations can foresee that its employees will commit crimes, it has an analogous responsibility to provide compensation.

Recognition that abuses may be incident to peacekeeping functions is not meant to minimize the nature of the human rights violation. Prevention through improved policies and a culture that does not accept the crimes as inevitable is important. However, as in the employer liability context, prevention can also be motivated by deterrent costs associated with violations. The United Nations must occasionally act as insurance for victims in host countries that need the services of peacekeeping personnel but that, due to immunity, lack of political will, or lack of domestic capacity, cannot provide a forum for remedies.

Assembly, Secretary-General Will Present 2006–2007 Budget Proposal to Fifth Committee 25 October, U.N. Doc. GA/AB/3695 (Oct. 25, 2005), available at <http://www.un.org/News/Press/docs/2005/gaab3695.doc.htm>. The Tribunal does not usually pay out on claims from its own funds but instead adjudicates claims against the United Nations as a whole. See Statute of the Administrative Tribunal of the United Nations, *supra* note 154, art. 10(3) (“[C]ompensation shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency . . .”).

¹⁷⁰ The reserve fund provides for extraordinary expenditures. See G.A. Res. 49/233, at 7–8, U.N. Doc. A/RES/49/233 (Mar. 1, 1995) (providing details of reserve fund).

¹⁷¹ In June 2006, then-Secretary-General Kofi Annan issued a statement saying that the sexual abuse scandals were an “almost inevitable” consequence of rapid growth in peacekeeping capacity. Sergei Ordzhonikidze, Director-General, United Nations, Opening Remarks at a Panel Discussion on the Occasion of the International Day of United Nations Peacekeepers (June 1, 2006), available at <http://www.unog.ch> (follow “The Director-General” hyperlink at top of page; then follow “Speeches” hyperlink on left-hand side; then follow “2006” hyperlink and click on title of speech).

¹⁷² See, e.g., *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995) (holding U.S. government liable for serviceman’s drunk-driving accident after on-base drinking). Posner and Sykes also cite the *Zafiro* case, which held the United States liable under international law when its sailors looted towns in the Philippines, as the captain should have known there was no security on shore and hence the sailors were likely to commit crimes. Posner & Sykes, *supra* note 160, at 105–06 (citing *Earnshaw (U.K. v. U.S.) (Zafiro)*, 6 R. Int’l Arb. Awards 160 (Perm. Ct. Arb. 1925)).

B. The United Nations Must Provide Organizational Accountability To Preserve Its Immunity

A gap exists where victims of abuse by peacekeeping personnel may find themselves without any remedy.¹⁷³ Recent cases in the ECHR have underscored the principle that allowing immunity for human rights violations by international organizations is tantamount to authorizing such violations. If the United Nations provides an adequate alternative forum, it may continue to enjoy immunity in national courts. But if claimants do not have a forum within the organization, European states following these cases may not grant the organization immunity.

Despite the longstanding tradition of international organizational immunity described above,¹⁷⁴ the ECHR has held that such immunity may be contingent on a provision of a “reasonable alternative means” by which to settle disputes and press claims.¹⁷⁵ Immunity should not be evaluated as a substantive limitation on particular rights but rather as a procedural bar that must be consistent with the right of fair access to court.¹⁷⁶ In *Waite v. Germany*, that evaluation took the form of rational basis review; the ECHR held that there must be a “reasonable relationship of proportionality between the [scope of immunity] and the aim sought to be achieved.”¹⁷⁷ Similarly, in *Woś v. Poland*, the ECHR emphasized that any limitation of victims’ remedies must be proportional to the aims of that limitation.¹⁷⁸

The United Nations should be concerned about these ECHR decisions because they have been followed by national courts in Europe and because national courts outside Europe may also consider

¹⁷³ See *supra* Part I.

¹⁷⁴ See *supra* Part I.D.

¹⁷⁵ *Waite v. Germany* [GC], App. No. 26083/94, 1999-I Eur. Ct. H.R. ¶ 68 (1999). This decision echoed the European Commission of Human Rights’ remarks about the function of immunity: “An international organisation can only function satisfactorily if its independence is ensured.” *Waite v. Germany*, App. No. 26083/94, 30 Eur. H.R. Rep. 261, 274 (1999) (Commission report).

¹⁷⁶ See *Markovic v. Italy* [GC], App. No. 1398/03, Judgment (Merits), ¶¶ 1–8 (E.C.H.R. Dec. 14, 2006), available at <http://www.echr.coe.int/echr/en/hudoc> (Bratza, J., concurring) (evaluating claim of right of access to court in light of distinction between substantive restrictions and procedural restrictions); *Woś v. Poland*, App. No. 22860/02, Judgment (Merits and Just Satisfaction), ¶ 98 (E.C.H.R. June 8, 2006), available at <http://www.echr.coe.int/echr/en/hudoc> (discussing evaluation of limitations on access to court). For instructions on locating documents within “HUDOC Database,” see *supra* note 71.

¹⁷⁷ See *Waite*, 1999-I Eur. Ct. H.R. ¶ 59.

¹⁷⁸ *Woś* was a case concerning mechanisms for compensation of survivors of the Holocaust; the ECHR held that survivors must be able to obtain some individualized review of denials of compensation. *Woś*, App. No. 22860/02, ¶ 101 (“The essential issue in this case is the proportionality of the contested limitation . . .”).

them persuasive authority.¹⁷⁹ August Reinisch has written that domestic courts are increasingly performing a sort of “human rights impact assessment” in deciding whether immunity should be granted to international organizations facing claims by employees in employment disputes.¹⁸⁰ Courts evaluate both the availability and adequacy of administrative tribunals established by organizations to hear such disputes.¹⁸¹ If no reasonable alternatives are available, national courts may allow the organization to be sued.¹⁸²

If, as Reinisch explains, the right of fair access to court demands an alternative forum in the context of employment disputes (which concern private, domestic rights), then that duty must be heightened in the context of potential international human rights violations.¹⁸³ Where immunity applies, the existence of an alternative forum such as a compensation commission can be a significant step toward legality and legitimacy.¹⁸⁴ If the United Nations wishes national courts to continue to recognize its immunity from suit, it must provide an alternative means of compensation.

CONCLUSION

The United Nations should implement a claims mechanism to compensate victims of sexual abuse. The current U.N. response of ex ante deterrence is a positive step forward but leaves victims with no remedy in light of problems of immunity and practical difficulties with post-conflict legal systems. If the United Nations wishes to preserve its legitimacy and its immunity from suit, it must provide an alternative means of remedy. An administrative remedy has distinct advan-

¹⁷⁹ The only current European missions of the United Nations are Georgia, Cyprus, and Kosovo. United Nations Peacekeeping, List of Operations, <http://www.un.org/Depts/dpko/list/list.pdf> (last visited Aug. 20, 2008). Both Georgia and Cyprus are High Contracting Parties to the Convention on Human Rights and Fundamental Freedoms and have previously been respondents in cases brought before the ECHR. Council of Europe, Georgia and the Council of Europe, http://www.coe.int/T/E/Com/About_Coe/Member_states/e_ge.asp (last visited Aug. 19, 2008); Council of Europe, Cyprus and the Council of Europe, http://www.coe.int/T/E/Com/About_Coe/Member_states/e_ch.asp (last visited Aug. 19, 2008). The court would have jurisdiction to order Georgia or Cyprus not to grant immunity to the mission in a particular instance.

¹⁸⁰ Reinisch, *supra* note 95, at 10–11.

¹⁸¹ *Id.* at 16.

¹⁸² France and Belgium have already done so in several cases. *Id.* at 11–13.

¹⁸³ For an argument that immunity does not extend in the context of international humanitarian law, see Jaime Saura, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 HASTINGS L.J. 479, 522–24 (2007). For an argument that the United Nations must be bound by human rights law, see also Abraham, *supra* note 115, at 1303–09.

¹⁸⁴ See Rawski, *supra* note 32, at 115 (citing Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 25–26 (Feb. 14)).

tages over a blanket waiver of immunity: It will protect missions from being hindered by frivolous litigation, prevent deterrent effects on recruitment of peacekeeping personnel, and avoid privileging some victims over others. Such a claims mechanism has precedent and support in the past payment of compensation by the United Nations, and should be funded as part of the peacekeeping budget to avoid budgetary struggles. Compensation may not return victims to their former state, but it will provide resources for them to rebuild their lives. It is the United Nations' responsibility to uphold human rights in providing this effective remedy for victims of abuse by peacekeeping personnel.

