The European Journal of International Law Vol. 29 no. 3

UNaccountable: A New Approach to Peacekeepers and Sexual Abuse

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Abstract

The appointment of a new United Nations (UN) Secretary-General brings new opportunities to address issues that have beset the organization over recent decades. A priority in that regard should be accountability for harms caused within peacekeeping. This issue has received significant attention over recent years, with the close scrutiny of cholera in Haiti and lead poisoning in Kosovo being just two examples. While legal scholarship in recent years has focused on how to reform UN accountability, particularly in relation to the Haiti cholera claims, there have been fewer proposals on how to address crimes committed by UN peacekeepers. One of the most serious of those crimes, in terms of harms caused both to victims and to the legitimacy of UN peacekeeping operations, is sexual abuse. Yet the proposals for addressing this issue largely have not been successful. To that end, this article – which is exploratory in nature – sets out why there is a need for a wholesale reform of how we approach accountability for peacekeepers who perpetrate sexual abuse, explaining particularly how the problems relate to laws and normative frameworks as well as to investigations and prosecutions. The article then proposes elements that might be considered in a new victim-centred approach – namely, criminal justice, truth and reconciliation, human rights and political processes.

1 Introduction

The need for stronger and more transparent accountability structures for international organizations and their personnel is a subject that has been explored extensively.

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Many legal commentators have focused on the gaps created when international organizations fulfil functions previously undertaken by states yet do so without considering accountability structures to address harms caused during those activities. The increasing role of international organizations externally (as opposed to being fora for member states) and the multiplicity of actors involved in many activities has given rise to tensions around responsibility and accountability that, for the most part, remain unresolved within doctrinal scholarship.[1]

Whether international organizations are assuming the roles or functions of states or, indeed, have become a form of global government, traditional accountability structures provide little opportunity for challenging their decisions or seeking accountability when harms are caused. One concerning consequence of this is that there are few opportunities for individuals to hold accountable international organizations, despite those institutions having a direct impact on their lives.[2] Individuals, therefore, frequently must rely upon states to intervene in such circumstances, something that many states are either incapable or unwilling to do.[3] The problem, however, goes beyond the accountability of the organizations and further includes the accountability of individuals who act on behalf of those institutions. It has been insisted by some scholars that no individual within international institutions is held responsible for action or inaction that leads to grave harms. A typical example of

[1] The primary concern of this article is accountability, not responsibility. That being said, responsibility remains relevant to this topic. For more on responsibility of international organizations, particularly the United Nations, see, e.g., International Law Commission, 'Draft Articles on the Responsibility of International Organisations' (2011), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf; Möldner, 'Responsibility of International Organizations: Introducing the ILC's DARIO', in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (2012), vol. 16, at 281–328; Lozanorios, 'Responsibility of the United Nations for Wrongful Acts Occurred in the Framework of Authorized Operations in Light of the Draft Articles on the Responsibility of International Organizations (dario)', in *Max Planck Yearbook of United Nations Law* (2014), vol. 18, at 109; Daugirdas, 'Reputation and the Responsibility of International Organizations', 25(4) *European Journal of International Law* (*EJIL*) (2015) 991. On shared responsibility, where international responsibility is attributed among actors, see the work and publications stemming from A. Nollkaemper, 'SHARES Project', available at www.sharesproject.nl/.

[2] A recent and high-profile example of this issue is the Haiti cholera claims. See Freedman and Lemay-Hebert, '"Jistis ak reparasyon pou tout viktim kolera MINUSTAH": The United Nations and the Right to Health in Haiti', 28(3) *Leiden Journal of International Law* (2015) 507; Freedman, 'UN Immunity or Impunity?: A Human Rights Based Challenge', 25(1) *EJIL* (2014) 239.

[3] In response to the Rwanda report, the then UN Secretary-General, Kofi Annan, publicly stated that 'on behalf of the United Nations, I acknowledge this failure and express my deep remorse'. He added that 'both reports – my own on Srebrenica, and that of the independent inquiry on Rwanda – reflect a profound determination to present the truth about these calamities'. United Nations (UN), Kofi Annan Emphasizes Commitment to Enabling UN Never Again to Fail in Protecting Civilian Population From Genocide or Mass Slaughter, UN Doc. SG/SM/7263/AFR/196, 15 December 1999; see also UN, Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257, 16 December 1999; UN, Report on the Fall of Srebrenica, UN Doc. A54/549, 15 November 1999. That being said, no blame was attributed to any one particular individual or group of individuals, and accountability came only in the form of expressions of regret and changes to policies and practice (for example, through the creation of the UN Human Rights Up Front Action Plan, available at https://interagencystandingcommittee.org/system/files/detailed_hruf_plan_of_action.pdf.

this is the Rwandan genocide, where no one was held responsible for the failures to prevent the atrocities – from officials on the ground to the United Nations (UN) Secretary-General. One scholar, B.S. Chimni, accordingly concluded: '[T]he UN represents, in the telling phrase of Bauman, "the rule of nobody".'[4] In order for accountability to be forthcoming, Chimni stresses that most work is needed in relation to individual responsibility for action or inaction (acts of commission and omission). Perhaps the most pernicious action or inaction, in relation to gravity and scale, is that which leads to a lack of accountability for harms caused by peacekeepers, and nowhere is that problem more pressing than in relation to crimes of sexual abuse.

Of course, this is not a new problem. Throughout the history of UN peacekeeping, sexual abuse has been perpetrated by the very people sent to restore or keep the peace. As peacekeeping operations have evolved both in terms of size and complexity of mandates, there have been greater numbers of victims of such harms. And it is both the frequency with which they are committed and the gravity of those crimes that demonstrate systemic weaknesses in laws, frameworks and practices of peacekeeping. After all, we look to those peacekeepers to enter armed conflicts or fragile states with the mandate to protect locals, and, at the very least, we should expect them to 'do no harm'.[5]

With the appointment of a new UN Secretary-General comes the opportunity to prioritize this issue that has been a stain on the UN's reputation and has caused serious harms in some of the world's most fragile regions. The problem that must be addressed is complex in terms of its historical and legal bases, which has resulted in difficulties in finding a workable solution. The laws and frameworks differ for civilian and military peacekeepers, but within both categories there are weaknesses that result in very few prosecutions of those who perpetrate sexual abuse. As will be set out in detail, civilian staff are immune from the jurisdiction of courts for any acts that fall under their official functions, and soldiers remain under the exclusive jurisdiction of their home states for any acts they commit while deployed on peacekeeping missions. Police sometimes are deployed as civilian peacekeepers, troops or experts on mission – the latter category being inviolable and, therefore, immune from jurisdiction of the host state. In theory, then, civilians accused of sexual abuse ought to be handed over to local authorities because such crimes can never form part of their official functions, and soldiers ought to be prosecuted by their home countries for crimes of sexual abuse. However, as will be explored, there has been a near failure to implement those laws. The result is a near-total lack of accountability, which has led to a culture of impunity in which bystanders from within and outside the UN believe that reporting is futile, in which victims' rights are violated a second time by a lack of access to justice and in which would-be or opportunist perpetrators are emboldened in knowing that it is easy to 'get away' with such crimes.

[4] Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15(1) *EJIL* (2004) 1, at 22.

[5] United Nations Department of Peacekeeping Operations and Department of Field Support, *Civil Affairs Handbook* (2012), at 70–71.

Of the many reasons why the current laws are not being implemented in relation to civilian staff, perhaps the most crucial is that in many peacekeeping contexts there are no local authorities, or, at least, not ones that are able or willing to uphold internationally accepted standards, to whom allegations may be referred. While the UN therefore does not have the power to investigate such allegations of criminal activity,[6] there needs to be a functioning mechanism that upholds international standards on investigations, rule of law, sentencing and punishment and other factors, to which alleged perpetrators may be sent. In relation to soldiers, there are again many factors that must be understood in relation to the failure to hold accountable perpetrators of sexual violence. These range from some countries having inadequate national laws on sexual abuse, to cultural and political resistance, and to failures by the UN to monitor and follow up on the implementation of the legal obligations of troop-contributing countries (TCCs). Such issues could be addressed through UN policies and political pressures (although such steps frequently do not go far enough to achieve those aims), but might better benefit from accountability mechanisms that function in the same way for civilians as for soldiers.

There are many factors involved in creating the culture of impunity within which peacekeepers commit sexual abuse. These factors must be identified and addressed in order for meaningful and lasting change to occur. The UN focuses on three broad categories when seeking to address sexual abuse by peacekeepers: prevention, enforcement and remedial action, all of which centre on the perpetrators. Within these categories, however, there are many aspects identified by scholars, practitioners and experts, ranging from pre-deployment training, to raising awareness about gender and cultures, to the empowerment of local populations, to foregrounding human rights and, crucially, to accountability laws and mechanisms alongside justice and support for victims. Indeed, there have been many attempts since 1996 to investigate, understand and address many of these issues through internal and independent reviews of the UN, reports, recommendations and proposed and enacted solutions. There have been very few changes made to implement robust methods for legal accountability that will serve as a deterrent, a punishment and a method for upholding victims' rights. While it is important to address prevention and protection, doing so alone and without looking at reforms for accountability is inadequate to address the scale and underlying causes of the problem. What has become clear over the past two decades is that this problem cannot be addressed without a new victim-centred approach that goes beyond looking at ad hoc reforms[7] and, instead, focuses on holistic policies, laws and frameworks.

[6] Even though the UN does have the power to undertake investigations into misconduct that may be in breach of an individual's employment contract with the UN.

[7] On ad hoc reform attempts within the UN, see G. Machel, *Impact of Armed Conflict on Children* (1996); UN Secretary-General, Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Doc. ST/SGB/2003/13 (2003); S. Mendelson, Barracks and Brothels: Peacekeeping and Human Trafficking in the Balkans, February 2005; GA Res. A/59/710, 24 March 2005 (Zeid report); GA Res. 59/300, 22 June 2005; N. Dahrendorf, Sexual Exploitation and Abuse: Lessons Learned Study, Addressing Sexual Exploitation and Abuse in MONUC, March 2006; C. Ferstman, Criminalizing

In this article, we set out how and why a new holistic approach is needed and stress that it ought to be centred on victims and human rights rather than on perpetrators and sovereignty. To do so, we start with an explanation of the problems with existing laws and frameworks in the second section and with investigations and prosecutions in the third section. In the fourth section, we explore the need to implement human rights alongside criminal law and political processes in order to achieve justice and accountability, before concluding in the fifth section.

2 The Problem: Laws and Frameworks

The ad hoc evolution of peacekeeping operations, combined with the ad hoc nature of laws and policies governing such activities and personnel, has contributed to a crisis of accountability for harms caused by peacekeepers. Weak laws, combined with international organizations assuming the functions of states while navigating who is in command and control, have resulted in the current state of crisis. Since the UN's founders did not conceive of peacekeeping, no one specific legal framework was created to cover peacekeeping personnel. Instead, what has occurred is the use of more general frameworks for some personnel and the development of bilateral and multilateral agreements for others. As indicated above, there are two main categories of peacekeeping personnel: civilian and military.[8] Different laws apply to each category, leading to a complex system that contains a myriad of problems and weaknesses in terms of the laws and their implementation and responsibility for ensuring that obligations are upheld. However, it is not just the laws that are the problem but also the practices in relation to how those laws operate and are implemented on the ground. This section sets out the laws and frameworks governing UN peacekeepers, while section 3 considers the practices that occur after an allegation is brought to the relevant authorities.

A *Immunities and Jurisdictional Bars*

The immunities and jurisdictional bars afforded to peacekeeping personnel seek to protect them from frivolous or pernicious interference by the host state, thus enabling personnel to undertake their functions and duties while on missions. The basic premise is sound and has its roots in diplomatic immunities.[9] In order for nationals of one

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Sexual Exploitation and Abuse by Peacekeepers, United States Institute of Peace Special Report 335, September 2013, available at www.usip.org/sites/default/files/SR335-Criminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peacekeepers.pdf; J. Stern, Reducing Sexual Exploitation and Abuse in UN Peacekeeping: Ten Years after the Zeid Report, Stimson Centre, February 2015; Report of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Doc. A/70/72, 9 February 2016; UN, Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the Secretary-General, Doc. A/70/729, 16 February 2016.

[8] Police deployed on peacekeeping operations may fall under the category of troops, civilians or experts on mission; therefore, this article does not deal with police as a separate category of peacekeepers.

[9] For a detailed discussion of the law on diplomatic immunity, see E. Denza, *Commentary on the Vienna Convention on Diplomatic Relations* (2016).

country to operate in other states, frequently where such operations might be viewed with hostility, those personnel require protection from local interference. The counterbalance for these protective laws in relation to diplomats and states is that there is a series of bilateral relations and agreements between those countries that have diplomatic relations with one another. Therefore, if one country refuses to waive immunity or to prosecute its national personnel who commit crimes when abroad, then there are two options open to the other country: first, to declare the individual *persona non grata*, revoke his/her diplomatic credentials and force the diplomat to leave the country or, second, to break diplomatic ties and relations with that state altogether. This counterbalance has been used effectively to leverage compliance with national criminal laws, and there have been some very public examples of states severing diplomatic relations for these very reasons.[10] Where it comes to the UN, however, such a counterbalance does not exist. Host countries do not have the ability to exert such leverage against the UN; thus, a system results where the UN holds all of the power despite its personnel operating on the sovereign territory of the host state.

This power imbalance is key to understanding why peacekeeping personnel are able to 'get away' with crimes with such alarming frequency. As we shall see, in theory, the immunities or jurisdictional bars will not protect UN personnel who commit crimes from being brought to justice. The system is designed in such a way that only frivolous or pernicious interference is blocked by the multilateral or bilateral agreements. Crucially, however, in practice, the current legal frameworks have created a culture of impunity owing to the difficulties or unwillingness to prosecute personnel who do commit crimes during peacekeeping operations. In order to understand the problem, it is important first to understand the separate regimes governing different types of personnel before then turning to what happens in practice and the impact on justice and accountability.

B *Civilian Staff*

Civilian peacekeeping personnel are international civil servants with immunity from the jurisdiction of any national court. UN officials are granted immunities under provisions in Article V of the Convention on Privileges and Immunities of the United Nations (CPIUN).[11] Immunity provides an individual with protection from all aspects of legal processes, and there are two types of immunity in relation to UN civilian staff: personal or functional. Personal immunity protects an individual from all legal processes at any time and is given to the highest level of UN staff, such as the Secretary-General, heads of offices and agencies and the heads of peacekeeping operations, among others. All other civilian staff are given functional immunity, which protects them from legal processes in relation to any act that falls within their official functions.

[10] See, e.g., Higgins 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience', 79(3) *American Journal of International Law* (*AJIL*) (1985) 641.

[11] Convention on the Privileges and Immunities of the United Nations (CPIUN) 1946, 1 UNTS 15.

Officially, the UN agrees with the idea that immunity of most civilian personnel is functional as opposed to absolute; thus, that no immunity will operate with respect to actions that are not part of a person's official functions. Whether the crime committed was part of his or her official functions is not about whether the person was 'on duty' at that time but, rather, whether the act being carried out that led to a crime was part of that person conducting his or her job. It is clear then that some crimes such as driving while drunk or unlawful killing may in some contexts be covered by functional immunity, whereas other crimes such as rape will never fall within that sphere.[12] Where there is a question as to whether functional immunity applies, the UN must make such a determination based on internal investigations not into whether the crime was committed but, rather, into the context within which it occurred. No such determination needs to be made in relation to those crimes or contexts that do not fall within an individual's official functions.

The theory, then, is sound, but the problems exist in relation to how they are implemented in practice. There are two problematic areas in this respect: first, the UN investigations into whether functional immunity applies and, second, the host states' lack of counterbalance to the UN's power in this regard. In relation to investigations, despite the clear lack of a mandate to do so, the UN conducts its own internal investigations into all allegations of crimes irrespective of whether the crime committed is able to form part of an individual's official functions and whether the context in which the crime was committed was part of a person's official duties. Moreover, these investigations typically go beyond whether functional immunity applies and, instead, focus on whether there is sufficient evidence to cooperate with local authorities.[13] Clearly, this is deeply problematic and undermines the very foundations of functional immunity, providing a cloak for perpetrators rather than a shield against pernicious allegations. The result is that the current system of immunities operates as absolute despite clearly being intended to be functional.

In relation to the host states' lack of counterbalance, there is the related problem that after conducting such investigations the UN then must provide an explicit or tacit waiver of immunity.[14] The waiver must be explicit where the crime has formed part of official functions, but there is a tacit waiver in other circumstances given that the UN has taken upon itself the ability to determine whether functional immunity applies despite it being an objective rather than a subjective test. As already noted, where a diplomat commits a crime that does fall within official functions and is covered by functional immunity, and the sending state fails to waive that immunity, the host state has two options to counterbalance that decision. However, there is no clause allowing host states to declare UN staff *persona non grata*, thus meaning that there is no

[12] See, e.g., Miller, 'Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations', 39 *Cornell International Law Journal* (2006) 71, at 92.

[13] This has been exposed most recently in terms of UN investigations into allegations against personnel in Haiti and Central African Republic, as evidenced in UN Office of Internal Oversight Services reports (e.g., in 2015).

[14] CPIUN, *supra* note 11, Art. 5, s. 20; Art. VI, s. 23.

recourse for the host state if a crime is committed and the UN fails to waive immunity or to comply with the local investigative authorities.

C *Experts on Mission*

Similar provisions (Article VI of the CPIUN) and practices govern UN experts on missions as occur in relation to civilian staff.[15] Those experts on mission have functional immunity in relation to acts committed while on mission. However, in addition, those individuals are deemed to be inviolable while on mission. Inviolability goes beyond immunity from legal processes in relation to an act and provides a protection of the person from any interference with their integrity while on mission. Inviolability attaches directly to the person and prevents an individual from being arrested or detained until after their mission finishes. Therefore, even if an act falls outside of their official functions, nothing can be done while the expert remains on mission. This is an important additional aspect to understand given that many police deployed on peacekeeping missions are experts on mission and, therefore, hold both functional immunity and are considered inviolable.

D *Military Personnel*

Military personnel are not afforded the same immunities as their civilian counterparts.[16] Soldiers are not directly employed by the UN; they remain under the control of their home country, which in turn has a contract with the UN. Those individuals are covered by bilateral agreements between their sending state (the TCC) and the UN,[17] and it is that document that sets out jurisdiction over such personnel if they commit crimes while on peacekeeping operations.[18] Military personnel operate under a system where the host state is barred from exercising jurisdiction in relation to crimes committed by those individuals. That is not an immunity *per se* as the TCC retains exclusive jurisdiction over its own soldiers and commits to exercise that jurisdiction to prosecute troops who commit criminal offences while on missions.[19] However, it does operate

[15] Miller, 'United Nations Experts on Mission and their Privileges and Immunities', 4 *International Organizations Law Review* (2007) 11.

[16] For an in-depth discussion, see Deen-Racsmány, 'Exclusive Criminal Jurisdiction over UN Peacekeepers and the UN Project(s) on Criminal Accountability: A Self-Fulfilling Prophecy', 53 *Military Law and Law of War Review* (2013) 247.

[17] These are based on the Model Memorandum of Understanding between the United Nations and [participating state] Contributing Resources to [the United Nations Peacekeeping Operation] in Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions, UN Doc. A/C.5/66/8, 27 October 2011.

[18] The bilateral agreements between the UN and the host states (Report of the Secretary-General on Model Status-of-Forces Agreement for Peace-Keeping Operations, UN Doc. A/45/594, 9 October 1990), further underscore that jurisdiction over military personnel belongs exclusively to the troop-contributing countries.

[19] UN General Assembly (UNGA), Model Status-of-Forces Agreement for Peacekeeping Operations, Doc. A/45/594, 9 October 1990.

as an absolute immunity from the jurisdiction of the host state. The jurisdictional bars prevent host countries from investigating or prosecuting any crimes, regardless of whether they were committed as part of official functions. The TCC is obligated to investigate and prosecute such crimes, with the UN being limited to administrative investigations and, even then, only if the TCC fails to undertake its own investigations within 10 days of an allegation being handed over to its authorities. Prosecutions may occur by the host state if a soldier is court-martialled *in situ* and handed over to local authorities or if that soldier is taken to military courts or national courts in their home state. The decision as to how to proceed, therefore, belongs exclusively to the TCC.[20]

There are two main problems with this system. First, troops frequently are not held accountable by their own countries for legal and political reasons. As will be explored below, not all TCCs are able to exercise extraterritorial jurisdiction over acts committed by their soldiers while on peacekeeping operations. Even where they are able to do so, the reality is that such states rarely, if ever, prosecute their soldiers. Often, that is because there is insufficient evidence gathered to do so – a problem attributable to investigating crimes committed abroad and in fragile states or conflict zones. Or it may be because of the national political implications of doing so and the likelihood that such prosecutions would undermine national support for contributing troops to UN peacekeeping operations. Second, the removal of host state jurisdiction results in a lack of access to justice for victims, something that highlights the problem with the legal frameworks centring on perpetrators and state sovereignty rather than on victims and human rights.

What becomes clear from these laws is that the system has been designed in such a way that peacekeepers are able and ought to be prosecuted for serious crimes while being protected from unwarranted interference. In practice, however, the record of immunities and jurisdictional bars has been deeply problematic. Currently, civilian personnel frequently operate with impunity owing to the UN failing to ensure that immunity is waived where crimes have been committed, and soldiers almost always are returned to their country and the matter is quietly dropped.[21] Ultimately, then, the country where the crime or abuses occurred is prevented from holding the perpetrators accountable because of the jurisdictional bars and immunities, and, in relation to soldiers at least, the country that does have jurisdiction (and potentially custody) is the one that will not exercise its jurisdiction.

3 The Problem: Investigations and Prosecutions

The problem of sexual abuse by, and lack of accountability of, peacekeepers has its roots not only in flawed laws and frameworks governing immunities and jurisdictional bars but also in the practices that occur once an allegation is made. The most

[20] On these matters, see R. Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving beyond the Current Status Quo and Responsibility under International Law* (2014).

[21] See, e.g., Grady, 'Sex, Statistics, Peacekeepers and Power', 79(6) *Modern Law Review* (2016) 931.

problematic issue in relation to such practices is that the institutions employing those peacekeepers are tasked with, or assume responsibility for, investigating allegations. As with the laws themselves, different regimes cover civilian and military peacekeepers, with deep flaws throughout the rules and practices of those investigatory regimes. It is important to understand the problems with both regimes because this is an issue that cuts across all categories of peacekeeping personnel.[22]

A *UN Internal Investigations*

In theory, under the laws governing functional immunity when an allegation is made against a UN civilian staff member, the UN's sole investigatory role is to determine whether functional immunity applies. Such a determination would require a two-part test: objectively, is the act one that may form part of official functions and, if so, subjectively, did that individual commit the act as part of his or her official functions? Of course, in many circumstances, the UN must conduct some form of administrative investigation into its personnel to determine whether functional immunity applies. Those powers are intended only to enable the UN to determine whether its personnel holds immunity in relation to the allegation and, if so, to make a decision as to whether to waive that immunity. In practice, however, the UN uses those investigatory powers to examine evidence of an allegation and, by doing so, the organization acts *ultra vires*. This is a fundamental issue that frequently is overlooked in scholarship and in practitioner reports.

There are two points to note here. First, the UN holds the same powers as all employers to conduct internal investigations regarding its personnel in relation to whether an act committed is in violation of contractual obligations. Second, some peacekeeping operations take place where there are no functioning rule-of-law institutions that are able to conduct investigations or prosecutions. While these factors must be borne in mind, they are ones that ought to be addressed after establishing the frameworks governing UN investigations rather than being used as a carte blanche method for the UN overreaching its investigatory powers when an allegation is received. As it stands, UN investigations into serious misconduct could be carried out by at least four different bodies. While there are links between the work carried out by those bodies, they serve very different functions and are governed by different rules. Their overlap can, and frequently does, lead to situations where no particular body takes responsibility for an investigation, which in turn results in allegations being mishandled at best.[23]

[22] Indeed, a detailed breakdown of the UN's figures show that, contrary to commonly held perceptions, around half of the total number of complaints of sexual abuse over the last decade have been made against police and civilian UN staff, rather than its peacekeeping soldiers, despite soldiers vastly outnumbering police and civilians in most peacekeeping missions. See the UN's sexual exploitation and abuse (SEA) database at http://cdu.unlb.org/.

[23] The problems with overlap and duplication can be seen in relation to how allegations were handled in relation to the Central African Republic in 2015, where Anders Kompass blew the whistle on the UN's failure to hand over allegations of abuse by French peacekeepers during a France-run peacekeeping operation. R. Freedman, 'French Peacekeeper Abuse Scandal Fits an Old Pattern of Impunity', *The Conversation* (29 April 2015), available at https://theconversation.com/french-peacekeeper-abuse-scandal-fits-an-old-pattern-of-impunity-40991. For further discussion on the broader issues, see Grady, *supra* note 21.

The Conduct and Discipline Unit (CDU) was originally created at UN headquarters in 2005 following recommendations by the Zeid report.[24] It is one of the few recommendations that was enacted almost immediately after the report was published[25] and was fully operational by April 2006.[26] Its two main functions are: 'to advise personnel and mission leadership alike on all matters of conduct and discipline; [and to] ensure the coherence of administrative and disciplinary procedures.'[27] Alongside the main CDU at headquarters, conduct and discipline units also form part of all peacekeeping missions. Those in-country units have specific functions including receiving all allegations of misconduct, making recommendations on investigations including forwarding them to the Office of Internal Oversight Services (OIOS)[28] and reporting all serious misconduct to mission heads.[29] They also report allegations to relevant investigative bodies and report back to victims and local populations about investigation results as well as liaise with UN gender and children teams.[30]

All allegations of sexual abuse received by the CDU must be reported to the OIOS, which contrasts with all other allegations of serious misconduct and reflects the pernicious and widespread incidents of sexual abuse perpetrated by peacekeepers. The OIOS then records and evaluates all allegations before prioritizing those to be investigated and about which it will conduct preliminary investigations[31] or dismissing those it deems to have insufficient evidence for investigation. The OIOS was established in 1994 to carry out audit, investigation, inspection and evaluation services, including establishing 'facts related to reports of possible misconduct to guide the Secretary General on jurisdictional or disciplinary action to be taken'. It also partly replicates the work of the UN Ethics Office, which was established in 2006 after the World Summit conference of the previous year to ensure 'that all staff members perform their functions consistent with the highest standards of integrity as required by the Charter of the United Nations'.

There are other mechanisms involved with allegations against civilian staff. In 2009, a UN Dispute Tribunal (UNDT) was established as a civil tribunal to hear and decide cases filed by, or on behalf of, current and former staff members. Many

[24] UNGA, Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, UN Doc. A/59/710, 24 March 2005, para. 42.

[25] It was enacted in November 2005.

[26] UNGA, Report of the Office of Internal Oversight Services on Its Investigation into Allegations of Sexual Exploitation and Abuse in the Ituri Region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo, UN Doc. A/61/841, 5 April 2007, para. 32.

[27] W. Durch, K. Andres and M. England, Improving Criminal Accountability in United Nations Peace Operations, Stimson Center Report no. 65, June 2009, at 12.

[28] UN, Comprehensive Report of Conduct and Discipline Including Full Justification of All Posts, UN Doc. A/62/758, 20 March 2008, paras 23–28.

[29] UNGA, 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, UN Doc. A/60/862, 24 May 2006, paras 38–53.

[30] Durch, Andres and England, *supra* note 27, at 13.

[31] UNGA, *supra* note 26, para. 7; UNGA, Implementation of the Recommendations of the Special Committee on Peacekeeping Operations, Addendum, UN Doc. A/61/668/Add.1, 22 December 2006, para. 8.

peacekeeping missions also have police components, which may be tasked with carrying out internal investigations into alleged criminal wrongdoing by the UN peacekeeping personnel. In addition, there is a Digital Forensics Unit for forensic recovery and analysis of digital information[32] as well as integrated teams in some countries.[33] The overlap among these various investigatory and adjudicative bodies, however, can hinder effective investigations and make it difficult for victims of sexual exploitation and abuse to know how to lodge and track complaints. Crucially, none of those bodies has the power to undertake criminal investigations into acts that fall outside of official functions.

It is important to note that the UN will not hand over a civilian staff member to local authorities in situations where there are issues with the rule of law, human rights or institutions within the host state (and, in the case of fair trial or other fundamental human rights, the UN cannot hand over a civilian staff member). This is an exception to the rule on how the UN ought to deal with crimes that do not fall within official functions. In those cases, however, civilians could be prosecuted by their home states, but it would only occur if their home country has legislation that asserts extraterritorial criminal jurisdiction for these particular actions and sufficient evidence for a successful prosecution can be gathered, which is not always the case.

B *Investigations in Troop-Contributing Countries*

The UN creates bilateral status-of-forces agreements with host countries. These agreements contain the jurisdictional bars that preclude the host state from using legal processes in relation to soldiers who commit crimes while on mission. Of course, this absolute immunity can be waived by the TCC, although that rarely happens. Instead, TCCs prefer – in word, at least, if not in deed – to investigate and prosecute their troops if they commit crimes. TCCs are bound by legal obligations to investigate and, where appropriate, punish soldiers who commit sexual abuse while operating under the UN umbrella. The bilateral agreements that those countries make with the UN – memoranda of understanding[34] – set out that TCCs have 10 days to start an investigation from the time they receive information from the UN regarding allegations of misconduct by its troops. If a TCC fails to do so, the UN may initiate its own administrative investigation. In practice, however, these obligations frequently have been ignored both by states and by the UN.[35] Many TCCs do not send national investigating officers

[32] Activities of the Office of Internal Oversight Services on Peacekeeping Operations for the Period 1 January to 31 December 2012, UN Doc. A/67/297 (Part II), 13 March 2012, para. 7.

[33] E.g., Central African Republic.

[34] Special Committee on Peacekeeping Operations and Its Working Group, Draft Model Memorandum of Understanding, Doc. A/61/19 (Part III), 12 June 2007, Annex.

[35] Deen-Racsmány, 'The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?', 16(2) *Journal of Conflict and Security Law* (2011) 342, at 348, citing statistics from 2005 to 2011. Department of Peacekeeping Operations, 'Monthly Summary of Military and Police Contribution to United Nations Operations, available at www.un.org/en/peacekeeping/contributors/documents/Yearly06.

with the troops that are deployed, which undermines their ability to conduct prompt investigations into allegations. And even where such investigations do occur, the UN has little power – and, seemingly, little desire – to compel the countries to report on the findings.

A key problem with accountability of troops goes beyond investigations and revolves around TCCs frequently being unwilling or even unable to prosecute crimes committed by troops when operating abroad.[36] First, and as mentioned, many countries do not have the legal authority to prosecute domestic crimes extraterritorially.[37] National laws frequently only cover crimes committed on national territory, and while some militaries do have extraterritorial reach in terms of laws governing soldiers, this is not always the case. Other countries only have such extraterritorial powers if the acts are deemed criminal in both the country where they occurred and in the country of nationality of the perpetrator,[38] which is problematic when it comes to definitions of sexual abuse. Soldiers may be held accountable through their military justice systems, but, again, that is not the case for all TCCs. And even where such prosecutions are able to take place, TCCs have to balance domestic pressures not to prosecute troops with UN efforts to encourage them to do so.[39]

It is important to understand the economics and politics of contributing troops to UN peacekeeping operations. Many of the countries that contribute the most troops do so for the status and power that it gives them within the UN and because the financial rewards of doing so can be significant. The UN gives countries a standard fee for troops, which in some states far exceeds the salaries that those troops are paid. Those countries, then, have significant interests in remaining contributors to UN peacekeeping operations and are reluctant to invoke any domestic pressures to reduce those contributions.

As a result of TCCs taking little action in relation to allegations of sexual abuse perpetrated by their soldiers, a range of political measures have been recommended or implemented over recent years. In March 2016, the UN Security Council voted to give the Secretary-General the right to repatriate entire units if the TCC fails to prosecute alleged perpetrators of sexual misconduct within six months.[40] The Security Council requested that the Secretary-General ensure that the replacement of personnel from troop- or police-contributing countries be a process that upholds standards of conduct

[36] See, generally, Wills 'Continuing Impunity of Peacekeepers: The Need for a Convention', 4(1) *Journal of International Humanitarian Legal Studies* (2013) 47.

[37] UNGA, Report of the Secretary-General, Criminal accountability of United Nations officials and experts on mission, UN Doc. A/63/260, 11 August 2008.

[38] UNGA, Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations, UN Doc. A/60/980, 16 August 2006.

[39] See, e.g., UNGA, Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo, UN Doc. A/59/66, 5 January 2005, especially paras 46, 38. See also the comments on this topic by the Congolese delegates to the Sixth Committee in 2009 and 2011. UN Summary Records of the Sixth Committee, UN Doc. A/C.6/64/SR.7, 10 November 2009; UN Doc. A/C.6/66/SR.9, 7 October 2011.

[40] SC Res. 2272, 11 March 2016.

and discipline and appropriately addresses allegations or confirmed acts of sexual exploitation and abuse by their personnel. This was heralded by the US ambassador to the UN, Samantha Power, as the UN 'finally doing something about the cancer in the United Nations system', despite it being a discretionary and political tool.[41] A similar method for dealing with this issue is 'naming and shaming' countries that do not investigate, prosecute and report allegations of sexual abuse. It will take some time to know whether such measures are effective, particularly in relation to the larger and more powerful TCCs.

C *Barriers to Accountability*

What becomes clear when exploring these laws and practices is that there are three main issues that must be addressed: gaps in the substantive law; the need for greater extraterritorial jurisdiction and the implementation of existing legal obligations. First, there currently exists a fundamental substantive law problem in relation to the lack of internationally agreed definitions of sexual abuse. This problem is exacerbated by failures at some national levels to have laws that comply with international standards on sexual crimes. In order to address these issues, there needs to be agreement within the international arena as to what constitutes sexual abuse, followed by discussions as to how those definitions might be upheld within military or domestic laws of countries that contribute personnel to peacekeeping operations. Second, there is a global situation whereby many countries lack universal or extraterritorial criminal jurisdiction for sexual crimes. The scope and quantity of the lacunae is significant among TCCs, and the need for extraterritorial jurisdiction is as important for civilian peacekeepers as it is for troops. Third, the failures of the UN and TCCs to uphold their existing obligations is a significant barrier to accountability, and methods for addressing this problem are explored in later in this article. These fundamental issues must be overcome to ensure that existing laws and policies can be upheld, although, as will be demonstrated, there also needs to be a more holistic approach to accountability that goes beyond the focus on criminal law.

4 A New Victim-Centred Approach

To date, the UN approach to accountability has constantly placed perpetrators and state sovereignty at the heart of all laws and frameworks. In order to adopt a more holistic and appropriate approach to accountability for UN peacekeepers, though, there needs to be a shift away from this. Moreover, there needs to be a recognition that the same human rights obligations that bind states – and which have increasingly developed since the UN was established – bind the UN when it acts as an external actor.

[41] 'Security Council Asks Secretary-General to Replace Contingents from Countries Failing to Hold Sexual Predators Accountable', *UN News Centre* (11 March 2016).

The UN itself has long accepted that the 'international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations'.[42] In 2004, the UN's legal counsel noted that '[a]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation'.[43] This acceptance of responsibility, however, is based on compensation for harms caused rather than a wider acceptance of responsibility for upholding and implementing human rights. It is widely accepted that the UN is subject to norms of *jus cogens* and by at least some parts of general international law.[44] It is also widely accepted that customary international law and the general principles of responsibility can apply to international organizations,[45] but whether and to what extent the UN is bound by international human rights law (IHRL) and, if so by which obligations, remains a contested topic.

A straightforward reading of the Charter of the United Nations is that the UN must promote human rights (Articles 1(3), 55 and 56), but those provisions direct an organization that was intended to be a forum within which member states agree upon actions that must be taken. As the UN has developed, it is clear that the organization serves different purposes at different times. As such, there is significant scope for arguing that the Charter provisions indicate that the UN must also promote human rights when acting externally rather than as a forum. Any actions that violate human rights would therefore contradict the UN's purposes and certainly would not be 'necessary' for their achievement. It appears contradictory, at best, that the UN would hold immunity with regard to such acts. However, that in itself does not demonstrate that the UN is bound by IHRL.

A number of scholars in recent years have examined the extent to which the UN is bound by IHRL. Frédéric Mégret and Florian Hoffmann set out three conceptions for how the UN may be bound by human rights obligations: the internal conception, the external conception and the hybrid conception.[46] Noelle Quenivet focuses on

[42] UN Secretary-General, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, Doc. A/51/389 (1996), para. 6.

[43] Unpublished letter from the United Nations Legal Counsel to the Director of the Codification Division, 3 February 2004, quoted in Report of the International Law Commission, UNGA Official Records, 56th Session, Supplement no. 10, Doc. A/59/10 (2004), at 111.

[44] For further discussion, see R. Higgins, *Problems and Processes: International Law and How We Use It* (1994), at 181; F. Morgenstern, *Legal Problems of International Organizations* (1986), at 32; A. Orakhelashvili, *Collective Security* (2011), at 56; Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review', in *Max Planck Yearbook of United Nations Law* (2007), vol. 11, at 143–195; Maus, 'Human Rights in Peacekeeping Missions', in H.-J. Heintz and A. Zwitter (eds), *International Law and Humanitarian Assistance* (2011) 103.

[45] Sheeran and Bevilaqua, 'The UN Security Council and International Human Rights Obligations: Towards a New Theory of Constraints and Derogations', in S. Sheeran and N. Rodley (eds), *Routledge Handbook of International Human Rights Law* (2013) 371.

[46] Mégret and Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', 25(2) *Human Rights Quarterly* (2003) 314.

whether the UN may be bound by IHRL treaties;[47] Tom Dannenbaum examines the UN's legal personality and insists that it gives rise to human rights obligations that form part of customary international law;[48] and Olivier de Schutter proposes a 'sliding scales' theory.[49] Some scholars have fused discussions of UN human rights obligations and immunity,[50] and others argue that members have a positive duty to enforce the Charter's human rights obligations 'over and above any other international law granting immunity',[51] with Jordan Paust insisting that the proposition that the UN has immunity even where that would violate human rights is 'counterintuitive'.[52] But those discussions largely remain at the theoretical level.[53] More practical discussions of accountability for UN personnel in peacekeeping operations largely focuses on criminal offences and laws of war, which are informative but do not address the human rights violations that occur when victims are denied access to a court and a remedy and to truth.[54] There are limited reported cases, reflecting the difficulties in bringing the UN or its personnel before courts, and the jurisprudence that does exist from national and regional courts focuses either on broader issues of immunity or on private law claims arising from criminal acts.[55] As we shall see, the evolving line of case law discussing issues of immunity and human rights, as well as the UN's use of human rights mechanisms to address harms caused, provides a strong basis for adopting a human rights-based approach.

A *A Victim-Centred Approach*

Ensuring a holistic and victim-centred approach means placing relevant aspects of criminal justice, truth and reconciliation, human rights and political processes at the heart of responses to allegations of sexual exploitation and abuse (SEA) by peacekeepers. This section explores these approaches, drawing upon theory and practices to understand how different aspects of these models may be appropriate when designing a system to deal with UN peacekeeping personnel.

[47] Quenivet, 'Binding the United Nations to Human Rights Norms by Way of the Laws of Treaties', 42 *George Washington International Law Review* (2010) 587.

[48] Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability', 51(1) *Harvard International Law Journal* (*HILJ*) (2010) 113.

[49] De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law International Responsabilité', in J. Wouters *et al.* (eds), *Accountability for Human Rights Violations by International Organisations* (2011) 51.

[50] Wouters and Schmitt, 'Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials', Leuven Centre for Global Governance Studies Working Paper no. 49, April 2010.

[51] Rios and Flaherty, 'Legal Accountability of International Organization: Challenges and Reforms', 16 *International Law Students Association Journal of International and Comparative Law* (2010) 433.

[52] Paust, 'The UN Is Bound By Human Rights; Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity', 51 *HILJ* (2010) 1.

[53] Freedman, *supra* note 2, however, has taken these theoretical foundations and applied them in the practical context of the UN's operations. This work, in turn, takes those more developed foundations and applies them in the context of individuals harmed by SEA.

[54] For detailed discussion on human and accountability, see Freedman, *supra* note 2.

[55] Conduct in UN Field Missions maintains a database of SEA cases, available at http://cdu.unlb.org/.

1 Criminal Justice

The use of criminal justice to hold accountable actors in the international arena began with the Nuremberg trials following World War II.[56] Those trials focused on war crimes, crimes against humanity and genocide, and they are the foundations of the modern system of international criminal law (ICL). Yet it was not until the early 1990s, in relation to the former Republic of Yugoslavia and to Rwanda, that ICL was once again enforced through an international tribunal and, since that time, has been enforced again in relation to crises in Cambodia (1997), Sierra Leone (2002), Iraq (2003) and Lebanon (2009).[57] These courts and tribunals were created alongside the International Criminal Court (ICC), which was established by the 1998 Rome Statute.[58]

Despite these mechanisms existing to tackle what are seen as the most pernicious harms at the international level – of which SEA by peacekeepers is undoubtedly one – there are two main reasons why ICL mechanisms in isolation are inappropriate for holding accountable peacekeepers who commit serious crimes. First, those courts and tribunals focus on international crimes, which are not the same as ordinary crimes committed within the international arena.[59] And, second, those mechanisms only prosecute those individuals most responsible for international crimes, which includes military and political leaders.[60] In those scenarios, the perpetrators of individual crimes if brought to justice are done so by national courts rather than by these international mechanisms.

International crimes are those crimes committed as part of a systemic pattern seeking to oppress, subjugate or destroy local populations. While those crimes may include murder, rape, looting, arson and many other criminal acts, the basis for ICL is the context within which those crimes are committed and the purpose for which those crimes are perpetrated. As such, where sexual violence is used to persecute or strike terror into a population, it may form the basis of a war crime or crime against humanity or, where rape is used to prevent the future birth of children accepted by a particular religion or ethnicity, then it may even form the basis for genocide, and it is that which distinguishes crimes of sexual abuse from international crimes that have been perpetrated through acts of sexual abuse.[61] That distinction is crucial when thinking about accountability for peacekeepers who perpetrate sexual abuse because it then becomes clear why it is impossible to use the ICC or internationalized courts or tribunals to prosecute those peacekeepers. Although sexual abuse by peacekeepers is widespread, no evidence has been produced to demonstrate that those crimes are committed as part of wider or systematic attempts to repress, subjugate or destroy

[56] P. Sands, *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003).

[57] W.A. Schabas, *The UN International Criminal Tribunals* (2006).

[58] Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

[59] A. Cassesse, P. Gaeta and J.R.W.D. Jones, *The Rome Statute of the International Criminal Court* (2002).

[60] *Ibid.*

[61] For a broad discussion on prosecuting rape as a war crime, see Goldstone, 'Prosecuting Rape as a War Crime', 34 *Case Western Reserve Journal of International Law* (2002) 277.

local populations,[62] which means that even where those crimes are systemic they do not amount to international crimes.

Even though international courts and tribunals are not appropriate for prosecuting peacekeepers who perpetrate crimes of sexual abuse, there have been proposals for hybrid courts that could prosecute crimes committed within the international arena.[63] Those proposals build upon the hybrid nature of the mechanisms developed for Cambodia, Chad, Iraq, Kosovo, Lebanon, Sierra Leone and Timor-Leste. These mechanisms have hybridity not only in terms of composition and applicable law but also in terms of the types of crimes they have been able to prosecute.[64] The proposals for hybrid courts in Burundi, Central African Republic, Democratic Republic of Congo, Kenya, Liberia, Somalia, South Sudan and Sudan have all focused upon prosecuting hybrid, rather than international, crimes. And while none of those mechanisms have yet to be implemented, the discussions around their form, nature and jurisdiction give a clear indication of the validity and possibility of setting up internationalized hybrid mechanisms that are able to prosecute criminal acts.

2 Truth and Reconciliation

During the lengthy period between the Nuremberg trials and the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, a different form of accountability mechanism was widely used across parts of Latin America and later developed and used in many other parts of the world. This mechanism is the truth commission,[65] which is a key form of transitional justice that focuses on restorative, rather than retributive, models of justice.[66] Truth-seeking entities have been used in Latin America, Central and Eastern Europe, and parts of Africa. While the design of these mechanisms has varied, at their heart has been the right to truth and a victim-centred approach. The fundamental principles include truth, transparency, inclusivity and accountability in the forms of apologies, reparations or other methods. While a truth-seeking entity is not sufficient on its own to address the problem of peacekeepers who commit sexual abuse, there are many aspects of the methodology and approach of these mechanisms that can and should be incorporated into the lens through which UN accountability laws are framed and implemented.

[62] Despite attempts by some commentators to argue that the International Criminal Court is an appropriate mechanism for these crimes. On SEA as an international crime, see O'Brien, 'Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-Based Crimes', 11(4) *International Criminal Law Review* (2011) 803.

[63] See Dickinson, 'The Promise of Hybrid Courts', 97 *AJIL* (2003) 295; P. McAuliffe, 'Hybrid Courts in Retrospect: Of Lost Legacies and Modest Futures', in W.A. Schabas *et al.* (eds), *The Ashgate Research Companion to International Criminal Law* (2013) 453.

[64] Scharf, 'The Iraqi High Tribunal: A Viable Experiment in International Justice?', 5 *Journal of International Criminal Justice* (*JICJ*) (2007) 258; Sisson and Bassin, 'Was the Dujalil Trial Fair?', (2007) 5 *JICJ* 272.

[65] Also known as truth and reconciliation commissions.

[66] P. de Greiff, *The Handbook of Reparations* (2008).

The right to truth is enshrined within international instruments[67] and has been focused upon by the UN Human Rights Council,[68] the Office of the High Commissioner for Human Rights,[69] treaty bodies[70] and special procedures.[71] At the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have been central in developing jurisprudence on the right to truth. This commission has emphasized the right of societies, as well as of individuals, to truth[72] and has framed it as a positive obligation to inform victims and others about what has taken place in the context of human rights violations.[73] The European Court of Human Rights (ECtHR) also emphasizes that the right belongs to victims, their next of kin and the general public.[74] The African Commission on Human and Peoples' Rights places the right to truth as an aspect of the right to an effective remedy, which is enshrined within the African Charter on Human and Peoples' Rights.[75]

67 These include the International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, and the International Covenant on Civil and Political Rights 1966, 999 UNTS 171; Geneva Conventions 1949, 1125 UNTS 3; Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609; International Convention for the Protection of All Persons from Enforced Disappearance, Doc. A/RES/61/177, 20 December 2006, Art. 24, para. 2, which sets out the right of victims to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person and state party obligations to take appropriate measures in this regard. The convention's preamble reaffirms the right to freedom to seek, receive and impart information to that end.

68 UN Human Rights Council (UNHRC), Right to Truth, UN Doc. A/HRC/RES/9/11, 18 September 2008, para. 1; UNHRC, Right to Truth, UN Doc. A/HRC/RES/12/12, 1 October 2009, para. 1.

69 United Nations High Commissioner for Human Rights (UNCHR), Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91, 8 February 2006; UNHRC, Right to the Truth, Report of the Office of the High Commissioner for Human Rights, UN Doc. A/HRC/5/7, 7 June 2007 (both documents with further references contained therein).

70 See, e.g., UN Committee against Torture, Concluding Observations of the Committee against Torture, Colombia, UN Doc. CAT/C/COL/CO/4, 4 May 2010, para. 27.

71 UNHRC, Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, 26 January 2011, para. 39; UNHRC, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/HRC/22/52, 1 March 2013, paras 23–26, 32–34; UNHRC, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/7/3/Add.3, 1 October 2007, para. 82; UNHRC, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/HRC/14/23, 20 April 2010, para. 34.

72 Inter-American Commission on Human Rights (IACommHR), Annual Report, 1985–86, Doc. OEA/Ser.L/V/II.68, Doc. 8 rev. 1, 26 September 1986, at 193.

73 IACtHR, *Myrna Mack Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25 November 2013, para. 274.

74 ECtHR, *El-Masri v. Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, Judgment of 13 December 2012, para. 191, the Court emphasizes 'the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened'.

75 Principle C(b)(3) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) highlight that the right to an effective remedy includes 'access to the factual information concerning the violations'. African Charter on Human and Peoples' Rights 1981, 1520 UNTS 217.

The right to truth entitles the victim, their families and the general public to seek and obtain all relevant information about an alleged violation.[76] Such information might include the whereabouts of the victim,[77] how the violation was officially authorized[78] and the facts and context of the violation. The UN Special Rapporteur on Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence has emphasized that to fulfil the right to truth institutions, mechanisms and procedures must be established to enable truth to be revealed, 'which is seen as a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation'.[79] The right to truth necessarily entails a victim-centred approach to justice, which includes meaningful participation in, and access to, the process. As the special rapporteur has emphasized:

> [p]rosecutions, for their part, can only serve as actual justice measures if the victims and their families are effectively involved in the processes and provided with the necessary information relevant to their participation in proceedings. Local or traditional methods of rendering justice, when compliant with international fair trial guarantees, can reach out to the local population so they recognize them as 'justice'.[80]

Highlighting the role of victims and civil society, the special rapporteur takes a holistic approach to justice and to the design and implementation of that process. He also stresses the need for institutional and personnel reform in order to guarantee non-recurrence, which is a crucial aspect of justice. Within the comprehensive approach that he has set out, there is particular emphasis on the centrality of victims not only in relation to participation in criminal justice procedures but also in relation to the visibility of victims and recognition of harms caused.[81]

3 Human Rights

IHRL mechanisms have been utilized by the UN to hold accountable state actors through complaints mechanisms within UN treaty bodies and through political methods at the UN Human Rights Council, among others. The UN has also set up bodies to examine human rights violations in peacekeeping operations where the mission has become the sole sovereign power within a country.[82] But the question of whether a human rights-based approach can be used in relation to the UN is as yet unanswered.

[76] UNCHR, *supra* note 69, para. 38.

[77] UNHRC, Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 71, at 12–17.

[78] GA Res. 60/147, 16 December 2005, annex, para. 24; see also IACommHR, *supra* note 72, at 193; *Myrna Mack Chang*, *supra* note 73, para. 274; *El-Masri*, *supra* note 74, para. 192.

[79] UNHRC, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Doc. A/HRC/24/42, 30 July 2013.

[80] UNHRC, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', UN Doc. A/HRC/21/46, 9 August 2012, para. 54.

[81] *Ibid*, paras 54–58.

[82] E.g., the Human Rights Advisory Panel in Kosovo.

Such an approach is based on the UN being bound by fundamental rights to access a court and a remedy, to truth and to the prohibition against torture.

The right to truth has already been explored in this section, but there are other fundamental rights that are also violated by the current laws and practices in relation to accountability and peacekeepers. The right to access a court and a remedy is contained within many international instruments and is considered a general principle of international law common across all legal systems.[83] It is clear that the current laws and practices violate that right of victims, either by the vast majority of prosecutions not occurring or taking place in countries where the victims do not have access to those courts or remedies. The prohibition against torture is also violated by the current system of laws and practices. Rape and sexual violence may constitute a human rights abuse in one of three ways: (i) if the rape or sexual violence was committed by a state agent with the explicit or tacit approval of the state (that is, with impunity); (ii) if the rape or sexual violence was committed by a private actor who then had impunity because the state failed to enact or implement effective criminal laws on those crimes or (iii) if state failures to investigate or prosecute amount to a violation of a victim's right to access a court and/or remedy and to truth.[84] When the UN is operating as a pseudo-state, then it will be liable for human rights abuses resulting from the impunity within which sexual abuse occurs if it is bound by IHRL. The prohibition of sexual abuse exists within UN policies and agreements, but the failures to implement those are akin to states failing to implement domestic laws on sexual abuse – thus, amounting to torture if the UN fails to implement those policies and thus protect individuals from such abuse.[85]

The question that must be addressed, then, is whether the UN is bound by IHRL. The starting point is that other international organizations are viewed as being bound by IHRL. The ECtHR has made clear that international organizations may be bound by IHRL, although these cases are not at all concerned with activities related to peacekeeping.[86] Similarly, other international organizations have adopted similar positions to the ECtHR.[87] Clearly, there is some movement towards international organizations' immunity being restricted for human rights reasons, mainly where there is no alternative or effective dispute settlement mechanism. Some scholars have insisted that this approach 'must be approved' under a right-based approach.[88]

[83] Statute of the International Court of Justice 1945, 59 Stat. 1031, Art. 38.

[84] Gaer, 'Rape as a Form of Torture: The Experience of the Committee against Torture', 15 *City University of New York Law Review* (2011) 293.

[85] For further discussion on states' duties and obligations to prevent and protect, see UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, Doc. CAT/C/GC/2, 24 January 2008.

[86] ECtHR, *Waite and Kennedy v. Germany*, Appl. no. 26083/94, Judgment of 18 February 1999; ECtHR, *Beer and Reagan v. Germany*, Appl. no. 28934/95, Judgment of 18 February 1999.

[87] International Labour Organization Administrative Tribunal, *Chadsey v. Universal Postal Union*, Judgment no. 122, 15 October 1969, at 176; UN Administrative Tribunal, *Teixera v. Secretary-General of the United Nations*, Judgment no. 230, 14 October 1977.

[88] Paust, *supra* note 52; Wouters and Schmidt, *supra* note 50.

National courts have considered the incompatibility between IHRL and the doctrine of absolute immunity in terms of international organizations and, specifically, the UN.[89] The first such case, *Manderlier v. Organisation des Nations Unies et l'Etat Belge*, laid foundations for a potential human rights-based challenge to UN immunity.[90] The Appeals Court criticized 'the present state of international institutions [being that] there is no court to which the appellant can submit his dispute with the United Nations' as being a situation that 'does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights'.[91] While the Court ultimately upheld the UN's absolute immunity, the case highlights the tension between absolute immunity and human rights. It is important to note that this case was brought at a time when IHRL was being codified. Over 40 years later, there is greater potential for challenging immunities on the basis of the developed rights.

More recent cases demonstrate that the door is ajar for a human rights-based challenge to the UN immunity laws and frameworks.[92] Each of these cases was decided on its own facts, with the courts finding that there were alternative modes of settlement available to the claimants. The courts, however, did set out the principle that a human rights-based challenge might be successful if the organization's immunity violates an individual's human rights. Jan Wouters and Pierre Schmitt assert that the question that arises 'is not so much a conflict between internal and international rules, but rather between international rules *inter se*'.[93] If a national court were to allow the claims to be brought against the UN, it would breach its obligations towards the UN. However, it may be 'permissible justification' if the court were 'to argue that the right' that has been violated 'may be considered as *jus cogens*' (of such a fundamental nature that there can be no limitations of or derogations from these rights). Holding that the rights to access a court or to a remedy are *jus cogens* would enable a national court to uphold a challenge to the UN's immunity without breaching its own obligations.[94]

Rosa Freedman insists that when the UN is acting as a sovereign or hybrid sovereign power it ought to be treated like a state; therefore, the UN ought to be able to be held accountable if it violates human rights in those circumstances.[95] Hovell takes a different approach, arguing that due process rather than human rights ought to be central to how the UN is treated, but she largely reaches the same conclusions regarding the

[89] Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals', 7 *Chinese Journal of International Law* (2008) 285.

[90] Brussels Civil Tribunal, *Manderlier v. Organisation des Nations Unies et l'Etat Belge (Ministre des Affaires Etrangeres)*, 11 May 1966, reprinted in *Journal des Tribunaux* (1966) 721.

[91] Brussels Appeal Court, *Manderlier v. Belgium State and United Nations*, [1969] 69 ILR 139, reprinted in [1969] *United Nations Juridical Yearbook* 236.

[92] *Urban v. United Nations*, 768 F.2d 1497, 1500 (DC Cir. 1985); District Court of the Hague, *Mothers of Srebrenica et al. v. State of the Netherlands and the UN*, Case no. 295247/HA ZA 07-2973, 10 July 2008; Appeal Court of the Hague, *Mothers of Srebrenica v. Netherlands & United Nations*, Case no. 200.20.151/01, 30 March 2010.

[93] Wouters and Schmidt, *supra* note 50.

[94] See, e.g., Bianchi, 'Human Rights and the Magic of *Jus Cogens*', 19(3) *EJIL* (2008) 491.

[95] Freedman, *supra* note 2.

end result.[96] Indeed, Devika Hovell's thesis is that there is currently insufficient theoretical underpinnings to inform the ad hoc practice on UN accountability and that without that theoretical framework there will be no consistency for victims. That lack of uniformity is all too clear when it comes to peacekeeping and accountability.

The UN has taken some steps towards embedding human rights across peacekeeping activities generally. While these are not directly focused on accountability, they demonstrate UN recognition of the need to foreground human rights in peacekeeping. The UN Human Rights Up Front Action Plan emphasizes the need to adopt a rights-based approach to all UN activities and requires a focal point within every UN department and agency.[97] Small steps are being taken towards implementing this action plan, but it is hampered by current accountability laws that lead to a culture of impunity within which serious crimes are committed followed by an ongoing denial of victims' rights. The tension between those incremental steps towards implementing human rights obligations and the current laws on accountability once again highlight the need for a new, holistic, victim-centred approach to immunities and jurisdictional bars.

4 Political Processes

Accountability may also occur through political processes that encourage, or even coerce, states to uphold their obligations to investigate and prosecute crimes of sexual abuse. Despite some commentators insisting that political processes cannot be relied upon to ensure accountability, it is clear that such processes have a significant role to play.[98] While politics cannot fulfil the role of law, political processes often are deployed to ensure that states implement international laws in the international arena. To do so, the political cost of not upholding legal obligations must outweigh any costs to the state of fulfilling their obligations. Of course, political processes are far from sufficient on their own to address the problem. Yet they play a vital role and must be considered in any discussions about a holistic approach to accountability.

Over recent years, the UN has deployed a range of political processes aimed at encouraging states to investigate and prosecute peacekeepers for crimes of sexual abuse. Steps forward such as 'naming and shaming' states that fail to comply with their obligations as well as repatriating contingents where sexual abuse is rife have contributed to the improved investigation and prosecution of sexual crimes. However, there is scope for further efforts in this regard. Political processes could be deployed to ensure that internationally accepted definitions and standards of sexual abuse are agreed within the international arena and then are used for international peacekeepers. Such a move would circumvent the need for a new convention, a proposal that has been mooted but that is unlikely to be accepted by states.[99] Similarly, politics could be

[96] Hovell, 'Due Process in the United Nations', 110(1) *AJIL* (2016) 9.

[97] Gilmour, 'The Future of Human Rights: A View from the United Nations', 28(2) *Ethics and International Affairs* (2014) 239. UN Human Rights Up Front Action Plan, *supra* note 3.

[98] See, e.g., Code Blue Campaign, available at www.codebluecampaign.com/.

[99] Deen-Racsmány, 'Towards a Convention on the Criminal Accountability of UN Personnel Including UN Military Experts on Mission and UN Police Officers', 54(2) *Military Law and the Law of War* (2015–2016) 195.

used to ensure that other legal gaps and flaws are addressed – for example, by not allowing countries to contribute troops or for nationals to apply for UN positions unless or until there are national laws enabling extraterritorial criminal jurisdiction for sexual abuse. Political processes have also been used to encourage the UN to comply with its obligations. Advocacy and lobbying efforts by civil society has placed significant pressure on the UN and member states to address failures within the organization. As a result, independent reviews and panels have been appointed that have recommended stronger policies, improved compliance and greater transparency. This work, in turn, has led to significant improvements in UN compliance with its obligations.

4 Conclusions on a New Approach to Accountability

It is clear that a new approach to accountability for UN peacekeepers is required and that there ought to be holistic reform by placing victims at the heart of the system. Precisely what that reform looks like, however, remains unclear. There are many proposals currently being presented, ranging from ensuring the implementation of existing laws, reforming those laws ad hoc or wholesale, creating new justice mechanisms, designing new policies or effecting new prevention strategies. What has not been discussed is what accountability looks like and who needs to be accountable to whom and in what manner. In order to have a holistic discussion about the methods for accountability, we must first address what accountability is and the different forms it might take within the context of UN peacekeeping. This brief, concluding section is not designed to answer those questions in full but, rather, to raise the issues that must be taken forward by all those concerned with this matter.

As explained, accountability is usually understood to refer to a relationship whereby an individual, group or entity demands that an agent report their activities and has the ability to impose sanctions on that agent. There are many different forms that accountability relationships take and many different methods by which such accountability occurs. While many people and societies view accountability mechanisms and practices as something that involves legal processes, mechanisms and sanctions, that is only one aspect of the range of ways in which accountability occurs around the world. Courts and quasi-judicial bodies are one method for holding a person or an entity to account, but in some contexts or societies, these would be wholly inappropriate. Although a victim plays a role and has her rights upheld within legal mechanisms, the focus remains on the perpetrator. Truth commissions and public enquiries are another method by which accountability occurs. In such bodies, the focus is on the victims and their communities, with the perpetrator playing a role in the gathering and exposing of the truth in order to present it to the victims. Accountability may also occur through remedies or through mitigating harms and consequences of an action, whether to the victim or to her family or community. Institutional accountability may take the form of reviewing and revising policies and practices to improve future conduct. Of course, there are many other methods for ensuring accountability that are context specific and that meet the needs of the person or entity to which the accountability is owed.

It is precisely because of this broad range of options, and the many different actors involved, that accountability in relation to UN peacekeepers must be viewed holistically and go beyond traditional calls solely for criminal law processes.

Accountability also operates in different ways depending on the scale at which that accountability takes place. In relation to sexual abuse and UN peacekeepers, there are many actors, and, therefore, accountability will be expected in a range of different ways. At the most basic level, there should be accountability of the perpetrator to the victim, to society and to the criminal law governing his behaviour. Accountability to the victim is also required from the justice mechanism that prosecutes the perpetrator, with the need for transparency, reporting and remedies where applicable. But the UN must also be accountable to the victim through accountability to the host country in relation to the steps it has and will take to prevent future harms. Similarly, TCCs are accountable to the UN, to host states and to local communities in relation to the steps they take to prevent and, where relevant, punish sexual abuse by their troops. All of those converging relationships demonstrate that accountability cannot be implemented solely through the lens of criminal law, human rights, training and prevention strategies or any other single focus. Instead, a holistic victim-centred approach must be adopted to ensure accountability.

By refocusing on the victim rather than on the perpetrator, and by adopting a holistic approach to reform rather than a piecemeal one that looks only at specific flaws or gaps, the foundations are set for a new approach to the issue of sexual abuse and UN peacekeepers. There is not necessarily a need to design new laws, new policies or new mechanisms but, rather, a need to work with what already exists and to harness, streamline and enhance those laws, policies and practices. To do so successfully, the victim must be placed at the centre of those existing processes and frameworks, and any gaps in the system must be addressed. There is a significant opportunity to bring together the many different perspectives on how to address this problem and to tackle it in a manner that will provide lasting and effective reform.