(UN)ACCOUNTABLE: WHO SHALL HOLD THE UNITED NATIONS ACCOUNTABLE FOR ITS HUMAN RIGHTS BREACHES? INTERNATIONAL ARBITRATION AND INSURANCE COVERAGE AS TWO VIABLE SOLUTIONS TO THE UN ACCOUNTABILITY DILEMMA

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ABSTRACT

The United Nations ("UN") is the guardian of human rights. Such guardianship is praise-worthy; nevertheless, UN peacekeepers breach human rights in host countries more frequently than not. If this is a factual truth, an inevitable question arises: who holds the guardian of human rights accountable for breaching human rights? Currently, there is no upstanding legal venue capable of adjudicating human rights breaches of International Organizations, especially the UN. Our aim in this research is to scrutinize the academically suggested administrative, legal, and quasi-legal mechanisms to arrive at an adequate and feasible legal mechanism to hold the UN accountable for its human rights breaches. This research suggests and evaluates two alternative accountability mechanisms for the UN, namely international arbitration and insurance coverage.

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I. INTRODUCTION

> It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality, than by arbitrarily rejecting their jurisdiction.[1]

[1] Rahimtoola v. Nizam of Hyderabad [1958] AC 379 (HL) 418 (appeal taken from Eng.).

The UN operates through multiple organs, bodies, and institutions. One of the methods for maintaining world peace under the UN Charter is deploying peacekeeping missions into a country that is facing turmoil.[2] Peace keeping missions are deployed through a UN Security Council ("UNSC") resolution.[3] Notwithstanding the highly political nature of UNSC resolutions, peacekeeping missions are often helpful in promoting peace in host countries. However, in some instances, such as in Haiti, some of the UN peacekeeping soldiers raped women and boys.[4] Furthermore, their collective negligent acts as a peacekeeping mission caused the cholera outbreak, leading to the death of more than 30,000 Haitians.[5]

The concern of this article is not to examine the passive human rights breaches committed by the UN due to its abstention to intervene, but rather it focuses on wrongful actions committed by UN peacekeepers that resulted in grave human rights breaches, leading to criminal and civil accountability.[6] While the UN is increasingly assuming the role of a quasi-state through having a larger impact on people's lives, the current accountability structure allows it to easily escape responsibility for its wrongful actions.[7] In theory, higher privileges shall correspond to higher responsibilities, but, in practice, the UN seems to be the only exception to this universal rule.[8]

As Rosa Freedman noted regarding the UN, the question of "what accountability looks like and who needs to be accountable to whom and in what matter" has neither been settled nor received sufficient academic attention.[9] Some scholars have examined whether the UN is bound by International Human Rights Law ("IHRL").[10] Frédéric Mégret and Florian Hoffmann laid down three conceptions to subject the UN to IHRL obligations:

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[2] *What Is Peacekeeping*, UNITED NATIONS PEACEKEEPING, https://peacekeeping.un.org/en/what-is-peacekeeping (last visited Feb. 10, 2022).

[3] *Role of the Security Council*, UNITED NATIONS PEACEKEEPING, https://peacekeeping.un.org/en/role-of-security-council (last visited Feb. 20, 2022).

[4] MARK SNYDER, UN SEA: SEXUAL EXPLOITATION AND ABUSE AT THE HANDS OF THE UNITED NATION'S STABILIZATION MISSION IN HAITI (2017), https://cepr.net/images/documents/UNSEA_11JAN17_FINAL.pdf.

[5] *See* Ed Pilkington & Ben Quinn, *UN Admits for First Time that Peacekeepers Brought Cholera to Haiti*, THE GUARDIAN (Dec. 1, 2016, 5:34 PM), https://www.theguardian.com/global-development/2016/dec/01/haiti-cholera-outbreak-stain-on-reputation-un-says.

[6] An example of such UN accountability is due to its failure to engage to stop the genocide in Rwanda. *See generally* Florian Hoffman & Frederic Megret, *Fostering Human Rights Accountability: An Ombudsperson for the United Nations?*, 11 GLOB. GOVERNANCE 43 (2005).

[7] *See generally* Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314 (2003).

[8] *See id.* at 315.

[9] Rosa Freedman, *UNaccountable: A New Approach to Peacekeepers and Sexual Abuse*, 15 EUR. J. INT'L L. 961, 984 (2018).

[10] *See id.* at 975.

"the internal conception, the external conception, and the hybrid conception."[11] Both Noelle Quenivet and Tom Dannenbaum relied on the UN's legal personality to give rise to human rights obligations as an integral part of customary international law.[12] Other scholars argue that UN member states shall enforce the Charter's human rights obligations "over and above any other international law granting immunity," even on the UN itself.[13] In addition, Jordan Paust proposed that it is counterintuitive that the UN enjoys immunity against its human rights violations.[14] Finally, José Alvarez has thoroughly criticized the Draft Articles on International Organizations Responsibility ("DARIO"), stressing the uselessness of these articles.[15]

Historically, there are very few cases that were brought against UN peacekeepers for breaching human rights, which reflects the extreme difficulty faced by victims in holding the UN accountable and emphasizes the importance of our research.

In Section II, this Article will break down the different classes of acts that are attributable to the UN's peacekeeping missions. In Section III, this Article will lay down the rights of victims who suffered personal injuries due to acts committed by UN peacekeepers that breach human rights. Moreover, we shall deconstruct the vexing legal issues concerning the UN legal personality and diplomatic immunity. Further, this Article will scrutinize the currently suggested accountability mechanisms of the UN in Section IV. Finally in Section V, considering these research findings and the relevant scholarship up to date, this Article will propose two viable legal solutions to the UN accountability dilemma.

II. THE DIFFERENT CLASSES OF ACTS OF PEACEKEEPING MISSIONS THAT ARE ATTRIBUTABLE TO THE UN

The UN Stabilization Mission in Haiti ("MINUSTAH") demonstrates a great example of the human rights breaches committed by the UN peacekeeping missions. The UNSC indicated in its 2004 resolution No. 1542 that the MINUSTAH is deployed under Chapter VII of the UN Charter – concerning offensive military action in cases of armed conflict – to maintain and promote peace and security in Haiti.[16]

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[11] *Id.*

[12] *Id.* at 975–76.

[13] *Id.* at 976.

[14] *Id.*

[15] *See* José E. Alvarez, *Revisiting the ILC's Draft Rules on International Organization Responsibility*, 105 HARMONY & DISSONANCE IN INT'L L. 344, 344–46 (2011).

[16] S.C. Res. 1542, ¶ 7 (Apr. 30, 2004).

MINUSTAH officers, who were deployed in Haiti to promote peace in Haiti, had committed grave human rights violations.[17] The blue-helmet personnel raped women and teenage boys, sexually harassed many Haitian women, and were the main reason for the cholera outbreak that led to the death of thousands of people.[18] These are clear-cut findings of in-depth investigations conducted by both the independent investigative body and the UN internal unit of investigation.[19] In response, the UN denied responsibility for the Cholera outbreak for more than six years, dismissed a few Pakistani personnel for raping a fourteen-year-old boy after attempting to cover-up the scandal, and did nothing more than offer a formal apology to mitigate its human rights violations.[20]

To accurately determine the accountability of the UN for human rights breaches, we must distinguish between two classes of acts. First, acts that can be attributed to specific personnel in peacekeeping missions; and second, collective acts that cannot be attributed to specific personnel but can be attributed to the UN peacekeeping forces collectively.

First, the acts of the MINUSTAH, such as sexual misconduct or rape, can be traced to specific soldiers.[21] Abrole stipulates that "[o]ut of the 57 missions [including MINUSTAH] that have been completed by the United Nations, there have been sexual abuse crimes at 11 missions."[22] In the early years of the UN peacekeeping missions, there were sexual abuse crimes in Somalia in 1993, wherein Canadian peacekeepers beat, raped and tortured a young Somali teenage boy.[23]

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[17] *E.g.*, SNYDER, *supra* note 4; Jake Johnston, *A U.N.-Backed Police Force Carried Out a Massacre in Haiti. The Killings Have Been Almost Entirely Ignored.*, THE INTERCEPT (Jan. 10, 2018, 7:01 AM), https://theintercept.com/2018/01/10/haiti-raid-united-nations-police-grand-ravine/; *Two Pakistani UN Soldiers Jailed for Raping Hatian Boy*, BBC NEWS (Mar. 13, 2012), https://www.bbc.com/news/world-latin-america-17351144.

[18] *See* SNYDER, *supra* note 4; Johnston, *supra* note 17; *Two Pakistani UN Soldiers Jailed for Raping Hatian Boy*, *supra* note 17.

[19] *See* Jonathan M. Katz, *U.N Admits Role in Cholera Epidemic in Haiti*, N.Y. TIMES, (Aug. 18, 2016, 9:20 PM), https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html.

[20] *See* Jake Johnston, *In MINUSTAH Abuse Case, Cover-Up Goes Unpunished*, CTR. FOR ECON. POL'Y & RSCH. [CEPR] (July 13, 2012), https://cepr.net/in-minustah-abuse-case-cover-up-goes-unpunished/; Joseph Guyler Delva, *Pakistani U.N. Peacekeepers Sentenced in Haiti Rape Case*, REUTERS (Mar. 12, 2012, 8:38 PM), https://www.reuters.com/article/us-haiti-un/pakistani-u-n-peacekeepers-sentenced-in-haiti-rape-case-idUSBRE82C06C20120313; Ban Ki-moon, *Righting a Wrong in Haiti*, UNITED NATIONS: SEC'Y GEN. (Dec. 5, 2016), https://www.un.org/sg/en/content/sg/articles/2016-12-05/righting-wrong-haiti.

[21] *E.g.*, *Two Pakistani UN Soldiers Jailed for Raping Haitian Boy*, *supra* note 17.

[22] Sam Abrole, *United Nations' International Accountability: Peacekeeping Forces' Sexual Abuse Crimes* 5, https://provost.baruch.cuny.edu/wp-content/uploads/sites/5/2019/04/United-Nations-International-Accountability_-Peacekeeping-Forces-Sexual-Abuse-Crimes.pdf (last visited Feb. 20, 2022).

[23] *Id.*

Second, collective acts committed by the MINUSTAH, such as cholera outbreaks, should be attributed to the UN, since a collective misconduct led to these events.[24] In other words, such acts cannot be attributed to specific soldiers since they are a result of a series of collective "bad" decisions of the MINUSTAH as a mission.[25] Article 13 of the DARIO covers the international law breach consisting of a composite wrongful act that is composed of a series of actions and omissions.[26] Thus, there is no reason under international law for the UN to escape civil responsibility for the collective misconduct of the peacekeeping mission in Haiti. Finally, Article 36 of DARIO provides for compensation as a remedy for such breaches if restitution is not possible.[27] It also highlights that such remedies are "an obligation" with which the concerned International Organization must comply.[28]

An attribution question arises with regard to the UN's responsibility for its on-ground activities. The question is whether the misconduct in international peace operations is attributable to the UN or to the state of the soldier who committed the misconduct. We find it hard to accept the attribution of the UN peacekeepers' civil liability to their national jurisdictions since this would create a double standard under international law. Under Articles 4, 5, 7, and 8 of the International Law Commission ("ILC") Articles on state responsibility, private parties who act under the color of a state organ or authority are attributable to their states, but UN peacekeeping operation's soldiers are not, despite acting as UN agents or organs.[29] In fact,

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[24] *See Justice for Haiti Cholera Victims: The Lawsuit Against the United Nations Frequently Asked Questions*, INST. FOR JUST. & DEMOCRACY IN HAITI, http://www.ijdh.org/wp-content/uploads/2014/12/Cholera-Litigation-FAQ-12.16.2014.pdf (last visited Feb. 25, 2022).

[25] *See, e.g.*, Katz, *supra* note 19; Daniele Lantagne et al., *The Cholera Outbreak in Haiti: Where and How Did It Begin?*, 379 CURRENT TOPICS IN MICROBIOLOGY IMMUNOLOGY 145, 150 (2013).

[26] Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fourth Session, U.N. Doc. A/66/10, at 102 (2011) [hereinafter DARIO]. Article 13 stipulates: "The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act." *Id.*

[27] *Id.* art. 36. Article 36 of DARIO provides that: "1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established." *Id.*

[28] *Id.*

[29] Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), arts. 4–5, 7–8 (2001). ILC articles on State Responsibility, Article 5 stipulates that: "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." *Id.* art. 5. Article 7 states that: "The conduct of an organ placed at the disposal of a State by another State shall be

the Supreme Court of the Netherlands had opined that UN peacekeepers are considered under the effective control of the UN and not their individual states according to the commentary of DARIO Article 7.[30] In addition, the court stated that the commentary on Articles 6 through 9 of DARIO does not render an agent's or organ's wrongful act exclusively attributable to the international organization, but rather creates a dual attribution to both the international organization and the state.[31]

Gala-Or and Ryngaert propose that the UN or contributing member state is apportioned attributions depending on which one exercises greater operational control or "effective control" of the UN peacekeeping forces.[32] In case the UN commanders assumed more operational decisions without needing an approval from a higher authority, then the wrongful peacekeeping acts shall be attributed to the UN.[33] In contrast, if the national force commander enjoyed a higher authority in effectively controlling the troops, then attribution of wrongdoings shall follow to the member of state rather than the UN.[34]

It is worth noting that the ILC DARIO had adopted an adequate standard for attribution regarding international organization. Chapter II of DARIO provides for the attribution of wrongful conduct to the international organization if committed by its organs or agents.[35] Article 2(d) defines agents as those who are under the effective control of the organization.[36] Similarly, the European Court of Human Rights ("ECHR") decided in *Behrami* and *Saramati* that the conduct by both the UN Interim Administration Mission in Kosovo, as well as the Kosovo Force troops, was attributable exclusively to the UN and not to the state contributing the troops.[37]

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considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed." *Id.* art. 7. Article 8 provides that: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." *Id.* art. 8.

30 *See* HR 06 september 2013, LZ/TT, at 19–21 (State of Neth./Nuhanović) (Neth.).

31 *Id.* at 19–20.

32 Noemi Gal-Or & Cedric Ryngaert, *From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN*, 13 GER. L.J. 511, 530 (2012).

33 *Id.*

34 *Id.*

35 DARIO, *supra* note 26, at 83.

36 *See id.* at 73 ("'[A]gent of an international organization' means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.").

37 *See* Behrami v. France, App. No. 71412/01, ¶ 144 (May 2, 2007), https://hudoc.echr.coe.int/eng?i=001-80830.

In conclusion, the human rights violations committed by UN peacekeepers during or because of their mission in a host country shall be attributed to the UN so long as the UN enjoys effective control over the troops and personnel.

III. THE RIGHT OF UN VICTIMS TO ADJUDICATE THEIR HUMAN RIGHTS CLAIMS AND THE UN DIPLOMATIC IMMUNITY

A. The UN's Obligation to Respect IHRL and the Right of UN Peacekeeping Victims to Adjudicate Their Human Rights Claims

The UN obligation to respect Human Rights under the UN Charter is undisputed. In particular, Articles 1(3), 55, and 56 of the UN Charter require the UN to respect and promote human rights.[38] Furthermore, since the UN enjoys a legal personality, it is also bound by customary international law that strictly refers to upholding human rights.[39]

Moreover, the UN must provide an alternative dispute resolution mechanism for human rights victims to adjudicate their human rights claims.[40] As part of their attempt to balance UN immunity with victims' rights to access a court and obtain a remedy, some scholars have suggested that international organizations must provide a reasonable legal remedy or an effective alternative dispute settlement mechanism.[41] This argument finds its basis in Section 29 of the 1946 Convention on Privileges and Immunities of the UN ("the Convention"). Section 29 of the Convention counterbalances the UN's absolute immunity under Section 2 by obliging the Organization to offer alternative mechanisms for resolving disputes: "[t]he United Nations shall make provisions for appropriate modes of settlement of . . . [d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party . . ."[42]

On the other hand, the victims of UN peacekeepers have the right to adjudicate their private law claims – including claims based on human rights breaches – on legal grounds found in human rights treaties such as the

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[38] U.N. Charter art. 1, ¶ 3; *id.* art. 55–56; Rosa Freedman, *UN Immunity or Impunity? A Human Rights Based Challenge*, 25 EUR. J. INT'L. L. 239, 243 (2014).

[39] *See* Tom Dannenbaum, Article, *Translating the Standard of Efficient Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L. L.J. 113, 135 (2010); *see also* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 322–24 (1996).

[40] *See* Freedman, *supra* note 38, at 241.

[41] *See id.*

[42] Convention on the Privileges and Immunities of the United Nations art. VIII, § 29, Feb. 13, 1946, 1 U.N.T.S. 4 [hereinafter The Privileges and Immunities Convention].

Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").[43]

The Preamble and Article 1 of the UDHR emphasize that human dignity and the rule of law are the two cornerstones of international law.[44] The UDHR preamble states that the "disregard and contempt for human rights has resulted in barbarous acts that have outraged the conscience of mankind."[45] Although it originally referred to the atrocities of World War II, we do not think that the breaches to human dignity committed by the UN peacekeepers in Haiti or Kosovo have any lesser gravity. Article 7 of the UDHR guarantees the right to due process and equal protection of the laws, which is also binding on the UN itself.[46] The UDHR also provides everyone with the right to an effective remedy for "acts violating the fundamental rights" granted by law.[47] Finally, Article 10 of the UDHR dictates that everyone is entitled to a fair hearing by an independent and impartial tribunal.[48] Even though most of these provisions were designed with nations rather than the UN in mind, they constitute powerful pillars upon which the UN – as the guardian of human rights – was built and shall be subjected to.[49]

The ICCPR also grants the above-mentioned rights to victims. In addition, Article 17 of the ICCPR stipulates that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.[50]

In this way, UN peacekeeping victims have the right to seek judicial redress and protection against any breaches of both the UDHR and the ICCPR.

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[43] *See* Freedman, *supra* note 38, at 249–50.

[44] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl., art. 1 (Dec. 10, 1948).

[45] *Id.* art. 1.

[46] *See id.* art. 7.

[47] *Id.* art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

[48] *Id.* art. 10.

[49] *See generally* Kevin C. Chang, *When Do-Gooders Do Harm: Accountability of the United Nations Toward Third Parties in Peace Operations*, 20 J. INT'L PEACEKEEPING 86 (2016) (describing the lack of international and domestic judicial accountability mechanisms and the reluctance of the UN to hold itself accountable to harms it inflicted).

[50] G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 17 (Dec. 16, 1966).

Finally, Article 6 of CEDAW provides for the suppression of "all forms of traffic in women and exploitation of prostitution of women."[51] Although this obligation is aimed at "states parties,"[52] it perfectly aligns with the purpose and spirit of the treaty to hold the UN to the same standard when it acts as a state.[53] Accordingly, Haitian women who were subject to abuse, trafficking, or exploitation have the right to hold the UN accountable for its peacekeepers' human rights and criminal violations.

It is worth noting that the European Union ("EU"), which is considered a prominent international organization of *sui generis* nature,[54] is bound by IHRL.[55] The ECHR made it clear that the EU only enjoys restrictive rather than absolute immunity.[56] The court also opined that there ought to be "reasonable alternative means" available to claimants.[57] The need for alternative mechanisms was further developed in *Siedler v. Western European Union*.[58] The *Siedler* court held that immunity is conditional on offering an alternative dispute settlement mechanism that meets certain criteria of due process to comply with Article 6(1) of the ECHR.[59]

B. The UN Legal Personality Is Sufficient for Holding It Accountable and Its Diplomatic Immunity Cannot Be Invoked Before International Courts

The UN, as an international organization, has a legal personality capable of enjoying rights and incurring obligations. Yet it seems that the UN often maximizes its privileges at the expense of its liabilities and obligations. Although some national courts have recently distinguished between absolute and restrictive immunity of states and international organizations,[60] most national courts are reluctant to waive the absolute immunity the UN enjoys.[61] In fact, many cases involving human rights atrocities committed by UN

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[51] G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 6 (Dec. 18, 1979).

[52] *Id.* ("States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.").

[53] *See* Freedman, *supra* note 38, at 242–43.

[54] *See generally* William Phelan, *What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime*, 14 INT'L STUD. REV. 367 (2012) (describing what makes the EU *sui generis*).

[55] Tawhida Ahmed & Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT'L L. 771, 771 (2006).

[56] *See* Waite and Kennedy v. Germany, 1999-I Eur. Ct. H.R. 393.

[57] *Id.* at 411.

[58] *See* Siedler v. Western European Union, JT 2004, 617 (Lab. Ct. App. 2003) (Belg.).

[59] *Id.*

[60] *E.g.*, Jam v. Int'l Fin. Corp., 139 S. Ct. 759 (2019).

[61] *See* Freedman, *supra* note 38, at 243.

peacekeepers have not resulted in either compensation by the UN to the victims nor access to domestic courts.[62]

This vexing issue has received full attention by international law scholars. Boon argues that the UN's absolute immunity severs ordinary legal principles: "an organization is responsible for the harm it causes" intentionally or negligently.[63] Furthermore, invoking absolute immunity against human rights violations undermines the very purpose of the UN, which is to uphold the international rule of law, and reduces the level of respect that may be expected from member states in upholding international law.[64] If the UN itself – as the guardian of human rights and the international rule of law – violates human rights and claims to be above accountability, why should states not do the same?

Although UN immunity was invented to assure its performance of international roles and prevent state interference, the immunity should be limited to only this purpose.[65] Over the last five decades, states' immunity has developed to apply the doctrine of restrictive immunity.[66] Restrictive immunity allows sovereign states to be held accountable for the actions of private individuals. Conversely, it limits immunity to acts performed *jure imperii* (acts of a sovereign nature).[67] Yet, international organizations and the UN appear to disregard such restrictive immunity, invoking absolute immunity before national courts regardless of the reason for the immunity in the first place.[68] Instead of waiving its absolute immunity to uphold its values, the UN stubbornly avoids accountability altogether through its use of the absolute immunity shield.[69]

It does not comport with sound logic that the UN would invoke absolute immunity to undermine its human rights obligations, which is precisely why the organization was established. In the past, UN peacekeepers have committed intentional and negligent crimes and torts throughout the world, including in Haiti and Kosovo, while simultaneously claiming internal and external immunity against the victims' private law claims.[70] Although the UN – the guardian of human rights – does not prefer to enforce international law

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[62] *See, e.g.*, *id.* at 241.

[63] Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT'L L. 341, 364 (2016).

[64] *Id.* at 347.

[65] Freedman, *supra* note 38, at 243.

[66] *Id.* at 242.

[67] *See id.*

[68] *See id.* at 242–43.

[69] *See id.* at 241.

[70] *See generally* Florian Hoffmann & Frédéric Mégret, *Fostering Human Rights Accountability: An Ombudsperson for the United Nations?*, 11 GLOB. GOVERNANCE 43 (2005) (describing instances where the UN exercised its internal and external immunity).

against itself, at the same time, it condemns developing nations for violating human rights.

Pursuant to Section 29 of the Convention, the UN is obliged to provide "reasonable alternative means" of settlement to its victims.[71] However, it is questionable that the UN – which often fails to implement such dispute resolution mechanisms – should simply invoke immunity and leave victims with no place to litigate their private law claims.[72] Although international organizations, including the UN, are mostly seen as quasi-states in terms of their functionality and internal legal systems, they are often granted absolute immunity as opposed to restrictive immunity, which is granted to states.[73]

One cannot discuss the legal personality and accountability of international organizations without referring to the ICJ's reparation case.[74] In this landmark case, the ICJ decided that international organizations might be held civilly accountable for their wrongdoings.[75] The reparation case is still considered a landmark case on the legal personality of international organizations and the implied attribution of their wrongdoings.[76] Yet the immunity issue of the UN is not that simple – it was the subject of many national court cases in the last few decades. The general attitude of national courts towards the UN is to grant it absolute immunity.[77]

In contrast to some national courts, which have applied restrictive immunity to international organizations based on their classification as quasi-states, other courts have not made such progress.[78] Even so, some of these progressive national courts continue to treat the UN differently than other international organizations by giving it absolute immunity in line with UN Charter Article 105(1), which says that "the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."[79] Freedman argues that a straightforward interpretation of UN Charter Articles 1(3), 55, and 56 does not allow the UN to invoke absolute immunity before national courts since breaching human rights is not considered a fulfillment of its purposes.[80] What ties national courts' hands even more is Section 2 of the Convention, which

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[71] The Privileges and Immunities Convention, *supra* note 42, art. 8, § 29.

[72] Boon, *supra* note 63, at 341.

[73] August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285, 285 (2008).

[74] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 8 (Apr. 11).

[75] *See id.*; *see also* Philippe Gautier, *The Reparation for Injuries Case Revisited: The Personality of the European Union*, 4 MAX PLANCK U.N.Y.B. 331, 332 (2000).

[76] Gautier, *supra* note 75, at 332.

[77] Freedman, *supra* note 38, at 243.

[78] *Id.* at 242–43.

[79] U.N. Charter art. 105, ¶ 1.

[80] Freedman, *supra* note 38, at 243.

states that "[t]he 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."[81] Due to this limitation, most national courts would not be able to interpret this provision as conferring only restrictive immunity, and their general interpretation of Section 2 would be to provide the UN with absolute immunity.[82]

In the landmark U.S. Supreme Court case *Jam v Int'l Fin. Corp*, the International Finance Corporation ("IFC") objected that international organizations should be treated as states based on the difference in the immunity's purpose for an international organization and a state.[83] The IFC argued that the purpose of an international organization's immunity is different from the purpose of a sovereign nation's immunity.[84] However, while the latter serves international comity and is about mutual respect, an international organization's immunity protects its ability to pursue the collective interest of its member countries without undue influence from their courts.[85] Accordingly, even though the immunity of foreign states has shifted from absolute to restrictive immunity under the U.S. Foreign Sovereign Immunities Act ("FSIA"), international organizations have different characteristics and purposes that disallow such a transition of immunity towards them.[86]

Regardless, the majority opinion of the U.S Supreme Court has denied the absolute immunity of international organizations for acts of a commercial nature as opposed to *jure imperii* acts.[87] The U.S. Supreme Court followed a restrictive immunity approach towards international organizations, similar to the FSIA restrictive immunity of states, opening its adjudication doors to any dispute of a commercial nature against international organizations.[88]

Even though the absolute immunity of the UN before national courts remains a barrier to the victims of UN peacekeepers by preventing them from filing their private law claims in national courts, we argue that it cannot be invoked to shield the UN from accountability before an international court simply because it does not serve that purpose. First, the immunity of the UN was designed to prevent political interference from any member state; it was not created to prevent international adjudicatory bodies from holding the UN

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81 The Privileges and Immunities Convention, *supra* note 42, art. 2, § 2.

82 *See id.*

83 Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 764 (2019).

84 *Id.* at 768.

85 *Id.*

86 *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2018); *Jam*, 139 S. Ct. at 764.

87 *See Jam*, 139 S. Ct. at 772.

88 *Id.*

accountable.[89] Second, the immunity is conferred upon the UN for functionality reasons, and thus it shall not apply when the UN is acting beyond its functions – committing human rights breaches.[90] Third, the UN immunity exists so that national courts do not apply their domestic laws on a global international body such as the UN.[91] Accordingly, the purposes behind the UN's immunity does not stand intact when the UN is standing before an international court or arbitral tribunal where international law is applicable as to its human rights breaches that are certainly beyond its functionality. Although we agree with scholars who argue that restrictive immunity is a progressive step towards holding the UN accountable before national courts, we believe that this step is not needed when international law and international human rights law are applicable to acts committed by peacekeeping missions.

IV. THE SUGGESTED ACCOUNTABILITY MECHANISMS OF THE UN AND THEIR UNDERLYING FLAWS

There are two types of accountability mechanisms under the UN system – internal accountability mechanisms that exist within the UN and external accountability mechanisms that are independent of the UN. While the former is almost always administrative in nature, the latter can be of political, economic, or quasi-judicial character.

A. Internal Accountability Mechanisms

1. The UN Office of Internal Oversight Services

The current UN attitude towards the misconduct and crimes committed by its peacekeeping missions is rather inadequate. The UN initially refers the matter of UN peacekeeper misconduct to the staff member's national government to both investigate and prosecute.[92] Only in the case where the accused staff member's national government refuses to investigate the matter,

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[89] *See* The Privileges and Immunities Convention, *supra* note 42, art. 2, § 2 ("[T]he 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. It is, however, understood that no waiver of immunity shall extend to any measure of execution."). On the purpose of the UN immunity under the General Convention, *see generally* August Reinisch, *Introductory Note* to *Convention on the Privileges and Immunities of the United Nations*, UNITED NATIONS AUDIOVISUAL LIBR. INT'L L. (2009), https://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html (explaining that the purpose behind the functional immunity of the UN was to protect smooth functionality of the UN by shielding it from domestic lawsuits).

[90] *See* Reinisch, *supra* note 89, at 1.

[91] *See id.* at 2.

[92] *Investigations*, UNITED NATIONS: CONDUCT IN UN FIELD MISSIONS, https://conduct.unmissions.org/enforcement-investigations (last visited Jan. 17, 2022).

the UN Office of Internal Oversight Services ("OIOS") reassumes the right to investigate.[93] The UN may take disciplinary measures against soldiers who engage in misconduct such as repatriating and banning them from joining peacekeeping operations in the future.[94] However, the criminal and civil liability of the soldier or staff member involved are solely reserved to the staff member's national jurisdiction.[95] Soldiers and staff members who commit crimes within their role in a peacekeeping mission can only be held accountable in accordance with their national laws.[96] This internal OIOS mechanism does not stand scrutiny. Firstly, the OIOS' role is not to hold accused UN peacekeepers responsible, rather it is to improve the logistics of the UN, including peacekeeping missions, as a self-correcting mechanism that is not authorized to initiate disciplinary action.[97] Second, from a criminal justice perspective, sending the accused staff or soldier back to their state for investigation and punishment has only resulted in many of the MINUSTAH's soldiers avoiding accountability.[98] Sovereign states are likely to protect their own officials rather than prosecute them for international wrongdoings.[99] Even if their state wanted to uphold justice, fleeing crime scenes in host states where the UN peacekeeping mission was deployed leaves the national court of the perpetrator with little to no evidence, witnesses, and access to victims, thereby creating a structural flaw at the criminal justice system.

On this front, we argue that it would be more beneficial to criminal justice to try the accused soldiers in the country where the peacekeeping mission sits and apply the national law of their jurisdiction. This would allow for a more

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[93] *Id.*

[94] *Standards of Conduct*, UNITED NATIONS PEACEKEEPING, https://peacekeeping.un.org/en/standards-of-conduct (last visited Jan. 17, 2022).

[95] *Id.*

[96] *Id.*

[97] *See Who We Are*, U.N. OFF. OF INTERNAL OVERSIGHT SERVS., https://oios.un.org/content/who-we-are (last visited July 14, 2021). OIOS provides that its role is limited to reporting to the Secretary General: "Where evidence of misconduct is established, the Investigations Division will send the Secretary-General the results of its investigation, together with recommendations, to guide the Secretary-General in deciding on the appropriate action to be taken. OIOS is not, however, responsible for deciding whether to initiate disciplinary proceedings or to institute corrective action as a result of its investigations." *How We Investigate*, U.N. OFF. OF INTERNAL OVERSIGHT SERVS., https://oios.un.org/how-we-investigate (last visited July 14, 2021).

[98] *E.g.*, Sofia Lotto Persio, *After 13 Years and Several Scandals, U.N. Votes to End Mission in Haiti*, NEWSWEEK (Apr. 13, 2017, 12:24 PM), https://www.newsweek.com/minustah-mission-haiti-un-peacekeepers-scandal-583490 ("[T]he biggest scandal involved around 134 Sri Lankan troops that were accused of carrying out multiple sexual assaults against Haitian women and girls between 2004 and 2007. According to military sources quoted by the AP, some of the peacekeepers involved in the ring were still in the Sri Lankan military as of 2016. Sri Lankan Defense Secretary Karunasena Hettiarachchi defended the troops, telling the AP: 'People are quite happy and comfortable with the peacekeepers.'").

[99] *E.g.*, *id.*

reliable judicial process for collecting evidence and hearing witnesses and victims. The only time, to our knowledge, that the MINUSTAH soldiers were tried within the borders of Haiti was when a Pakistani military court convened to try two Pakistani soldiers for rape charges.[100] As a result, the two Pakistani soldiers were imprisoned for a year for raping the fourteen-year-old boy after the MINUSTAH's multiple attempts of trying to cover it up.[101] Had it not been a widely publicized scandal, the UN might not have allowed a Pakistani military court to convene in Haiti.

Since its formation, the OIOS has conducted investigations on allegations of corruption, mismanaging of funds, and misconduct of UN personnel and staff.[102] These investigations have led to dismissals of the responsible UN staff in some instances.[103] In fact, many investigations conducted by the OIOS have been followed by some UN reforms, such as the International Criminal Tribunal for Rwanda.[104] Thus, the OIOS, as an accountability mechanism, scores well on two aspects – the future behavior of the organization and sanctions.[105] Nonetheless, one cannot be too optimistic about the OIOS' role since it often fails to offer a remedy to aggrieved victims.[106] In other words, its focus on accountability is primarily concerned with treating UN misconduct rather than offering a rights-based remedy to victims.[107]

2. The UN General Assembly

There are other internal accountability mechanisms such as the General Assembly ("GA"). In theory, the GA plays the role of a world parliament of states, which renders it the most competent in exercising control and oversight over states and all its organs, including the UNSC.[108] However, several, if not all, secretary generals have lacked such oversight due to the intervention of powerful nations.[109]

On the other hand, all the UN organs, including peacekeeping operations, are obliged to report their progress to the GA.[110] Further, the GA is responsible

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100 Delva, *supra* note 20.

101 *Two Pakistani UN Soldiers Jailed for Raping Haitian Boy*, *supra* note 17.

102 GUGLIELMO VERDIRAME, THE UN AND HUMAN RIGHTS: WHO GUARDS THE GUARDIANS? 331 (1st ed. 2011).

103 *Id.* at 358.

104 *Id.* at 331–32.

105 *Id.* at 332.

106 *Id.*

107 *See id.*

108 *See* Amin R. Yacoub, *A World Government: A Critical Look into the Present, to Foresee the Future*, 50 N.Y.U. J. INT'L L. & POL. 1443, 1452 (2018); VERDIRAME, *supra* note 102, at 391.

109 VERDIRAME, *supra* note 102, at 391.

110 *Id.* at 321–22.

for administering the UN's budget, which allows it to cut off funding to peacekeeping missions if they violate international law or human rights obligations.[111]

Furthermore, the GA is required to inform the UNSC of the exercise of its delegates' powers as well as all relevant developments relating to peacekeeping missions.[112] This obligation was indirectly recognized in the *certain expenses case*, and it is restricted only to UNSC mandates under Chapter VII of the Charter.[113] A similar obligation also exists with regards to UNSC mandates issued under Chapter VI,[114] such as the Advisory Committee for the UN Operation in the Congo ("ONUC"), which was formed by a secretary general initiative to issue detailed reports for the UNSC regarding political and factual developments in a state where a peacekeeping mission is deployed.[115] However, Verdirame criticized the GA's role of control and oversight as being too weak.[116] This is understandable because the GA's obligations of control and oversight over all its organs are so considerable that it renders the reports it receives merely a bureaucratic process with little value.

3. The UN Security Council

The UNSC has the power to internally monitor the UN's actions. The UNSC might designate a delegation to conduct fact-finding missions.[117] This fact-finding is sometimes conducted by high-level UN officials and by civil society and domestic non-governmental organizations.[118] The missions have previously addressed the accountability of UN peacekeeping forces. For example, the Security Council Mission to Central Africa investigated accountability measures being taken in regard to perpetrations of sexual abuse committed by members of the UN Mission in the Democratic Republic of Congo.[119] These missions can investigate both institutional and individual responsibility.[120] In fact, the Independent Inquiry Committee investigated the Oil for Food program and "its findings led to indictments by US courts."[121] Although the UNSC mechanism has proven to be fruitful once, it is often

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111 *See id.*

112 *See id.* at 323.

113 *Id.*

114 U.N. Charter art. 11, 35.

115 VERDIRAME, *supra* note 102, at 325.

116 *Id.* at 322, 391.

117 *Id.* at 326.

118 *Id.* at 326–27.

119 *Id.* at 327; *see* S.C. Res. 716, ¶ 48 (Oct. 27, 2005).

120 *See* VERDIRAME, *supra* note 102, at 329.

121 *Id.*

perceived as being investigational rather than remedial in nature on the one hand and highly political on the other.[122]

4. The International Court of Justice

The current International Court of Justice ("ICJ") statute provides in Article 34 that the Court's jurisdiction is only limited to disputes between states.[123] Yet, the ICJ may request information from international organizations relevant to the case before it.[124] The ICJ may also issue an advisory opinion to international organizations, especially with regards to the construction of the constituent instrument of the public international organization.[125] In spite of the non-binding character of such advisory opinions, they can be extremely useful to develop international law on international organizations' responsibility, as demonstrated by the landmark ICJ reparation case.[126] We argue that there is a probability – although very slim considering the history of the ICJ advisory opinions – for the ICJ to issue an advisory opinion against the UN if the host state brought a case against the country of origin of the accused UN peacekeepers.[127] For example, if Haiti brought its cholera claim against the country that provided the greatest number of soldiers and staff to the MINUSTAH, the ICJ might issue an advisory opinion to the UN, urging it to provide relief for Haitians. In spite of this, an advisory opinion from the ICJ is merely ink on a piece of paper since it is non-binding.[128]

Another solution is to use Articles 69 and 70 of the ICJ statute to introduce an amendment to the court's competence and extend it to include

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[122] *See id.* at 8, 334–35.

[123] Statute of the International Court of Justice, art. 34 ("1. Only states may be parties in cases before the Court. 2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. 3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.").

[124] *Id.* ¶ 2.

[125] *See id.* ¶ 3.

[126] Reparation for Injuries Suffered in the Service of the United Nations, *supra* note 74.

[127] Article 65 of the ICJ allows for advisory opinions to be requested from the ICJ. Statute of the International Court of Justice, art. 65 ("1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. 2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.").

[128] Elena Cirkovic, *An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence*, 11 GER. L.J. 895, 906 (2010).

disputes between victims or groups of victims, and international organizations. Amending the ICJ statute, however, requires a two-thirds majority vote of member states under Article 108 of the UN Charter.[129] Practically, although feasible, obtaining a two-third majority may be far-fetched due to the conflicting interests of member states and the current international atmosphere of untrust.

5. The International Criminal Court

In 2002, the International Criminal Court ("ICC") was established. The Rome Statute, the ICC's founding treaty, grants jurisdiction to the ICC over four main classes of crimes – genocide,[130] crimes against humanity,[131] war crimes,[132] and crime of aggression.[133] In 2002, nearly 140 states signed, and sixty states ratified the Rome Statute.[134]

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[129] Statute of the International Court of Justice, art. 69 ("Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter . . . ."); U.N. Charter art. 108 ("Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.").

[130] "*[T]he crime of genocide* is characterized by the special intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group." *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Feb. 26, 2022) (emphasis added).

[131] "*[C]rimes against humanity* . . . are serious violations committed as part of a large-scale attack against any civilian population. The 15 forms of crimes against humanity listed in the Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid, and deportation." *Id.* (emphasis added).

[132] "*[W]ar crimes* which are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes." *Id.* (emphasis added).

[133] "*[T]he crime of aggression* [is concerned with] the use of armed force by a State against the sovereignty, integrity or independence of another State. The definition of this crime was adopted through amending the Rome Statute at the first Review Conference of the Statute in Kampala, Uganda, in 2010. On 15 December 2017, the Assembly of States Parties adopted by consensus a resolution on the activation of the jurisdiction of the Court over the crime of aggression as of 17 July 2018." *Id.* (emphasis added).

[134] William A. Schabas, *International Criminal Law*, BRITANNICA, https://www.britannica.com/topic/international-criminal-law/Post-World-War-II-developments (last visited Feb. 26, 2022).

The ICC exercises jurisdiction over these crimes if they were committed on or after July 1, 2002 by a state party national, in a territory of a state party, or in a state that accepted the ICC's jurisdiction.[135] The ICC may also exercise jurisdiction over such crimes if they were referred by the UNSC to the ICC Prosecutor under Chapter VII of the UN Charter.[136] A recent development to the jurisdiction of the ICC took place in 2018. As of July 17, 2018, the UNSC may refer any act of aggression to the ICC regardless of whether the state involved is a party to the Rome Statute.[137] Finally, if the UNSC is reluctant to refer one of those crimes to the ICC, the ICC Prosecutor has jurisdiction to investigate any of these crimes "on [their] own initiative or upon request from a State party."[138]

It might thus seem logical to allow the ICC to investigate crimes committed by UN peacekeepers and hold the UN accountable for them. In fact, the drafters of the Rome Statute did not intend to remove UN peacekeepers from being subject to the jurisdiction of the court.[139] Although the original draft of the Rome Statute included a provision that granted immunity to UN peacekeepers, this provision was removed in the final draft.[140] Nonetheless, the U.S. was the first member state to refuse exposing its personnel serving as UN peacekeepers to the risk of "politicized prosecutions before the ICC."[141] This early fear of exposure to the jurisdiction of the ICC certainly meant that the ICC was perceived as an international judicial body capable of holding UN peacekeepers accountable. At the time, the UN Secretary General, Kofi Annan, did not believe that UN peacekeepers were "'anywhere near committing the kind of crimes' falling under the ICC's jurisdiction, and the case was thus hypothetical and 'highly improbable.'"[142]

Some scholars, such as Giles, argue that the ICC indeed has jurisdiction over UN peacekeepers' criminal acts.[143] She built her proposition on four blocks. First, the atrocities committed by UN peacekeepers fall under one

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135 *How the Court Works*, *supra* note 130.

136 *Id.*

137 *Id.*

138 *Id.*

139 *See* GEERT-JAN ALEXANDER KNOOPS, THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW 3 (2004).

140 *Id.* ("[The] absolute exemption of United Nations peacekeepers received widespread criticism both as to the substance and concept, which resulted in its deletion.").

141 *See UN Peacekeepers Exempted from War Crimes Prosecution for Another Year*, UN NEWS (June 12, 2003), https://news.un.org/en/story/2003/06/71102-un-peacekeepers-exempted-war-crimes-prosecution-another-year.

142 *Id.*

143 Shayna Ann Giles, *Criminal Prosecution of UN Peacekeepers: When Defenders of Peace Incite Further Conflict Through Their Own Misconduct*, 33 AM. U. INT'L L. REV. 147, 180, 182 (2017).

class of crimes or another over which the ICC has jurisdiction.[144] Second, the complementary jurisdiction of the ICC would allow it to prosecute and adjudicate crimes against UN peacekeepers in case national courts prove unwilling.[145] Thus, the ICC complements the national court system and does not substitute it. Third, the ICC will be more neutral as a forum than a national court for holding UN peacekeepers accountable.[146] Finally, the ICC system is already in place and thus creates a sense of security.[147]

This proposition, however, seems easier in theory than in practice. Setting all criticism directed at the ICC aside, most of the crimes committed by UN peacekeepers simply do not qualify as war crimes, genocide, aggression, or crimes against humanity.[148] In practice, the ICC Prosecutor is very reluctant to assume jurisdiction over acts that do not rise to the extreme seriousness and gravity expected by the court.[149] For instance, the MINUSTAH peacekeepers have raped and sexually assaulted multiple women in Haiti.[150] Unless victims could prove that the MINUSTAH peacekeepers raped them to destroy in whole or in part their national, ethnic, racial or religious group by killing its members, or the purpose behind the rapes was to prevent births within the group, the rape and sexual assault crimes would not qualify as genocide and would not fall under the ICC's jurisdiction.[151] In the same example, a seemingly qualified rape and sexual assault victim may not be able to resort to the ICC arguing that the UN peacekeepers' attack was on a sufficiently large-scale to be considered as crimes against humanity and fall under the ICC's jurisdiction.[152] Thus, even by applying this accountability system, most of the UN peacekeepers will escape liability for their private small-scale crimes, which constitutes the bulk of crimes committed against the host state's population – rendering the system almost useless. Moreover, many of the crimes committed by the UN peacekeepers are rather negligent crimes or torts – such as the outbreak of

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144 *Id.* at 180.

145 *Id.* at 179.

146 *Id.*

147 *Id.* at 179–80.

148 Melanie O'Brien, *Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold*, 10 J. INT'L CRIM. JUST. 525, 535–36 (2012).

149 *See id.* at 536.

150 Sonia Elks, *Haitians Say Underaged Girls Were Abused by U.N. Peacekeepers*, REUTERS (Dec. 18, 2019, 10:43 AM), https://www.reuters.com/article/us-haiti-women-peacekeepers/haitians-say-underaged-girls-were-abused-by-u-n-peacekeepers-idUSKBN1YM27W.

151 *See* Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 361 (2003).

152 *See How the Court Works*, *supra* note 130.

Cholera – that do not fall under the jurisdiction of the ICC.[153] Lastly and most notably, the ICC does not have jurisdiction to hold the UN itself accountable for the crimes committed by the blue-helmet officers under its effective control.[154] The ICC cannot issue an enforceable decision against the UN to pay compensation to the victims.[155] Hence, in a strict sense, the ICC does not qualify as an accountability mechanism for the UN.

B. External Accountability Mechanisms

There are mainly two external accountability mechanisms: Ombudsmen and UN Member States.

1. Ombudsmen

Ombudsmen are both independent and impartial, and they are not affiliated with the UN.[156] They enjoy a semi-judicial nature that allows them to indicate remedies for individuals.[157] This gives them an edge over any other current accountability mechanism.[158] They are open to receiving complaints from third parties: victims or groups of victims.[159] The Inspection Panel of the World Bank is an example of an ombudsmen.[160] This Panel has received at least sixty-nine requests for inspecting whether the World Bank had complied with its policies in managing a particular project.[161] Since the ombudsmen reports are public, they could play a role in certain reforms through the shaming tactic.[162] Notwithstanding this advantage, the ombudsmen reports issued on the World Bank are not legally binding.[163] Many international law scholars and lawyers have called for adopting an ombudsmen – in the footprints of the World Bank's – for UN peacekeeping operations.[164] After a UN mission scandal, the Secretary General had listened to these proposals and had established a Conduct and Disciplined Unit ("CDU") in 2007.[165] The CDU became responsible for assessing the discipline in peacekeeping

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153 *See id.* (explaining that the ICC jurisdiction only governs the four categories of international crimes and does not extend to unintentional or negligent crimes).

154 *See id.*

155 *See id.*

156 VERDIRAME, *supra* note 102, at 332.

157 *Id.*

158 *See id.* at 332–33.

159 *See id.* at 333.

160 *Id.*

161 *Id.*

162 *See id.*

163 *Id.*

164 *See, e.g.*, *id.* at 335.

165 *Id.* at 333–34.

operations and special political missions.[166] It has both preventive and remedial roles, yet the latter role is activated upon receiving individual allegations of misconduct.[167] Its investigations may result in repatriation of the accountable UN personnel and ban them from future peacekeeping missions.[168]

The ombudsman accountability mechanism seems too ambitious yet empty. Despite its impartiality and independence from the UN and its effectiveness in using the shaming technique to some extent, it only produces non-binding decisions that lead to repatriating or banning the accused UN peacekeeper who engaged in misconduct.[169] Thus, the ombudsman end-result returns us to square one – the OIOS mechanism. Although the former is considered more impartial and effective, it also does not hold the UN itself accountable for its human rights breaches.[170] In no decision delivered by the Ombudsman has the UN ever been held accountable for acts of violence committed by UN peacekeepers under its effective control and ordered that compensation be paid to victims.[171] Thus, despite all the virtues, ombudsman does not qualify as a valid accountability mechanism.

2. UN Member States

Secondly, member states composing the UN might also hold it accountable in various ways. First, a state might call the UN to provide compensation because of its human rights violations. This mechanism was exemplified by the settlement agreement reached by Belgium with the UN after its citizens brought claims against the ONUC in its national courts.[172] They called for the joint liability between the UN and the Belgian state for damages to their property as a result of the UN intervention in Congo.[173] Their efforts yielded no fruits until Belgium concluded the settlement.[174] The drawback of this mechanism lies in both its unpredictability, as well as the member states' will rather than the victims.[175] If the state fails to advocate its citizen's case through exercising diplomatic protection, no accountability will take place.[176]

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166 *Id.* at 334.

167 *Id.*

168 *Id.*

169 *See id.* 332–35.

170 *See* Christopher P.M. Waters, *'Kosovanizing' the Ombudsperson: Implications for Kosovo and Peacekeeping*, 15 INT'L PEACEKEEPING 648, 658–59 (2008).

171 *See id.*; VERDIRAME, *supra* note 102, at 332–35.

172 VERDIRAME, *supra* note 102, at 338.

173 *Id.*

174 *Id.*

175 *See id.* at 337–38.

176 *See id.*

Further, a member state might suspend payments to the UN because of a lack of accountability.[177] For example, in the 1980s, the U.S. made the payment of arrears dependent on UN system reform, or at least satisfying certain reform criteria within a limited period of time.[178] Although this latter mechanism might prove more fruitful than the first, it suffers from two major drawbacks. First, it can only be adopted by rich developed nations that often make high contributions to the UN budget. A developing nation that does not contribute with any arrears does not stand a chance to exercise such a mechanism. Second, in case of frequent adoption of such mechanisms, the UN might be discouraged from deploying peacekeeping operations and other important on-ground missions.

In conclusion, we argue that none of the existing or suggested accountability mechanisms stands scrutiny. Moreover, there is a dire need for a judicial forum to hold the UN and other international organizations accountable for their human rights breaches.

V. TWO SUGGESTED FORMS OF ACCOUNTABILITY TO HOLD THE UN ACCOUNTABLE FOR HUMAN RIGHTS BREACHES COMMITTED BY THE UN PEACEKEEPING MISSIONS

As we suggested above, the vexing dilemma that needs solving in this research is the civil liability of the UN for human rights violations committed by its peacekeepers. Simply, we believe holding criminal trials at the host state where the UN peacekeepers' crimes took place is a viable solution to the criminal accountability of the blue-helmet perpetrators. In the following paragraphs, we suggest three viable forms of accountability mechanisms to hold the UN civilly liable for human rights breaches committed by blue-helmet soldiers or staff, especially for torts or negligent acts that cost lives.

A. International Arbitration as an Alternative Accountability Mechanism to the UN Human Rights Breaches

The UN leadership is bound to follow the procedure clearly stipulated by the Convention to provide an appropriate mode of settlement for the victims' claims. Philip Alston, the former special rapporteur on extreme poverty and human rights, argues that Section 29 of the Convention "requires the United Nations to provide for appropriate modes of settlement of disputes of a private law character to which it is a party" and there is no legal excuse to justify the UN's position in not abiding by that Section.[179]

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177 *Id.* at 338.

178 *Id.*

179 Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 28, U.N. Doc. A/71/40823 (Aug. 26, 2016).

We agree with Alston that the UN is under the obligation to provide an alternative mechanism as the Convention provides.[180] Nonetheless, scholars are divided on what form of accountability is adequate to hold the UN accountable for the human rights violations committed by the UN peacekeepers.[181] Some scholars suggested the establishment of a multilateral court or a specialized court under the UN, such as the International Criminal Tribunal for the former Yugoslavia.[182] The issue of accountability would not be resolved by this, however, since the UN may not appear before this newly formed multilateral court in the same manner that states do not appear before the ICJ.[183] Furthermore, a specialized court established under the auspices of the UN cannot be neutral and impartial to hold the UN itself accountable for human rights breaches.

To this moment, many states are reluctant to appear before a foreign national court based on the doctrines of sovereign immunity, independence, and non-interference.[184] The doctrine of sovereign, or jurisdictional, immunity finds its origins in English law based on the maxim that "the king can do no wrong,"[185] yet it expanded in practice until it became "generally accepted as a principle of customary international law."[186] Moreover, many states do not comply with international court decisions or even refuse to appear before them.[187] Yet, looking at the number of states appearing before international arbitration tribunals such as International Center for Settlement of Investment Disputes ("ICSID") and complying with investment arbitral awards, proves that sovereign states do respect international arbitration as an alternative method of dispute resolution and are more likely to comply with its awards.[188]

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[180] *Id.*; The Privileges and Immunities Convention, *supra* note 42, art. 8, § 29 ("The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party . . .").

[181] Giles, *supra* note 143, at 184.

[182] *See id.* at 166–67.

[183] *Cf.* Inst. of Int'l L. [IIL], *Non-Appearance Before the International Court of Justice*, at 1–3 (Aug. 31, 1991), https://www.idi-iil.org/app/uploads/2017/06/1991_bal_01_en.pdf.

[184] *See generally* George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953) (reviewing the history of invoking sovereign immunity by states when they are sued in courts of another state).

[185] *See id.* at 476.

[186] G.A. Res. A/59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property, pmbl. (Dec. 2, 2004).

[187] *E.g.*, Reuters Staff, *Explainer: Highest U.N. Court Can Tell States What to Do - But Not Enforce*, REUTERS (Jan. 23, 2020, 3:23 AM), https://www.reuters.com/article/us-myanmar-rohingya-world-court-explaine/explainer-highest-u-n-court-can-tell-states-what-to-do-but-not-enforce-idUSKBN1ZM1HP; *see generally* Stanimir A. Alexandrov, *Non-Appearance Before the International Court of Justice*, 33 COLUM. J. TRANSNAT'L L. 41 (1995) (discussing non-appearance before the International Court of Justice).

[188] *See* Emmanuel Gaillard & Ilija Mitrev Penushliski, *State Compliance with Investment Awards*, 35 ICSID REV. 540, 593 (2020).

In principle, states are bound by international tribunal awards because they are signatories to the ICSID Convention, the New York Convention on the Recognition and Enforcement of Arbitral Awards, and a bilateral investment treaty (or a multilateral treaty such as the North American Free Trade Agreement), that gives rise to the adjudicated claims.[189]

In contrast to scholars who suggest establishing a multilateral court to hold the UN accountable, we recommend international arbitration as an alternative method of dispute resolution that the UN must offer.[190] Allowing UN peacekeeping victims to benefit from international arbitration is not an easy task, but once established, it would garner the best possible outcomes. The international arbitration system is already in place and would not need further efforts or funds for its establishment. Victimized host states may push for the adoption of a multilateral treaty that could be signed by international organizations on the footprints of the ICSID treaty, which established the Investor-State-Dispute-Settlement system of arbitration between host states and foreign investors.[191] Once the UN, and other vital international organizations, sign the ICSID-like multilateral treaty, they can be subject to arbitration upon an agreement.[192]

A second option is to allow the UN and other international organizations to sign the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This suggestion provides for the binding nature of international arbitration awards upon states and allows national courts to refer cases to arbitral tribunals upon the existence of an agreement to arbitrate.[193] One challenge is that the treaty language only addresses states and is not open to international organizations to sign.[194] However, considering that the UN

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[189] *See generally* RUDOLF DOZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (1st ed. 2008) (discussing the international mechanisms that bind states to international tribunals' awards).

[190] *See, e.g.*, Giles, *supra* note 143, at 184.

[191] *See* Convention on the Settlement of Investment Disputes Between States and Nations of Other States art. 25, ¶ 1, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 8359 (entered into force Oct. 17, 1966) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.") [hereinafter ICSID Convention].

[192] *See, e.g.*, *id.* Although this is currently applicable between host states and foreign investors, there is no existent similar mechanism in place yet to allow for arbitrating human rights disputes against the UN.

[193] *See The New York Convention*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/ (last visited Feb. 27, 2022).

[194] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 84 Stat. 692, 330 U.N.T.S. 4739.

acts as a quasi-state in sending peacekeeping missions, the global leadership shall find no difficulty in pushing the UN to sign this treaty.[195]

A third option would be to allow victims of UN peacekeepers to bring an arbitration claim against the specific country that furnished the personnel who committed the violations of human rights. Upon being sued, this state may force the UN to join the arbitration proceeding under a mandatory joinder as they may be jointly liable for the breach of human rights caused by the peacekeeping personnel's misconduct. Should the UN decline to join, the concerned state could cut a portion of its funding to the UN proportional to the estimated amount of compensation resulting from the UN liability stipulated by the arbitral award.

Finally, a victim may also bring a direct arbitration claim against the UN before an international arbitration center. Some international arbitration centers are readily available to handle cross-border disputes.[196] If the proposed ICSID-like treaty is not yet in place, the victim or their country needs to sign an arbitration agreement with the UN. Once an arbitration agreement is signed by the victim's state, such as Haiti, and the UN, the international arbitral tribunal's jurisdiction over the dispute will be established even without a treaty.

It is worth noting that the proposed ICSID-like treaty does not need to stipulate the primary obligations of the UN to respect the human rights of victims, nor does it need to set liability standards to hold the UN accountable. This is because current human rights treaties, primarily the UDHR, clearly enumerate the primary obligations of the UN and states to respect and promote human rights.[197] Furthermore, tribunals may resort to DARIO, while taking into consideration the criticism directed at it, as it provides the liability standards for international organizations.[198] International tribunals may directly apply human rights treaties and customary international law to the cases before them.[199] To activate such a treaty, the host member state must

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[195] Thomas Hammarberg, *International Organisations Acting as Quasi-Governments Should be Held Accountable*, COUNCIL OF EUR.: COMM'R FOR HUM. RTS. (June 8, 2009), https://www.coe.int/en/web/commissioner/viewpoints/-/asset_publisher/xZ32OPEoxOkq/content/international-organisations-acting-as-quasi-governments-should-be-held-accountable?_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB.

[196] *See, e.g.*, *About ICDR-AAA*, INT'L CTR. FOR DISP. RESOL., https://www.icdr.org/about_icdr (last visited Mar. 7, 2021) ("The ICDR®—International Centre for Dispute Resolution®— is the international division of the largest arbitral institution in the world, the American Arbitration Association® (AAA®). Handling more cases than any other international institution—5,000 over the past five years—the ICDR is the foremost provider of global conflict-resolution solutions to businesses and organizations involved in cross-border disputes.").

[197] *See, e.g.*, U.N. Charter art. 1, ¶ 3; *id.* art. 55–56.

[198] *See* DARIO, *supra* note 26; *see also* Alvarez, *supra* note 15.

[199] *See, e.g.*, ICSID Convention, art. 42, ¶ 1 (allowing for the application of international law on the Investment Arbitration disputes before them in case the parties did not agree on the

also include an arbitration agreement with the UN, perhaps in its required consent under Chapter VI, to allow for the UNSC resolution deploying the UN peacekeepers in the state.[200]

Having such an arbitration mechanism would allow victims of each state to file private law claims against the UN based on violations of human rights. The UN is likely to comply with the arbitral tribunal's award just as states do because its independence is protected even when it is subject to arbitration. Moreover, the UN cannot argue absolute immunity before an arbitral tribunal because Section 29 of the Convention specifically requires that the UN provide an adequate alternative mechanism as a condition for its absolute immunity in national courts. Additionally, the misconduct of UN peacekeepers is not considered to be a furtherance of the UN's purposes, which would invoke its immunity. Finally, all arguments in support of UN immunity fall under an arbitration system where the UN could participate in the formation of the arbitral tribunal by choosing an arbitrator, experts, and counsel.

International arbitration is known to be both flexible and fast.[201] In arbitration, each party appoints an arbitrator, and the two appointed arbitrators appoint the presiding arbitrator.[202] In addition, the usual course in arbitration is that each party carefully selects an arbitrator that reflects their own philosophies and is more favorable towards them.[203] However, the appointment of the third presiding arbitrator makes the system neutral.[204] Further, each party to the arbitration appoints counsel to represent them throughout the arbitration proceedings.[205]

Thus, we could imagine the victims of the MINUSTAH bringing human rights claims against the UN through the filing of a notice of arbitration. The UN may find it suitable to hire an arbitrator who is leaning towards narrowing the scope of UN unaccountability. Both the victims and the UN may hire lawyers as counsel to represent them before the arbitral tribunal. There is a

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applicable law) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable.").

200 *See id.* art. 25 (requiring an agreement in writing to refer investment disputes to the Center).

201 *See* LATHAM & WATKINS, GUIDE TO INTERNATIONAL ARBITRATION 5, 7 (2017), https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017.

202 *See Number of Arbitrators and Method of Appointment - ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISP., https://icsid.worldbank.org/services/arbitration/convention/process/appointment (last visited Mar. 9, 2022).

203 *See id.*

204 *See Arbitrators Ethics Guidelines*, JAMS, https://www.jamsadr.com/arbitrators-ethics/#:~:text=Arbitration%20is%20an%20adjudicative%20dispute,based%20on%20the%20evidence%20presented (last visited Feb. 27, 2022).

205 *See id.*

likelihood that arbitral awards will be accepted as binding on the UN, since the latter willingly had a role in the entirety of the proceedings.

B. Adopting an Insurance Plan or a Lump-Sum Compensation for the Protection of Victims Harmed by UN peacekeeping Missions

Alston has written a detailed report on the human breaches committed by the UN peacekeepers, or the MINUSTAH, in Haiti.[206] Towards the end of his report, he stressed the importance of the UN coming out and admitting accountability.[207] In addition, he suggested putting an insurance system in place to protect the victims of the UN peacekeepers.[208]

Putting an insurance plan in place is a feasible remedy mechanism. It seems that drafters of DARIO also had a similar remedy mechanism. Article 36 of DARIO specifies that the responsible international organization is required to offer compensation as a remedy for such breaches, if restitution is not possible.[209]

In the aftermath of Alston's report, the UN had taken a two-track Haiti cholera response that aimed to: "(i) intensify efforts to treat and eliminate disease; [and] (ii) adopt[] a framework proposal with Member States for material assistance to . . . Haitians," with a goal of raising at least $400 million for the plan.[210] Yet, the UN provided no formal acceptance of its responsibility, apology, recognition of legal responsibility, agreement or use of the term "compensation" or "reparations," or legal settlement as required by law.[211]

The UN, as an international organization enjoying a separate legal and financial personality, is obliged to provide compensation to victims as this burden is not upon its member states.[212] As Alston discerned in his report on the MINUSTAH's human rights violations in Haiti, "the most effective way to address the fears of troop-contributing countries is to ensure that an insurance scheme is in place, whether set up internally or with an external

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[206] *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, *supra* note 179.

[207] *See id.* at 21–22.

[208] *See id.* at 17.

[209] DARIO, *supra* note 26, art. 36, ¶ 1 ("The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.").

[210] *Statement by Professor Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights UN Responsibility for the Introduction of Cholera into Haiti*, U.N. HUM. RTS.: OFF. OF THE HIGH COMM'R (Oct. 25, 2016), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20794&LangID=E.

[211] *Id.*

[212] *See Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, *supra* note 179, art. 36.

insurer."[213] Alston has also guided the UN on the importance of providing lump-sum settlements to the victims of such violations.[214]

Nonetheless, the lump-sum mechanism suggested by Alston is only viable if the UN admits its wrongdoings and human rights breaches. If the UN denies responsibility, no institution or mechanism could adjudicate its violations or force it to provide a lump-sum compensation to victims.

It is worth noting that in 1966, Belgian nationals filed suit against the UN before a Belgian Court for property damages.[215] The "[UN] Secretary General made a lump-sum payment to the Belgian government for the settlement of all disputes of its nationals" committed by ONUC operations "without prejudice to the privileges and immunities which the United Nations enjoys."[216] The UN had also followed a similar path with nine other countries to make reparations for its breaches under international law.[217]

Therefore, in our view, this mechanism neither holds the UN accountable, nor produces a binding decision against the UN to pay compensation to victims. However, it is the second-best viable option if the international arbitration system is not established in the future.

VI. CONCLUSION

The accountability dilemma of the UN is not an easy one to solve. In spite of that, the pressure produced by the international community via scholars, human rights organizations, special rapporteurs, and activists often induces the UN to make the right decision.

For the suggested ideas to become a reality, the political will of member states is necessary. In the absence of a strong political commitment on the part of all nations, the UN cannot act as a guardian for human rights. While no one can deny the positive impact of the UN on our world, no one can also blindly ignore the atrocities committed by the UN peacekeepers.

As an international community, it is time to stand up and hold our representative of collective political powers, the UN, accountable for violations of human rights, which it was entrusted with protecting. If the UN adopts the proposed mechanisms, it will not forfeit its immunity, but rather it will be able to meet the expectations of the international community as the ultimate protector of human rights. Although the UN does not have to renounce its immunity before national courts in order to be held accountable, it must give up its impunity before international arbitration tribunals, since

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213 U.N. General Assembly, Rep. of the Special Rapporteur on Extreme Poverty, at 17, U.N. A/71/40823 (Aug. 26, 2016).

214 *Id.* at 18.

215 Boon, *supra* note 63, at 377.

216 *Id.*

217 *Id.*

such immunity is incompatible with an international organization that was founded to protect human rights.