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Peacekeeping in Name Alone: Accountability for the United Nations in Haiti

By MATT HALLING AND BLAINE BOOKEY*

I. Introduction

The period from February 29, 2004 – the day democratically elected President Jean-Bertrand Aristide was forced to leave his country – to the present has marked a dark period for Haiti.¹ Thousands of men, women, and children have been murdered, raped, and unlawfully detained. Peacekeeping forces of the United Nations Stabilization Mission in Haiti (“MINUSTAH”), sent to Haiti in an effort to reinstall democracy, are directly responsible for scores of these human rights violations.

Since its authorization in April 2004, MINUSTAH forces, operating primarily under Brazilian command, have engaged in a systematic pattern of attacks resulting in the deaths and injuries of

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1. For more information regarding President Aristide’s kidnapping see ROBINSON, RANDALL, *AN UNBROKEN AGONY: HAITI, FROM REVOLUTION TO THE KIDNAPPING OF A PRESIDENT*, (Basic Civitas Books 2007).

innocent civilians residing in the capital's poorest slums. Peacekeepers have also raped Haitian women. Moreover, through joint operations and willful blindness, MINUSTAH's actions (and inactions) have assisted efforts of the Haitian National Police under the Interim Government of Haiti, when it was in effect, to quell political dissent.

This report attempts to demonstrate the magnitude of human rights abuses that have occurred and continue to occur in Haiti at the hands of U.N. peacekeeping forces in addition to discussing potential mechanisms for accountability and making recommendations to the United Nations.

Section II of the report provides a background of abuses committed by MINUSTAH. This section provides an analysis of MINUSTAH's actions to show that the actions taken by the peacekeeping forces (1) clearly violate their own official mandate, and (2) rise to the level of violations of international law.

Section III of the report analyzes potential mechanisms for accountability for the United Nations and MINUSTAH's largest troop-contributing country, Brazil, through the lens of a private right of action. Four legal options are explored: (1) suit in Brazil, (2) suit in Haiti, (3) suit in the Inter-American Court of Human Rights, and (4) direct suit against the United Nations. This section also assesses the feasibility of each option to achieve justice for Haitian victims of MINUSTAH violence. Suit in the International Criminal Court ("ICC") is not explored as the ICC does not appear to be a viable mechanism for accountability at this point.² The ICC is a court of last resort and currently has a limited docket.³ Well over 1,000 complaints have been filed in the ICC, but only four have been opened for investigation.⁴ Because this report focuses solely on private rights of action, the International Court of Justice ("ICJ") is excluded as its jurisdiction is limited to actions brought by nation states.⁵

In conclusion, Section IV of this report makes recommendations

2. See Alexandra Harrington, *Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing Them in the Future*, 12 ILSA J. INT'L & COMP. L. 125, 141-42 (2005).

3. International Criminal Court, About the Court, <http://www.icc-cpi.int/about.html>.

4. International Criminal Court, Situations and Cases, http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_CommU.N.ications_10_February_2006.pdf.

5. Annex to U.N. Charter, Statute of the International Court of Justice, June 26, 1945, arts. 36 and 37.

to the U.N. regarding the creation of a more binding mechanism of accountability for its peacekeepers. This section is especially pertinent given the extension of MINUSTAH's mandate until October 15, 2008, the rise in peacekeeping operations over the last decade, as well as the wholly inadequate accountability mechanisms so far employed by the United Nations. One striking example is peacekeepers, guilty of raping young women in the Congo, were simply repatriated.⁶ It goes without saying that repatriation provided neither redress for victims nor true accountability for the U.N. soldiers.

II. MINUSTAH Mandate and the Failure to Live Up to It

United Nations' peacekeeping forces, also known as "Blue Helmets," have been present in Haiti from 2004 to the present. After the overthrow of twice elected President Jean-Bertrand Aristide on February 29, 2004, the President of the Interim Government of Haiti ("IGH"), Boniface Alexandre, requested assistance from the United Nations.⁷ This request authorized international troops, the Multinational Interim Force ("MIF"), to enter Haiti.⁸ Thereafter, on April 30, 2004, the United Nations Security Council established the U.N. Stabilization Mission in Haiti ("MINUSTAH"), transferring authority soon after in June.⁹ The U.N. mission has been marred since its inception: It is the only peacekeeping force deployed without a formal peace agreement.¹⁰ In lieu of enforcing a peace agreement, the mission of U.N. forces has instead been to consolidate the *coup d'état*.¹¹ As is discussed in detail below, MINUSTAH has launched the overwhelming number of its operations in neighborhoods where large numbers of residents support the Fanmi Lavalas political party

6. U.S. Department of State, *U.S. Urges Stronger Measures Against Sex Abuse by U.N. Peacekeepers*, July 27, 2005, available at <http://usinfo.state.gov/xarchives/follow/washfile-english> hyperlink; then follow "2005" hyperlink; then follow "July" hyperlink).

7. Haiti – MINUSTAH – Background, [hereinafter Background], available at <<http://www.U.N..org/Depts/dpko/missions/minustah/backgroU.N.d.html>>.

8. S.C. Res. 1529, ¶ 2, U.N. Doc. S/RES/1529 (Feb. 29, 2004).

9. S.C. Res. 1542, ¶¶ 1-2, U.N. Doc. S/RES/1542 (April 30, 2004).

10. Concannon, Brian and Joseph, Mario, *Haiti, MINUSTAH, and Latin America: Solidaridad?*, Americas Program, Center for International Policy Special Report, April 9, 2007, available at <http://americas.irc-online.org/am/4140> [hereinafter Concannon].

11. *Id.*

and the return of President Jean-Bertrand Aristide.¹²

On February 7, 2006, René Préal was elected President of Haiti, marking the country's return to constitutional rule.¹³ Since that time, the Haitian National Police ("HNP") have stopped murderous raids upon innocent civilians. However, according to a recent report released by the Center for International Policy, "[MINUSTAH,] under pressure from the Bush administration and Haitian elites to take a 'hard line' against the poor neighborhoods, keeps shooting."¹⁴

A. Alleged Human Rights Abuses Committed by MINUSTAH Soldiers

i. Large-Scale Operations Conducted by MINUSTAH

MINUSTAH has conducted several large-scale operations in poor neighborhoods known as hotbeds for supporters of President Aristide. Although additional operations have been conducted, the two discussed here are some of the largest in magnitude. Additional operations will be discussed below and more information is available upon request.

On July 6, 2005, MINUSTAH forces led a full-fledged military attack in Cité Soleil.¹⁵ The target of the attack was alleged gang leader, Dread Wilme, who was killed during the operation along with an "unspecified number of his associates."¹⁶ A MINUSTAH "after action report" states that U.N. soldiers expended 22,000 rounds of ammunition over the course of seven hours.¹⁷ MINUSTAH has acknowledged the inevitable "risk of civilian casualties" and "unintended targets," given the (1) "flimsy construction of homes in

12. See *infra* Section A.1.

13. Central Intelligence Agency, The World Factbook - Haiti, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html>.

14. See Concannon, *supra* note 10.

15. Center for the Study of Human Rights University of Miami School of Law, *Haiti: Human Rights Investigation, March 11-16, 2006*, at 11, *available at* http://www.law.miami.edu/cshr/CSHR_Report_0311-162006.pdf [hereinafter Miami 2006].

16. Cable from US Embassy Port au Prince re "Haiti: Dread Wilme Killed; HNP More Active," to U.S. State Department Headquarters, (July 6, 2005), *available at* http://www.cod.edu/people/faculty/yearman/cite_soleil.htm.

17. Cable from U.S. Embassy Port au Prince re "Human Rights Groups Dispute Civilian Casualty Numbers from July 6 MINUSTAH Raid" to U.S. State Department Headquarters, (July 26, 2005), *available at* http://www.cod.edu/people/faculty/yearman/cite_soleil/Port_au_Prince_001919_26July2005.pdf.

Cité Soleil,” (2) “large quantity of ammunition expended,” and (3) “nature of such missions in dense populated urban areas.”¹⁸ The death toll has been estimated at “close to 30.”¹⁹ Further, Doctors Without Borders operating at a nearby hospital, reported treating “26 gunshot victims from Cité Soleil on July 6, of whom 20 were women and at least one was a child.”²⁰

On December 22, 2006, MINUSTAH launched another large-scale attack on the residents of Cité Soleil.²¹ Again, there were hundreds of peacekeepers present, including aerial support, and the goal of the attack was to apprehend gang members.²² Further, the Red Cross coordinator said, “U.N. soldiers prevented Red Cross vehicles from entering the zone to assist wounded children.”²³ According to a U.N. Security Council report, at least nine civilians were killed.²⁴ However, independent sources estimate that “more than 20 people [were] killed and more than 40 individuals were reported injured.”²⁵ Some estimates are as high as 70 people killed.²⁶

ii. Additional Human Rights Violations Perpetrated by MINUSTAH

In addition to large-scale operations carried out in the capital’s slums, MINUSTAH soldiers have conducted several smaller-scale raids as well as incidents of murder, unlawful detention, and rape. Several incidents will be discussed in chronological order starting from the most recent. Again, the following is not intended to provide

18. *Id.*

19. *Id.* See also International Tribunal on Haiti, *Preliminary Report of the Commission of Inquiry, First Inquiry October 6-11, 2005* (2006), 6-8, <http://www.ijdh.org/article_international-tribU.N.al.htm>. [hereinafter COIR Report](reporting alleged human rights abuses perpetrated by U.N. and de facto government forces, listing names of specific victims of the July 6th massacre).

20. Cable from U.S. Embassy, *supra* note 17.

21. WOMEN’S INT’L LEAGUE FOR PEACE AND FREEDOM HUMAN RIGHTS ABUSES IN HAITI (2007), *available at* <http://www.ijdh.org/pdf/headline6-4-07.pdf> [hereinafter “Women’s League”] (submitted to the U.N. Human Rights Council May 31, 2007).

22. *Id.*

23. RAUL ZIBECHI, REPRESSION IN HAITI: THE RESPONSIBILITY OF THE LEFT, International Relations Center (2007), *available at* <http://www.ijdh.org/pdf/headline3-30-07.pdf?sid=06/08/31/144239>.

24. Security Council Report, *February, 2007 Haiti*, <http://www.securitycoU.N.cilreport.org/site/c.glKWLeMTIsG/b.2461273/k.472/February_2007brHaiti.htm>.

25. Women’s League, *supra* note 21.

26. Zibechi, *supra* note 23.

an exhaustive list of alleged human rights violations; additional information can be provided by the authors upon request.

On February 1, 2007, during a raid in Cité Soleil, U.N. soldiers engaged in indiscriminate shooting, resulting in the deaths of Stephanie Lubin, seven, and Alexandra Lubin, four.²⁷ Moreover, during the incident, the soldiers shot and wounded the children's parents.²⁸

On January 25, 2007, MINUSTAH again led an operation in Cité Soleil.²⁹ The United Nations claims that the operation was "to take over a house near an important road controlled by the gangs that also served as a base for attacks against U.N. forces."³⁰ At least five people were killed, including one woman who suffered a bullet wound from the attack and died in a nearby hospital hours later.³¹ Moreover, at least six people were wounded during the operation.³²

On January 20, 2007, U.N. soldiers shot and killed Berhens Germain, nine.³³ The soldiers shot Berhens in the head in the morning as he sat on the ledge of the family's roof in Cité Soleil playing with a pink toy phone.³⁴ MINUSTAH soldiers attempted to justify the shooting by claiming that the boy was "holding a gun."³⁵ The family cannot afford a burial for the child.³⁶

On June 29, 2005, MINUSTAH forces raided Bel-Air, a slum located in the capital.³⁷ During the raid, U.N. soldiers entered a residential courtyard and shot William St. Mercy – "a middle-aged invalid, who was sitting, unarmed, in his wheelchair" – in the head,

27. Haiti Information Project, *U.N. terror kills Haiti's children at night*, Feb. 2, 2007, http://haitiaction.net/News/HIP?2_2_7/2_2_7.html.

28. *Id.*

29. *Clashes in Haiti leave at least five dead and twelve wounded*, Agence France Presse, Jan. 26, 2007, available at <<http://www.wehaitians.com/january%202007%20supplement%20news%20and%20analysis%20this%20month.html>>.

30. *Id.*

31. *Id.*

32. *Id.*

33. Sandra Jordan, *Haiti's children die in U.N. crossfire*, The Observer, Apr. 1, 2007, available at <<http://observer.guardian.co.uk/world/story/0,,2047451,00.html>>.

34. *Id.*

35. *Id.*

36. *Id.*

37. See Petition filed by Lionel Jean-Baptiste, Esq. et al. before the Inter-American Commission on Human Rights, ¶¶12-13, available at <http://www.ijdh.org./Brazil_Petition.pdf> [hereinafter IACHR Petition].

“blowing off the top half of his skull.”³⁸ MINUSTAH was not under attack when conducting the raid.³⁹

On April 9, 2005, MINUSTAH soldiers shot Fedja Raphel, 16, from an armored vehicle “in broad daylight.”⁴⁰

In February 2005, three U.N. soldiers were accused of raping a 23 year-old woman in the city of Gonaives.⁴¹ The United Nations allegedly conducted an investigation in this case and cleared the soldiers of the charges.⁴²

On November 18, 2004, a MINUSTAH soldier shot Hercules LeFevre, 42, “through the shoulder” with a “high-powered rifle” as he walked to work.⁴³

On October 22, 2004, MINUSTAH forces conducted a raid in Martissant, a slum located in Port-au-Prince.⁴⁴ During the raid, U.N. soldiers, from within armored vehicles, shot indiscriminately “all over the place, especially in the school.”⁴⁵ As Carlo Pierre, 26, “was about to throw a rock, a machine gun. affixed to one of the U.N. tanks shot him in “the stomach, the chest and near the mouth[.]” resulting in his death.⁴⁶

In 2004, a MINUSTAH soldier raped a 16-year-old girl.⁴⁷

iii. Human Rights Abuses Assisted by MINUSTAH

In addition to direct perpetration of human rights abuses against civilians, MINUSTAH forces have stood by as members of the HNP carried out mass killings of Haitian civilians. Several instances where U.N. soldiers have tacitly consented to the HNP’s reign of terror

38. *Id.* at ¶13.

39. *Id.*

40. Miami 2006, *supra* note 15, at 16.

41. Harvard Law Student Advocates for Human Rights & Centro de Justicia Global, *Keeping the Peace in Haiti? An Assessment of the United Nations Stabilization Mission in Haiti Using Compliance with its Prescribed Mandate as a Barometer for Success*, Mar. 25, 2005 available at <[http://www.ijdh.org/Haiti\(English\)\(Final\).pdf](http://www.ijdh.org/Haiti(English)(Final).pdf)> [hereinafter Harvard Report].

42. *Id.*

43. Griffin, Thomas M., Esq., *Haiti Human Rights Investigation: Nov. 11-21, 2004*, Center for the Study of Human Rights University of Miami School of Law, 34 [hereinafter Miami 2004].

44. Harvard Report, *supra* note 41, at 27.

45. *Id.*

46. *Id.*

47. Mike Williams, *Fears over Haiti child ‘abuse,’* BBC News, Nov. 30, 2006, available at <<http://news.bbc.co.uk/2/hi/americas/6159923.stm>>.

against the poor will be addressed below; however, it is worth repeating, this list is not exhaustive.

On August 20, 2005, the HNP, along with gang members, attacked spectators at a USAID-sponsored soccer match in the Martissant slum.⁴⁸ Over the stadium loudspeaker, the police "ordered everyone in the field to lie down."⁴⁹ Several people who attempted to flee were gunned down both inside and outside the stadium, and others were "hacked to death" with machetes.⁵⁰ Although MINUSTAH soldiers "were stationed nearby the stadium," they "did not intervene to investigate the shootings and commotion."⁵¹

On February 28, 2005, while MINUSTAH was patrolling a Lavalas demonstration in Port-au-Prince, the HNP "killed three demonstrators and took two bodies away in an ambulance," leaving the body of Stanley Bulot on the ground with his "head blown open by gunfire."⁵²

On November 28, 2004, a member of the police shot Robin Emmanuel, 32, in the torso.⁵³ At the time of the shooting, MINUSTAH officers were present with the HNP.⁵⁴

On November 18, 2004, while attending a pro-Aristide demonstration in Bel-Air, HNP shot Delage Mesnel, 26, in the arm and upper torso.⁵⁵ MINUSTAH soldiers were present, yet did nothing to intervene.⁵⁶

On November 10, 2004, HNP members shot and killed seven people and arrested another 180 people in Bel-Air at a demonstration calling for Aristide's return to Haiti, despite alleged security provided by MINUSTAH.⁵⁷ Of those arrested, "five to eight of the disappeared" were discovered "at the mass burial site in Titanyen" and three were discovered "at the general morgue of Port-au-

48. Miami 2006, *supra* note 15, at 17.

49. IACHR Petition, *supra* note 37, at ¶17.

50. Tom Luce, *5000 soccer fans in Haiti witness machete and hatchet massacre by police and new death squads*, Haiti Information Project, Aug. 26, 2005, <http://www.haitiaction.net/News/TL/8_26_5/8_26_5.html>.

51. IACHR Petition, *supra* note 37 at ¶17.

52. *Id.* at ¶9.

53. Harvard Report, *supra* note 41, at 40.

54. *Id.*

55. *Id.* at 32.

56. *Id.*

57. *Id.*

Prince.”⁵⁸

On October 24, 2004, members of the HNP shot and wounded two teenagers, Gorda Guerrier and Guy Wilson.⁵⁹ The teens underwent operations, and as a result of MINUSTAH’s failure to secure hospitals against the danger of violent and “fatal intrusion,” within days the HNP entered the hospital and killed them both.⁶⁰

On October 6, 2004, “MINUSTAH and the HNP conducted one of their first joint operations in Bel-Air, wherein they swept the area and carried out “warrantless arrests and house searches.”⁶¹ Gerald Benjamin, 28, was among those arrested. He remained in police custody for more than three months, under which he endured torture and beatings.⁶²

B. MINUSTAH’s Actions Violate the U.N. Mandate and Principles of International Law

As outlined in the official MINUSTAH mandate, the United Nations deployed peacekeeping forces to Haiti to (1) ensure a “secure and stable environment,” (2) assist in “monitoring, restructuring and reforming the Haitian National Police, consistent with democratic policing standards, and (3) support efforts to promote and protect human rights, particularly of women and children.”⁶³ The mandate also creates the duty to “to monitor and report on the human rights situation, in cooperation with the Office of the U.N. High Commissioner for Human Rights.”⁶⁴ Initially, MINUSTAH’s mandate was for a period of six months.⁶⁵ It has been extended on several occasions.⁶⁶ On February 15, 2007, the United Nations. extended MINUSTAH’s mandate, calling upon peacekeeping forces to recognize “that respect for human rights, due process and addressing the issue of criminality and credible, competent, and transparent governance are essential to ensuring

58. *Id.*

59. *Id.* at 30.

60. *Id.* at 30-31.

61. *Id.* at 39.

62. *Id.*

63. S.C. Res. 1542, *supra* note 9 at ¶ (III)(a).

64. *Id.*

65. *See* Background, *supra* note 7.

66. *Id.*

security in Haiti.”⁶⁷ Moreover, the extended mandate emphasized “that a combination of measures are necessary to effectively disarm, demobilize, and reintegrate gang members[.]”⁶⁸ Most recently, on October 15, 2007, the U.N. extended MINUSTAH’s mandate for one year with the prospect of further renewal.⁶⁹

In addition to the official U.N. mandate, in July 2004 the Haitian authorities and the U.N. Secretary General signed the requisite Status of Forces Agreement (“SOFA”).⁷⁰ The SOFA outlines the basic practical concerns of the peacekeeping operation in Haiti (e.g., communications, supply provisions, etc.)⁷¹ The SOFA also discusses the general principles for MINUSTAH soldiers to follow: For example, they must respect the laws of the country as well as the principles announced in international conventions.⁷² Further, the SOFA outlines the jurisdiction and accountability mechanisms for human rights violations.⁷³ These specific provisions are explored more deeply in Section III.

MINUSTAH’s actions, and lack thereof, undoubtedly violate the terms of their official mandate and the SOFA. The volume and severity of the abuses committed by U.N. soldiers shows a lack of effort on the part of MINUSTAH to protect human rights in Haiti and uphold standards of international law. On several occasions MINUSTAH has led operations in Cité Soleil and other poor, densely populated slums located in Port-au-Prince. As evidenced, dozens of innocent civilians, including women and children, have been murdered or wounded and severe property damage has been exacted as a result of the indiscriminate and voluminous rounds of ammunition dispensed by MINUSTAH.

Peacekeeping forces have failed to monitor and report on human rights violations as they were called upon to do. They have done the opposite. For example, after the July 6, 2005, raid, investigators “did not receive any report of human rights violations that occurred during

67. S.C. Res. 1743, U.N. Doc S/RES/1743 (Feb. 15, 2007).

68. *Id.*

69. S.C. Res. 9141, U.N. Doc. SC/9141 (Oct. 15, 2007).

70. *Accord Entre L’Organisation Des Nations Unies Et Le Gouvernement Haïtien Concernant Le Statut De L’Opération Des Nations Unies en Haïti* [Status of Forces Agreement], ¶ 51(b), (July 2004) [hereinafter SOFA].

71. *Id.* at ¶¶10, 20.

72. *Id.* at ¶¶5, 6(b).

73. *Id.* at ¶¶51(b), 52(b), 55.

the massacre until January 2006.”⁷⁴ This suggests a U.N. cover-up.⁷⁵ The SOFA mandate provides that a standing claims commission be created to hear private law claims that may arise.⁷⁶ No such commission has been created.⁷⁷ Instead, in light of preliminary findings, the United Nations created a disciplinary commission of inquiry to investigate alleged abuses of peacekeeping forces perpetrated in October 2005, which suggests that MINUSTAH did in fact use excessive force and inappropriate body searches.⁷⁸ However, the persistence of human rights violations demonstrates that the commission’s efficacy has been minimal and that it has not led to any changes in the behavior of U.N. soldiers.

MINUSTAH has also been charged with disarming, demobilizing, and reintegrating gang members. However, it can hardly be said that MINUSTAH is implementing proportioned measures to meet this directive when it has primarily engaged in murderous raids in civilian neighborhoods. While it is true that several alleged gang leaders and members have been removed from society by U.N. bullets, it remains unclear why MINUSTAH has determined that these civilians should not and cannot be afforded justice and requisite due process under the law.

In addition to violating their own official mandate, MINUSTAH’s actions rise to the level of violations of international law in contravention of the SOFA. Crimes of murder (or extrajudicial killing),⁷⁹ rape,⁸⁰ and arbitrary arrest,⁸¹ for example, are

74. Miami 2006, *supra* note 10, at 12.

75. *Id.*

76. SOFA, *supra* note 70, at ¶55.

77. *See id.*

78. Institute for Justice and Democracy in Haiti, *Haiti: U.N. sets up panel to probe report that peacekeepers used excessive force*, Dec. 9, 2005, <http://www.ijdh.org/U.N.inhaiti.htm>; *see also* *Communique*, (U. N./ Stabilization Mission in Haiti, Port-au-Prince, Haiti), Dec. 8 2005, *available at*, http://www.minustah.org/compress/comm13_1.pdf.

79. *See* 28 U.S.C. § 1350 (3)(a) [hereinafter *Alien Tort Statute*] (the term extrajudicial killing has been defined as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”).

80. Declaration on the Elimination of Violence Against Women, U.N. Doc. A/RES/48/104, art. 2 (Dec. 20, 1993).

81. *See* U.N. Covenant on Civil and Political Rights, art. 9, cl. 1 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law); Universal

Universally recognized as violations of international law. The widespread and systematic nature of MINUSTAH's actions perpetrated against civilians in Haiti, which have led to the deaths, severe injury, warrantless detention, and persecution of hundreds of persons known for their political support of ousted President Aristide bears alarmingly resemblance with the definition of crimes against humanity stated in the Rome Statute.⁸²

The human rights violations committed by MINUSTAH soldiers, all the while bearing the flag of the United Nations, shock the conscience. Criminal sanctions, in addition to civil sanctions, would provide a more holistic form of accountability and punishment. As emphasized in a recent U.N. Commission on Human Rights report, "Where individuals engage in conduct of a criminal character, they ought to be subject to criminal proceedings."⁸³ However, as of now, private causes of action provide a more immediate and feasible mechanism for providing redress for victims and fostering a climate of accountability. This report now turns to an analysis of available mechanisms in the hopes of adding to efforts to provide justice for past atrocities as well as to prevent reoccurrence in the future.

III. Potential Mechanisms for U.N. Accountability

The available mechanisms for an individual getting a legal remedy for MINUSTAH abuses are: (1) to sue in Brazil (which is MINUSTAH's largest troop contributing country and, the home of the operation's top commanders, thereby the largest foreign state

Declaration of Human Rights, art. 9.

82. See Rome Statute of the International Criminal Court, art. 7, sec. 1, July 17 1998, U.N.T.S.90 [hereinafter "Rome Statute"] (a crime against humanity has been defined as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; . . . (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape . . . ; (h) Persecution against any identifiable group or collectivity on political . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; . . . [and] (k) Other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health").

83. *U.N. Econ. & Soc. Council [ESCOR], Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, Working Paper: Administration of Justice, Rule of Law and Democracy, ¶ 11, U.N. Doc. E/CN.4/Sub.2/2005/42 (July 7, 2005) (prepared by Françoise Hampson) [hereinafter Hampson]*.

action in this scenario); (2) to sue in Haiti; (3) to sue at the Inter-American Commission of Human Rights (IACHR); or (4) to attempt to sue the United Nations directly, either in a third party national court or through a U.N. claims commission. These options need not be mutually exclusive.

A. Liability, Defendants and Remedies Against Brazil

An argument for Brazil's liability for abuses committed by a largely Brazilian-commanded MINUSTAH is consistent with the most recent draft of the International Law Commission on *Responsibility of International Organizations*.⁸⁴ Draft Article 28 says that a member state of an international organization incurs responsibility when "it avoids compliance with an international obligation" and, that this provision applies "whether or not the act in question is internationally wrongful for the international organization."⁸⁵ Although this provision is still in draft form, this language casts a broad net around what may constitute legal responsibility for a member of an international organization. There is conflicting authority in international courts as to whether member states are generally liable for international organization abuses.⁸⁶ However, recent opinions critical of this kind of liability, have acknowledged an exception for abuses committed by military contingents in U.N. peacekeeping operations (See Part B Below).

Recklessness by state actors in international operations has been found to give rise to liability and responsibility in international courts as was seen, for example, in the *Öneryildiz v. Turkey* case tried recently before the European Court of Human Rights.⁸⁷ The ICJ has

84. U.N. Int'l Law Comm'n, *Report of the International Law Commission*, art. 28, U.N. Doc. A/61/10 (Aug. 11, 2006).

85. *Id.* at 251 n. 537.

86. See *Behrami v. France* 45 E.Ct. H.R. 41 (2007) (holding that a failure to remove mines in Kosovo, in violation of the peacekeeping mandate, could only be attributable to the United Nations and not the European troop contributing states) In *Behrami*, the Court cited with approval the International Law Commission's exception to this rule, which provides that a state contributing military contingents to a U.N. peacekeeping mission is still liable for troop abuses. *Id.* at ¶31. Obviously, this exception is the case with Brazil and MINUSTAH. For another case acknowledging state responsibility within an international organization, see *Bosphorus Hava v. Ireland* 42 E.H.R.R. 1 (¶152-3) (2006).

87. *Öneryildiz v. Turkey* 41 E.Ct H.R. 20 (2005) (holding that a direct causal link between a fatal methane explosion and the contributory negligence of the government authorities).

commented that, in meeting evidentiary burdens of proving criminal acts by state actors, the victims "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."⁸⁸ This "indirect evidence is admitted in all systems of law, and its use is recognized by international decisions."⁸⁹ Such broad language is favorable to a Haitian plaintiff in being able to establish Brazil's recklessness within MINUSTAH.

Individual soldiers and officers could be held liable for particular abuses, but the abuses reported in Haiti often do not have the requisite specificity to name individual defendants. Furthermore, with respect to imposing civil penalties, it is unlikely that individual U.N. soldiers will have enough money to pay for the judgment. For these reasons, the troop-contributing state is a superior defendant for a Haitian plaintiff to sue. Responsibility is easier to establish in the case of a troop-contributing state than it is in the case of the United Nations because jurisdiction over peacekeeping abuses is explicitly granted by the Haitian SOFA (the SOFA is further detailed in Part C).⁹⁰

It is important to recognize that the remedies sought should fit the crime. As discussed in Section III, the allegations of U.N. and Brazilian abuses in Haiti easily rise to the level of criminal violations, but it is practically impossible in the present legal climate to obtain criminal remedies without the troop-contributing state prosecuting its own soldiers. Civil remedies for Haitian victims, though sub-optimal in terms of justice, present a more realistic option. The unacceptable solution is leaving Haitian victims with no remedy at all, this is especially true given that civilians are suffering within a peacekeeping operation intended to better their lives.

B. The United Nations and Brazil May Both Be Liable for MINUSTAH's Human Rights Abuses

State liability for abuses by peacekeeping troop contingents is fairly non-controversial, but a further issue arises: is the U.N. concurrently liable for the abuses committed by a peacekeeping contingent? Not only does the United Nations have immunity from

88. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325, 444 (Sept. 13) (separate opinion of Judge Lauterpacht).

89. *Id.*

90. SOFA, *supra* note 69.

suit that extends beyond that of an individual state, but also there are understandable concerns for the fairness of holding the whole United Nations responsible for the actions of one of its members. However, the U.N.'s connection with MINUSTAH is so intimate that this situation may be one where concurrent liability should arise.

Concurrent liability makes sense for several reasons. First, the U.N. legal counsel recently admitted that "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."⁹¹ Second, the Status of Forces' domestic immunity for the United Nations does not protect against all liability because, as Loyola Professor Jaume Saura stated, issues such as MINUSTAH's human rights abuse is "an international dispute between international subjects to which the United Nations is not at all immune."⁹² Third, the U.N. General Assembly Resolutions on matters giving rise to U.N. liability and on remedial limits, would be largely moot if the United Nations had no peacekeeping liability.⁹³

Even official U.N. commissions recognize the possibility of concurrent liability. The International Law Commission's Special Rapporteur has recognized that "one could envisage cases in which conduct should be simultaneously attributed to an international organization and one or more of its members."⁹⁴ Furthermore, the Special Rapporteur's "paradigmatic example" of where a dual state-organization attribution could be warranted was the 1999 NATO bombing in Yugoslavia which culminated in the *Bankovic* case.⁹⁵ MINUSTAH is an analogous situation: it is a military contingent of

91. Giorgio Gaja, *Second Report on Responsibility of International Organizations*, ¶ 36, delivered to the U.N. Int'l Law Comm'n, U.N. Doc. A/CN.4/541 (Apr. 2, 2004) (citing Letter from Hans Corell, U.N. Legal Counsel, to Václav Mikulka, Dir. of the Codification Div. (Feb. 3, 2004)).

92. Jaume Saura, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 HASTINGS L.J. 479, 523 (2007).

93. See discussion *infra* Section E.

94. Gaja, *supra* note 91, at ¶ 7.

95. The fact that the European Court of Human Rights ("ECHR") in *Bankovic v. United Kingdom* denied jurisdiction against NATO does not impact this concurrent liability analysis. The Court specifically withheld examination on "alleged several liability of the respondent States for an act carried out by an international organization of which they are members." See *Bankovic v. United Kingdom*, 44 Eur. Ct. H.R. SE5, 92 (2001).

member states acting within an international organization where each member state is mandated to be individually responsible for the actions of its troops. The Commission also recognized that “dual attribution of conduct normally leads to joint, or joint and several, responsibility.”⁹⁶

C. Domestic Venues for Suit: Brazil and Haiti

As mentioned in Section II, the SOFA outlines the venue options for a suit against MINUSTAH. Members of the military component of a United Nations peacekeeping operation shall be subject to the “exclusive jurisdiction of their respective participating states in respect of any criminal offenses which may be committed by them” in the host country.⁹⁷ Civil proceedings may be instituted against members of the United Nations peacekeeping operation in any court in the host country, but this option is limited by a certification provision. Before a civil proceeding can continue in the host country’s court, the commander of the mission has to certify whether the proceeding is related to the official duties of the U.N. troops.⁹⁸ If the commander certifies that the troops were acting within their official duties, then the suit is not allowed to proceed.⁹⁹ The SOFA does mandate a standing claims commission provision, but none has been created as of September, 2007.¹⁰⁰

Ironically, the country where the abuses are occurring is possibly the most difficult forum to choose for litigation among the available venue options. The SOFA will only allow for a civil action to proceed in Haiti with the commander’s approval, and the U.N. commander has not yet conceded that any of the recent killings fall outside MINUSTAH’s “official duties.” Apparently, deadly attacks, like the one that killed William St. Mercy in his wheelchair, are not rogue activities, but rather planned, official operations. The U.N. Commission of Human Rights puts so little faith in the likelihood of this certification that they describe bringing suit against peacekeeper military contingents in the host state as falling under “absolute immunity.”¹⁰¹ Furthermore, the Haitian legal system is unstable as it

96. Gaja, *supra* note 91, at ¶8.

97. SOFA, *supra* note 70 at ¶51.

98. *Id.* at ¶52(b).

99. *Id.*

100. *Id.* at ¶55. See also *infra* Part E.2, for additional analysis.

101. Hampson, *supra* note 83, at Table 1.

is, and the added restrictions to litigate under SOFA make a suit in Haiti practically impossible.

Since Brazil is the country that has contributed most of MINUSTAH's top commanders and the largest troop contingent, the SOFA allows for a suit in Brazil to proceed regarding human rights abuses in Haiti. Title III of the Brazilian Military Code allows for a soldier to be charged with qualified homicide when the crime is committed "for a futile motive" (i.e., no military necessity).¹⁰² The Brazilian military's disproportionate and ineffective response to the situation in Cite Soleil could easily qualify under the statute. The punishment for violating the statute carries a minimum twenty-year sentence, so a successful prosecution would offer significant punishment for human rights abusers. Because this option involves criminal prosecution, the State of Brazil would have to initiate the proceedings. There is no indication as of this writing that Brazil is willing to take such legal action. However, this climate could change with pressure from human rights and other groups working in that country.

A foreign plaintiff can bring suit in Brazil for a wrongful death action. Brazil's Code of Civil Procedure states that the Brazilian judiciary is competent when the defendant, regardless of his/her nationality, is domiciled in Brazil.¹⁰³ Brazil's soldiers are presumably domiciled in Brazil, so a wrongful death action, to pick an example, could be brought by a Haitian plaintiff. Furthermore, there is also some established precedent in Europe for bringing successful civil claims of this type against a sending state's peacekeepers in their own courts. In a parallel case, *Bici v. Ministry of Defence*, a British high court found that the Ministry of Defense was financially responsible for the deaths of two people by British soldiers operating with the U.N. peacekeeping mission in Kosovo.¹⁰⁴ This case can be referenced by analogy in seeking redress for Brazilian peacekeepers' actions in Haiti.

Nevertheless, Brazil has several disadvantages as a forum for

102. See CÓDIGO PENAL MILITAR, [C.P.M.], vol. 1, tit. IV, ch. I art. 205 (2)(I) (Braz.). Many thanks to U.C. Hastings College of the Law student Joana Castro for Portuguese translations.

103. See CODIGO DE PROCESSO CIVIL [C.P.C.], vol. 1, tit. IV, ch. II, art. 88(I) (Braz.).

104. *Bici v. Ministry of Def.*, EWHC 786 (Q.B. 2004). Interestingly, Britain conceded that it was "vicariously liable" for the wrongs committed by its soldiers on the U.N. mission. See *id.* at ¶ 2.

suit. Haitian victims are not able to bring a criminal action on their own behalf. A civil action in a distant and possibly hostile forum would be difficult for a Haitian plaintiff to litigate. Lastly, it is worth noting that Cite Soleil, the target of many of the deadliest MINUSTAH raids, is a very poor neighborhood consisting of people who have the least means to access a Brazilian court.

D. Regional Venues for Suit: The Inter-American Court on Human Rights

Since both Brazil and Haiti are members of the Inter-American Commission on Human Rights ("IAHCR"), it is possible to bring a suit alleging violations of the American Convention of Human Rights.¹⁰⁵ If the Commission finds merit to the Haitian plaintiff's claim and a settlement with Brazil cannot be mediated, then the Commission would sue Brazil in the Inter-American Court of Human Rights.¹⁰⁶ Countries normally have to consent to IAHCR jurisdiction in any given case, but Brazil is one of 21 countries that have currently accepted jurisdiction of the Court in every potential suit as of this writing (November 2007).¹⁰⁷ Individual Haitian plaintiffs may launch a suit under Article 44 of the Convention.¹⁰⁸ MINUSTAH's human rights violations implicate violations of the right to life (Article 4), the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to property (Article 21), and the right to judicial protection (Article 25).¹⁰⁹ Article 25 has also been interpreted by the IACHR to include a failure to properly investigate serious crimes like the ones alleged in Haiti.¹¹⁰

However, the IACHR will refuse to hear a human rights case regarding Brazil's actions as part of MINUSTAH unless "all remedies under domestic law have been pursued and exhausted in accordance

105. American Convention on Human Rights, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter "American Convention"].

106. *Id.* at arts. 48-51.

107. For a list of countries accepting the jurisdiction of the Inter-American Commission on Human Rights see the IACHR website, <http://www.corteidh.or.cr/index.cfm>.

108. American Convention, *supra* note 101, at art. 44 "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations of [sic] complaints in violation of this Convention by a State Party."

109. *Id.* at arts. 4, 5, 7, 21, 25.

110. See *Velasquez v. Peru*, Case 11.031, Inter-Am. C.H.R. 1129, Report No.111/00, OEA/Ser.L/V/II.111, doc. 20 rev. ¶60 (2000).

with generally recognized principles of international law.”¹¹¹ In fact, two petitions regarding Brazil’s actions in Haiti have both been declared inadmissible because domestic remedies were not exhausted.¹¹² In the event a plaintiff is deemed to have exhausted his or her administrative remedies, the benefits of bringing suit in IACHR are that the Commission could demand that Brazil change their military contingent’s conduct and/or award damages.

It is probably sufficient to attempt suit only in Brazil and Haiti (without a concurrent claim through the U.N. claims mechanism) in order to exhaust remedies. On August 4, 2006, the IACHR issued a brief statement that indicated that evidence against Brazil’s MINUSTAH abuses was inadmissible because “the remedies within the national legal system have not been exhausted.”¹¹³ The “national legal system” language implies that remedies need only be sought against states, not international organizations. Further, due to the remarkably poor likelihood of a suit being certified to proceed in Haiti, it is arguable that the futility of bringing suit in Haiti means that remedies there have already been exhausted. Filing a formal complaint with the United Nations and thus commencing their internal claims procedure, explained in detail below, does not seem necessary in terms of exhausting administrative remedies from a literal reading of the IACHR’s language in their recent petition dismissals. All exhaustion possibilities must be completed before launching suit with the IACHR, as that court will not hear a case that is pending in another legal proceeding.¹¹⁴

111. American Convention, *supra* note 101, at art. 46.

112. For the two petitions, see Lionel Jean-Baptiste, *Petitioners Hereby Make an Urgent Request for Provisional Measures Based on Grave Threats to the Lives of Civilians Living in Port-Au-Prince* (Nov. 2005) (denying admissibility against Brazil) and *Jimmy Charles v. Republic of Haiti*, (Jan. 18, 2006) (denying admissibility against Brazil), available at <<http://www.iachr.org/casos.eng.htm>>).

113. Letter from Ariel E. Dulitzky, Assistant Executive Sec’y, Org. of American States, Inter-American Comm’n on Human Rights, to the Inst. for Justice and Democracy in Haiti (Aug. 4, 2006).

114. American Convention, *supra* note 101, at art. 46(c). See also DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (Oxford University Press, 2d ed. 2005).

E. Other Venues: Legal Options Against the U.N. Directly

i. U.N. Liability in a Third Party Court

The United Nations may be directly liable for the actions of its peacekeepers, but the problem of finding an appropriate venue that will hear the case makes an attempted suit an exercise in frustration. To illustrate the difficulty of this option, this section will explore an attempted suit against the Brazilian MINUSTAH commander under the Alien Tort Statute ("ATS") in a United States federal court.¹¹⁵ Human rights violations committed abroad have been previously considered violations of American law under the ATS, and such a statute could theoretically be used here against the Brazilian commander.¹¹⁶

The United Nations maintains complete jurisdictional immunity under the 1946 Convention of Treaties and Immunities for the United Nations.¹¹⁷ Senior U.N. officials, such as the Secretary General or Security Counsel Representatives, have absolute immunity under the Convention.¹¹⁸ Lower U.N. officials, as the MINUSTAH commander arguably qualifies, are only immune from liability if they are acting in their official capacity (i.e., functional immunity).¹¹⁹ Since the Brazilian military commander is formally appointed by the Secretary General (currently Major-General Carlos Alberto Dos Santos Cruz), he can be considered a U.N. official, or, in other words, an agent of the United Nations. The U.N. commander is functionally immune from most suits in the United States, and there is no exception recognized for human rights abuses. Functional immunity has been defined by the United Nations as being inapplicable for certain serious criminal acts, since they are clearly outside official functions.¹²⁰

115. Alien Tort Statute, *supra* note 79.

116. The Alien Tort Statute was first used in this way in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

117. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15. The convention was ratified by the United States in 1970.

118. *Id.* at art. V, §19. This note assumes that U.N. officials have the same immunity as "diplomatic envoys." For an example of the kind of immunity a diplomat customarily receives, see The Vienna Convention on Diplomatic Relations art. 31, Apr. 24, 1964, 500 U.N.T.S. 95.

119. Convention on the Privileges and Immunities of the United Nations, *supra* note 112, at art. V, §18

120. As an example, the U.N. Commission on Human Rights describes how immunity was declared inapplicable by the U.N. during a rape case involving the

Even if the United Nations refuses to disavow the commander's functional immunity, the Restatement [Third] of Foreign Relations Law states that diplomatic agents, even in their official duties, "are subject to tort, criminal, and property law generally, although the law cannot be enforced by legal process."¹²¹ This confusing language suggests there may be liability but no means for a remedy.

A more realistic option than asking the United Nations to expressly waive its immunity and allow suit against its agent is to wait for the U.N. official's immunity to terminate. Though immunity never terminates with respect to the agent's official actions, after an official ceases to be a U.N. official (for example, when the commander's time with MINUSTAH is concluded) he may become liable for violations of laws where personal jurisdiction can be found. So, the argument would be that while the MINUSTAH commander cannot be held liable for officially authorizing the February 2007 raid in Cite Soleil, he could be held liable if the sheer volume of similar raids and civilian casualties could establish gross recklessness, which would clearly be outside the scope of official duties. Even if the commander's gross *negligence* could be established, the US Supreme court recently discussed how this evidence is insufficient to create ATS liability.¹²² If the court does not accept the recklessness argument and finds that the MINUSTAH commander's actions were within the scope of his official duties, then functional immunity precludes suit. Furthermore, the commander is a Brazilian official protected by sovereign immunity; this is an additional hurdle that must be cleared to bring this kind of suit.

For this suit to commence, a former U.N. peacekeeping commander would have to avail himself of United States jurisdiction for any civil action to commence. As for a criminal action, the types of abuses MINUSTAH troops have engaged in could be considered in the aggregate as rising to the level of international crimes warranting universal jurisdiction. However, universal jurisdiction is

U.N. in East Timor. See Hampson, *supra* note 83, at ¶ 31

121. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 464 cmt. c (1987). Incidentally, officials of an international organization are not the same as diplomatic agents, but the Restatement intended for them to have the same general immunity. See *id.* at § 470 cmt. b.

122. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702 (2003) (negligent behavior by state actors is so easy to allege that it should be met with skepticism in any FTCA claim). Due to the failure of Respondent's FTCA claim, he was not allowed to recover under the ATS. *Id.* at 720.

for individual criminal responsibility and has never been used before against a U.N. peacekeeper. The concept of universal jurisdiction is sufficiently controversial that it is unclear if the United States government would exercise such jurisdiction in the foreseeable future even for more "typical" human rights abuses involving state actors and/or military officials.¹²³

Combining all these laws and principles, it seems possible to sue the individuals responsible for the abuses in Haiti in U.S. court if: i) they are not senior U.N. officials and ii) they are subject to personal jurisdiction and iii) if they committed non-official actions, and iv) either the United Nations expressly waives immunity or both functional and sovereign immunities have expired/become invalidated through something like universal jurisdiction. Furthermore, all of this analysis could also be fruitless if the Brazilian commander does not have an adequate amount of resources for a judgment. This futile exercise illuminates the Unsettling reality that U.N. officials can only be held accountable for human rights abuses when the United Nations decides to judge against itself.

ii. U.N. Liability in a Claims Commission

Recent General Assembly law has established the parameters of U.N. financial liability, but the new laws create no private right of action for a Haitian plaintiff.

The United Nations created a limited liability resolution in 1998 with very strict damage caps (US \$50,000 maximum damages) and a six month statute of limitations.¹²⁴ However, the financial limitations and time limits are removed in situations where U.N. actors commit actions of gross negligence or willful misconduct.¹²⁵ MINUSTAH's actions could fit under either standard. No method of enforcing these damages is explained, nor are the words "gross negligence" or "willful misconduct" defined in the resolution. Should the United Nations be found directly liable under MINUSTAH, it could then sue Brazil

123. The United States has never authorized universal jurisdiction. However, The United Kingdom did famously recognize such jurisdiction in *ex parte Pinochet Ugarte* (1998) 3 W.L.R. 1456 (H.L.), [1999] 38 I.L.M. 1302.

124. G.A. Res. 52/247, ¶¶ 8, 9d, U.N. Doc. A/RES/52/247 (July 17, 1998).

125. *Id.* See also The Secretary-General, *Reform of the Procedures for Determining Reimbursement to Member States for Contingent-Owned Equipment*, Annex B(6) ¶20, *delivered to the Security Council and the General Assembly*, U.N. Doc. A/50/995, (July 9, 1996).

directly for reimbursement under the resolution.¹²⁶ As discussed earlier, the SOFA dictates that a standing claims commission will be created to hear any Haitian plaintiff's private law claims.¹²⁷ These standing claims commission clauses are contained in all recent peacekeeping operations, but no standing commission has ever been created. The current approach for settling claims against the United Nations is by using U.N. claims review boards.¹²⁸

In order to prompt the creation of a U.N. claims review board a victim must make a formal complaint that notifies the Head of the Mission of the alleged abuse.¹²⁹ After the investigatory phase, the United Nations has to decide that the acts are sufficiently serious to warrant the creation of a formal Board of Inquiry ("BoI").¹³⁰ The BoI's deliberations are confidential, but at their conclusion they tell the victim of any action to be taken by the organization.¹³¹ This structure means that the victim has no opportunity to plead her case and their remedy is completely at the discretion of the BoI. Having the United Nations decide when it has to pay for its own human rights abuses is hardly ideal for creating accountability, but it is an available option to Haitian human rights victims.

Although the claims review boards are not transparent, there are some existing guidelines that a review board would logically look to when determining U.N. liability for a peacekeeping operation. The Department of Peacekeeping Operations states that the United Nations cannot be liable for "the necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate."¹³² The Secretary General has outlined four factors to be considered in evaluating operational necessity: (1) the force commander needs a "good faith conviction" that "operational necessity exists," (2) the measure itself is "strictly

126. *Id.* at art. 9.

127. SOFA, *supra* note 68 at ¶ 55.

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

129. Directives for Disciplinary Matters Involving Military Members of National Contingents, ¶ 9, U.N. Doc. DPKO/MD/03/00993.

130. *Id.* at ¶ 15.

131. *Id.* at ¶ 26.

132. The Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, ¶ 13, delivered to the Security Council and the General Assembly, U.N. Doc. A/51/389 (Sept. 20, 1996).

necessary” and not just “a matter of mere convenience or expediency,” (3) the act is part of an overarching “operational plan and not the result of a rash individual action,” and (4) the damage inflicted will be “proportional to what is strictly necessary to achieve the operational goal.”¹³³ If the claims review board were to review MINUSTAH’s actions based on these factors, it would likely determine those actions do not meet factors (2) or (4), and arguably do not meet factor (1). For example, the massive amount of force used to capture a single *alleged* gang member in July, 2005 (See Part II) is a shocking example of the sheer scale of an attack that was neither strictly necessary nor proportional to the goal and, therefore, in violation of the Secretary General’s second and fourth factors. Additionally, the horrific attacks in Cite Soleil and other places were not strictly necessary and were vastly out of proportion to what legitimate goals, if any, were being pursued. The MINUSTAH commanders may have had a good faith belief that all their operations were necessary, but the unacceptably high number of civilian casualties should have led to more careful tactics in subsequent operations, especially in the context of a peacekeeping mission.

F. Applying the Law to the Facts in Haiti

Each of the legal options listed above has its own set of drawbacks. Suit within Brazil is the only option expressly mandated by SOFA, so there is no doubt that this option at least exists. But Brazil would be a foreign and possibly hostile forum for Haitian victims of MINUSTAH abuses. The IACHR’s status as a regional court would be an easier and more neutral forum than Brazil, but the Court will not hear a suit until it is satisfied that all domestic remedies are exhausted. Suing the United Nations for MINUSTAH’s human rights abuses would create the best precedent for creating incentives for the United Nations to go to greater lengths to ensure future peacekeeping operations follow recognized principles of human rights. However, there is a mountain of jurisdictional obstacles to suing the United Nations directly, and there is no established precedent via this route. Pushing for the creation of a U.N. claims review board seems a more likely way to obtain a direct U.N. remedy, but by choosing this path the organization gets to determine its own

133. *Id.* at ¶ 14.

responsibility for the alleged abuses in Haiti.

IV. Conclusion and Recommendations

To operate under its professed ideals, the United Nations must allow for more accountability for the actions of U.N. peacekeepers. The current structure makes it too difficult to force the United Nations or troop contributing countries to be held responsible for their human rights abuses. There are genuine worries that an overzealous accountability regime would discourage countries from contributing troops to future peacekeeping missions. Such concerns, however, should be balanced with the concerns for the horrific abuses that innocent Haitian civilians have relentlessly endured at the hands of MINUSTAH. Given these conflicts, some measures should be implemented to create better peacekeeping accountability:

The United Nations should create the standing claims commissions mandated in the model SOFA agreement. The claims commissions should be structured so as to allow actions by non-state actors and should be created in the host state of a peacekeeping mission whenever possible. The claims commission should be independent with arbitrators elected by both parties. As an example of how this can be done, each side could elect an arbitrator and jointly agree on a third.

The United Nations should be allowed to seek reimbursement from the troop-contributing country for any successful claims brought for human rights abuses. As such, all troop contributing countries must sign a "consent to reimburse" agreement before they may be allowed to contribute troops for U.N. peacekeeping.

An independent investigative body should be created to monitor each individual peacekeeping operation. Any reported human rights abuses must be investigated by this body. This body would operate similarly to the recently discharged ombudsperson in Kosovo, but this principle should be extended to all peacekeeping missions.

The claims commission judgment should not be a complete bar to suing within an existing legal system. A revamped U.N. claims commission's judgment should be relevant when another court is considering an additional remedy, and the second suit should still be allowed where there would otherwise be a denial of justice. This protects against any imperfections that may exist in the standing claims commission and ensures that both the United Nations and a specific state actor can be concurrently liable and responsible for

human rights abuses.

These recommendations are designed to shift responsibility from the troop-contributing country (where the United Nations cannot demand compliance) to the organization itself (where they can). Such measures would perhaps lead to more careful negotiations before peacekeeping missions are launched, but is that such a bad thing? Peacekeeping operations have expanded dramatically over the last decade and, as a result, there is heightened potential for human rights abuses. Peacekeeping accountability must be in place before a single blue helmet arrives in places like Haiti. These accountability measures are necessary both to deter future horrors and to give justice for the volume of past ones: *At 5:00 a.m. on July 6, 2005, Edeline Pierre Louis, thirty and mother of five, was shot at Bois Neuf in her house. She suffered bullet wounds in her left arm and in her belly. At seven months pregnant, Edeline lost her baby.*