



BRILL

Fostering Human Rights Accountability: An Ombudsperson for the United Nations?

Author(s): Florian Hoffmann and Frédéric Mégret

Source: *Global Governance*, Jan.—Mar. 2005, Vol. 11, No. 1 (Jan.—Mar. 2005), pp. 43-63

Published by: Brill

Stable URL: <https://www.jstor.org/stable/27800553>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Brill is collaborating with JSTOR to digitize, preserve and extend access to *Global Governance*

Fostering Human Rights Accountability: An Ombudsperson for the United Nations?



Florian Hoffmann and Frédéric Mégret

In recent years, the UN has assumed a widening scope of responsibilities and has gradually been transformed from an intergovernmental organization to a global governance mechanism with an ever greater direct impact on individuals. This entails that the UN is also, in principle, capable of violating human rights and occasionally does so in different operational contexts. While this has raised demands for greater UN accountability, Hoffmann and Mégret argue that the existing institutional mechanisms do not allow the UN to respond to these adequately. They then explore the contribution that a UN-wide ombudsperson could make to the objective of fostering UN accountability. Ombudspersons have become recognized almost universally as an indispensable good governance mechanism, and the creation of ombudsperson institutions in peacekeeping contexts, which may theoretically scrutinize the UN's own actions, shows that the time may be ripe for a more ambitious proposal. They conclude by outlining a few concrete suggestions as to how a UN-wide ombudsperson could work and how such an institution could be created. **KEYWORDS:** ombudsperson, accountability, UN, human rights, peacekeeping.

The UN is involved in more activities than it ever has been. By and large, it is probably fair to say that its engagement has helped to improve many often intractable situations around the world. However, the UN has certainly not been immune to failures. Of course, some of these are bound to arise when it comes to an organization that is, after all, expected to deal with a wide range of the world's problems.

Yet there is an increasing number of such failures that cannot easily be blamed on the imperfect structure of international society and that would seem to exceed the limits of the UN's political and operational fallibility, properly understood. These are failures that are directly

attributable to an incapacity on the part of the UN to live up to its own standards, particularly those standards that have been at the heart of its activities, namely human rights.

This occasional incapacity is in itself potentially very damaging to the UN's credibility. But it has only been made worse by the UN's failure to respond adequately to the question of accountability. In this article, we propose to examine the contribution that the creation of a UN systemwide ombudsperson could make to improving the UN's human rights accountability record.

The Accountability Problématique

Before we address some of the specific institutional forms that accountability might take, it is important to understand that accountability is essentially a demand, made by civil society in general, for the UN to be more responsive to complaints about the consequences of its actions. This demand covers a wide range of alleged UN shortcomings.

At one end are some of the UN's "structural failings." Srebrenica and Rwanda, in particular, stand out as striking cases where the UN's lack of political will and its operational meekness led to catastrophic consequences for entire populations. In situations where the UN had effectively undertaken to protect civilians, its incapacity to back promises by force led to what are arguably some of the worst stains on the organization's record.

However, the UN's accountability problems are not confined to the structural level. On a much smaller scale, the UN has not escaped criticism for some of the more significant negative side effects of its activities. Peace operations, because of their breadth and because they involve the use of force, were an early case in point. Already during the UN operation in the Republic of Congo (1960–1964), for example, concerns were raised about the possibility that troops operating under UN command had violated international humanitarian law.¹ Even in the context of lower-key peacekeeping missions, and aside from routine problems concerning compensation for use or destruction of property or accusations of drug trafficking and black marketeering,² UN Blue Helmets have not escaped accusations of occasional grave wrongdoing. In one notorious case, three members of an elite Canadian paratroopers regiment were photographed smiling next to the blood-drenched body of a tied-up Somali, leading to charges of acts of barbarity and torture. Similar accusations later surfaced concerning Italian and Belgian troops.³ UN Protection Force (UNPROFOR) peacekeepers were also reported to

have gravely misbehaved in a hospital they were guarding in central Bosnia.⁴ After a string of incidents in Cambodia, Bosnia, Macedonia, Mozambique, West Africa, the Democratic Republic of Congo, and Eritrea, and following the publication of several UN reports,⁵ it has emerged that rape, child prostitution, and the trafficking of women are a common consequence of the deployment of peacekeeping troops and civilian police forces in many operational theaters.

The problem has assumed even wider proportions in cases where the UN is entrusted with the administration of entire territories. Indeed, in both Kosovo and East Timor, despite UN international administrations' remarkable achievements there, UN police forces, for example, have been accused of brutality and illegal detention.⁶ The UN Mission in Kosovo (UNMIK) administration, in particular, has been accused of authoritarian behavior and of ignoring the decisions of courts, an attitude that prompted the Organization for Security and Cooperation in Europe (OSCE) to note that the applicable domestic and international law "is almost universally ignored in Kosovo."⁷ Moreover, UN international administrations have generally been described as unresponsive to calls for participation by the local population in decisions affecting its future.⁸

However, peace operations are probably only the tip of the iceberg, the most obvious manifestation of a growing accountability problem at the UN. There are many less prominent operational areas in which previously "submerged" accountability shortcomings have recently been brought to the surface. One example is the management of international criminal tribunals. Here, the UN International Criminal Tribunal for Rwanda has, in particular, come under substantial criticism for repeated failures to respect the rights of the accused and to compensate adequately when such abuses became clear.⁹ Another instance of an unexpected accountability void is the international refugee regime. Although the recent "sex-for-aid" scandal¹⁰ in Sierra Leone now appears to have been exaggerated, concerns about the failure of the UN High Commissioner for Refugees (UNHCR) to guarantee human rights in the refugee camps under its control are not new and raise similar questions of UN accountability.¹¹ Finally, there have also been complaints, even if on a smaller scale, in a number of other areas of UN activity, including humanitarian assistance,¹² development aid,¹³ and health administration.¹⁴

It is apparent that the accountability problématique applies to a wide range of UN activities and covers a variety of problems, from political negligence to outright human rights violations. These are normally treated as distinct issues in what is, on the whole, a very scarce literature on the topic. Yet, following a more ambitious approach that we sketched out in a

previous publication,¹⁵ we propose to deal here with the UN's various accountability incidents as part of a larger genus of problems.

Indeed, the emergence of the UN's accountability problem may be seen more generally as a consequence of the gradual transformation of the UN from a predominantly intergovernmental organization into a global governance institution, a transformation that, in a context of crumbling or fragilized state institutions, is making the UN come increasingly face to face with the people it is ultimately meant to benefit. Therefore, at the heart of this problématique lies the issue of the UN's responsiveness.

The UN's Response

Traditionally, diplomatic immunity bestowed on many UN employees and special arrangements with troop- and personnel-contributing states, not to mention mere indifference, have been seen as a barrier to a more proactive engagement on the part of the UN.¹⁶ The UN's typical response to the problems mentioned above has been to call for improved and broader training,¹⁷ to issue codes of conduct and guidelines,¹⁸ or to carry out lessons-learned exercises.¹⁹ For example, after the refugee scandal in western Africa, the Inter-Agency Standing Committee (IASC) went so far as to set up a task force that adopted a Plan of Action on Protection from Sexual Exploitation and Abuse in Humanitarian Crises.²⁰

Although all these steps may represent significant progress toward mainstreaming human rights into the UN, they have essentially been soft, preventive measures. As such, although they might trigger awareness of potential human rights problems, they are insufficient in terms of ensuring human rights compliance by UN personnel in future missions and of providing concrete and effective remedies for past abuses. As one report put it, in the context of the protection of children in peace operations, "Codes of conduct and specialised training do not seem to address the problem adequately. . . . Perceptions based on an eroded status . . . for children will not be erased by a few hours or even days of human rights training. This suggests that . . . stricter preventive and punitive measures may be the only solution."²¹

Admittedly, since episodes such as those in Somalia, the UN has become more sensitive to the need to show signs that it is responsive to demands for accountability in the particular context of peace operations. Both the Security Council and the General Assembly have directly

addressed such issues as the special vulnerability of women, children, and refugees in peacekeeping contexts.²² In recent cases of sexual misconduct by the UN Transitional Administration in East Timor (UNTAET) police officers and the UN-sanctioned International Force for East Timor (INTERFET) soldiers, UN officials have made it clear that the perpetrators will not enjoy immunity.²³ The UN has repeatedly called on troop-contributing states to vigorously investigate and prosecute all allegations of human rights violations by peacekeepers and to report their findings back to the UN.²⁴

Still, the fact that new incidents have occurred since Somalia shows that the problem is likely to persist. The UN, for its part, has continued to display a somewhat ambiguous attitude toward its own accountability. For instance, often it has acted as if sending soldiers home or expelling staff—assuming such minimal measures are taken—are an effective substitute for a proper accountability policy. The logic behind such thinking seems to be that if responsibility for wrongdoing can be traced to individuals, then the UN itself cannot possibly be to blame. Yet such an implicit externalization of responsibility conveniently avoids the fact that in most (if not all) cases, abuses are also attributable, at least in part, to failures in recruitment, training, or oversight by the UN. Hence, there is a strong case to be made in favor of the UN shouldering responsibility commensurate with its role.

Peace operations are complicated by the presence of an intervening variable—the troop-contributing state. The UN’s typical response when specific problems arise has been to hide behind standard status-of-forces agreements (SOFAs), which specify that contributing states retain exclusive jurisdiction over their military. As UN spokesman Fred Eckhard put it in relation to the problems experienced during the Somalia mission, “Ultimately, when something goes wrong, the United Nations, under its arrangement with troop contributing countries, does not have the authority to discipline troops.”²⁵

There are several problems with this state of affairs, the most notorious being that, although the secretary-general has recommended that the Security Council ask states to follow up on relevant investigations,²⁶ under the present conditions the UN basically forfeits any leverage to ensure that these investigations are conducted. Most importantly, however, the problem with this approach is that even if the investigations launched by states were always adequate—which they are not—it misses the point that state responsibility does not and should not exclude a *residual* UN accountability for the acts of those serving in its name, above and independent from the accountability of states. After all,

it is not as if the UN does not have the power to minimally monitor the human rights compliance of its military deployments. Moreover, peacekeepers are serving under the UN flag and, for most purposes, will be perceived as representing the UN.

On the face of it, there are signs that some things may be changing. On learning of the accusations in Somalia, Kofi Annan, in a move that seemed designed to take at least partial responsibility for the acts of UN troops, insisted that “every possible effort will be made on the part of the United Nations to ensure that such incidents do not recur.”²⁷ After realizing that “avenues of recourse for beneficiaries are practically non-existent,” both the Office of Internal Oversight Services and the Inter-Agency Standing Committee have recommended that an “independent reporting procedure to reach into the refugee camps and communities” be established.²⁸ At times, the UN has even endorsed what looks like a more ambitious approach to the accountability problématique. For example, in the case of Rwanda and Srebrenica, the Security Council created two commissions, which issued landmark reports examining the UN’s role in allowing these tragedies to occur.²⁹ These were clearly important and innovative steps to foster a culture of accountability throughout the UN.

Yet there remain significant shortcomings with such initiatives: they are often very general exercises that usually stop short of naming people; they often conspicuously lack a framework to allow for direct victim involvement, thus minimizing the benefits of accountability as a fundamentally inclusionary concept; and the existence of formal mechanisms in some cases but not others begs the question of arbitrariness—if these, why not others?

Indeed, there seem to be significant disadvantages to the ad hoc nature implicit in the UN’s response to date. First, there is a risk that accountability problems will be politically minimized by being reduced to isolated instances when, as argued here, they may be part of a more general trend. Second, potential institutional synergies are not exploited, and the effectiveness of any ad hoc measures is usually not monitored centrally across the system, so that few general “lessons” are actually learned. Third, less obvious abuses will easily fall through such an ad hoc accountability net, even though they may be, in aggregate, no less damaging than the more obvious scandals that attract the media’s attention.

Overall, therefore, the UN’s accountability policy is vulnerable to the double criticism that it has been both insufficiently hard-headed and

excessively haphazard when what is really needed is a more systematic and sustained effort to close the accountability gap.

The Case for Systemwide UN Accountability

In view of the UN's relatively weak response, we reiterate that the case for accountability is an extremely strong one. Accountability is an essential feature of good governance, frequently promoted as such by the UN itself in various contexts. As one observer put it in the context of peace maintenance operations, "Nothing can be more contradictory than a United Nations force transgressing humanitarian law standards."³⁰ A similar impulse seems to have led the secretary-general to note that abusive behavior toward refugees "violates everything the United Nations stands for."³¹ It will clearly become increasingly important for the UN, by its actions, to avoid being accused of unaccountability.

Aside from sheer concern for coherence, there are more pragmatic considerations involved. If accountability has become such a prominent issue, it is also because it has come to be seen as the indispensable corollary of the legitimate exercise of authority. This is why the Lessons Learned Unit, after having explored the successes and failures of several UN peace operations, felt confident enough to insist that "the United Nations must . . . demonstrate a commitment to the principles of transparency and accountability in its activities. It must not be perceived as being 'above the law.'"³² Conversely, it is difficult to underestimate the impact that a perception of the UN as not measuring up to its own standards may have on those under its care. When it comes to peacekeeping generally, "legal unaccountability will definitely lose for a mission the support of the local population,"³³ so that being accountable is not only a moral imperative but also an operational one if the UN is to maintain the kind of credibility on which it relies.

There is another, more subtle, reason why the UN should uphold the highest standards of accountability. In many areas of the world, especially where the UN is taking over from weak or collapsed states—whether by keeping the peace, administering territory, managing refugee camps, or holding international trials—the UN will generate considerable local expectations. If the international community manages to rise to the highest standards of governance, it will not only facilitate its own work but, in leading by example, may also foster or consolidate a local culture of accountability. As Amnesty International put it in the context of Kosovo,

“The conduct of UNMIK and KFOR will set the standard in Kosovo and the Federal Republic of Yugoslavia as a whole for the manner in which law enforcement officials and security forces responsible for maintaining public safety and order exercise their duties.”³⁴

Finally, there is an emerging awareness that because of the complex nature of the problem, “accountability needs to be addressed at the individual agency *and collectively*.”³⁵ Fostering a culture of accountability throughout the UN would more generally signal a shift from an organization that was and probably still is to a large extent dependent on states, to one that is increasingly legitimate in the eyes of its ultimate beneficiaries. As such, it would be an enormous step toward winning the hearts and minds of those who, through a variety of routes, are becoming crucial partners.

What Kind of Accountability?

Accountability has been described as a “multifaceted phenomenon,”³⁶ which at a minimum involves a sensitivity to the possible impact of one’s actions and a willingness to answer for the consequences arising from them.

Thus, accountability lies somewhere between political responsiveness and legal responsibility. At one end, accountability is said to entail notions of democratic decisionmaking and political participation. An institution is accountable if, by means of regular reporting and monitoring procedures, its executive is made to answer for its conduct before some kind of legislative body. In that sense, the UN has always been accountable to the General Assembly, for example. Whether it should improve its political accountability by reforming the Security Council or by opening the doors to international civil society is an important debate in its own right, but not one with which this article is primarily concerned.

The fact that an institution is accountable in its decisionmaking should not obviate the fact that, under contemporary understandings of the term, institutions should also be accountable for their decisionmaking—that is, for the adverse substantive impact that their decisions may have regardless of their democratic legitimacy. This legal kind of accountability, in turn, needs to be distinguished from the traditional concept of international responsibility. It is a long-recognized rule of international law that international institutions may be made responsible for the prejudice caused to others, along lines very similar to those of state responsibility.³⁷ However, this concept is both too narrow

and too heavy for the UN's more subtle accountability needs: too narrow because of its focus on a strictly defined, generally material, prejudice; too heavy because of its all-or-nothing approach to liability and the limited range of remedies it offers. The point is that international institutions such as the UN may want to be made politically accountable for certain decisions even though they are not strictly internationally responsible for them.

In that sense, the accountability problématique begs the larger question of accountability to whom? Both political accountability and legal responsibility have traditionally—although not exclusively—been geared toward states. The point of legal accountability is that it inaugurates a move away from a “shareholders” approach (in the context of political accountability) or “victims of prejudice” approach (in the context of international responsibility) to a larger concept of stakeholders, defined as all those who are directly or indirectly affected by the UN's policies and who have a distinct interest in ensuring that the UN is answerable for such policies. Hence, if political accountability and legal responsibility occupy fairly fixed points in the UN's legal constellation, the concept of UN accountability promoted here aims to fill the gaps left by the former by providing a more fluid regime that is above all geared to ensuring the UN's responsiveness to some of the negative side effects of its activities.

The Inadequacy of Existing Mechanisms

One might think that the UN's intricate network of organs and mechanisms might be sufficient to safeguard and to promote human rights accountability, but a closer look reveals that none of these mechanisms, individually or as an aggregate, have been able to systematically bring the UN's otherwise prevalent human rights focus to bear on its own activities. The main reason for this inadequacy may lie not so much in a genuine lack of institutional values as in their structural separation: the promotion of good internal governance, on the one hand, and of human rights, on the other. While the former is seen as essentially unrelated to human rights, the latter is treated as non-self-reflexive and hence unrelated to the UN itself, leaving a huge accountability gap at the heart of the UN's institutional setup.

As for the existing internal governance mechanisms, these are all geared toward auditing and management control with none of them appearing to be seriously concerned with overseeing the human rights impact of the UN. Nominally, the most likely candidate, the Office of Internal Oversight Services (OIOS), looks *prima facie* as if it could be a

real accountability watchdog. Its mandate is to “ensure compliance with the resolutions of the General Assembly, and with regulations, rules, and policies of the United Nations.”³⁸ The inspector-general, who heads it, is sometimes referred to as an “ombudsman.”

Yet, in practice, the OIOS has always understood its mandate as essentially one of internal management control, which is almost exclusively geared toward “enhanc[ing] the way the United Nations does business.”³⁹ Indeed, its single-minded focus on “accountability for the stewardship of resources,” “efficiency and productivity,” or “cost-effective controls to ensure compliance with authority, minimize waste and deter fraud and dishonesty” has de facto prevented it from conceiving of its accountability role in human rights terms and from carrying out any form of systematic investigation in that respect.⁴⁰

Whenever the OIOS has exercised its oversight services over potentially human rights-sensitive areas it has done so in a human rights-neutral way.⁴¹ The only case where the OIOS came close to investigating issues of accountability as understood in this article was in the West African sex-for-aid scandal, in which it officially based its role on the Convention on the Rights of the Child. The investigation led to the interview of more than 1,500 refugees and to an important report that, though finding that some of the accusations leveled against the UN were unverifiable, clearly acknowledged that the problem was widespread.⁴² The fact that the investigation was an isolated instance, that it was undertaken specifically at UNHCR’s request rather than as part of any autonomous initiative, and that the OIOS at times seemed to be overwhelmed by the magnitude of the task demonstrates that even this case cannot be taken as an example of thoroughgoing human rights scrutiny.

Those organs that are specifically geared toward human rights promotion have in turn tended to be largely oblivious to the UN’s own occasionally less-than-positive role. The quintessential human rights body, the UN High Commissioner for Human Rights (UNHCHR), has mostly kept silent on the larger, more recent human rights blunders of the UN, speaking out usually only in relation to the conduct of the states involved and not explicitly in relation to the UN’s behavior.

The treatment of the Somalia scandal by the UN’s human rights apparatus is revealing. Both the Sub-Commission on Human Rights⁴³ and the Commission on Human Rights have shown a distinct reluctance to thematize UN accountability. The then special rapporteur on Somalia for the commission seemed to base her report on the assumption that the UN was not in command and control of the mission’s ground operations, which effectively ensured that the UN’s accountability fell outside the

scope of her study.⁴⁴ Because the UN is not technically a party to the major human rights treaties promoted under its auspices, none of the treaty bodies was ever called on to examine its behavior from a human rights perspective. However, when both the Human Rights Committee (HRC) and the Committee Against Torture (CAT)⁴⁵ had the opportunity to examine the UN's role in Somalia indirectly through the reports of states whose troops had been accused of wrongdoing while serving under the UN, they failed to even allude to the UN's potential coresponsibility. This pattern of failing to see the UN as "part of the picture" only seems to have gotten worse in the context of international administrations. For example, when the special rapporteurs on extrajudicial summary or arbitrary executions, on torture, and on violence against women conducted on-site visits in East Timor, their report did not allude to the possibility that UNTAET staff might have committed human rights violations.⁴⁶

It would seem that there are essentially two lessons to be learned from the inadequacy of the mechanisms currently in place: first, a self-reflexive human rights focus should become as much part of the UN's internal accountability approach as good administrative practices already are; second, the existing mechanisms need to be modified, or a new mechanism created, so that the UN will have at its disposal an internal human rights watchdog that would be truly independent, capable of receiving complaints about the human rights dimension of UN activities, and empowered to conduct thorough investigations and to provide effective remedies. In short, the UN needs an office whose characteristics resemble very much those of a human rights ombudsperson.

The Ombudsperson Idea

The idea of an ombudsperson goes back to the beginning of the nineteenth century, notably to the Swedish Justitieombudsman, which has served since its creation in 1809 as the general model for ombudsperson-type institutions to the present day. The idea has been remarkably successful, with currently over ninety countries having some kind of public sector ombudsperson. Although in many of these countries the ombudsperson has originally and essentially been conceived as a supervisory instrument for public administration, a broader association of an ombudsperson with accountability and the protection of human rights has developed over the years. So much so that ombudspersons have come to be identified as a hallmark of good governance in a wide variety of institutions, be they public or private, national or, indeed, international.

As would be expected, ombudspersons differ widely in their

institutional status, powers, jurisdiction, and mode of functioning.⁴⁷ However, all ombudspersons share a number of basic features that strike a balance between the needs of accountability and institutional accommodation. At the minimum, ombudspersons are meant to be independent from both the body that created them and the agencies they oversee; they should be competent to receive complaints from the general public; they need to be empowered to carry out some form of independent investigation on those complaints; and they need to be able to take some form of remedial action. Beyond these defining features, because the flexibility of ombudspersons is largely due to the fact that they are not full-blown judicial bodies, their remedial powers are usually recommendatory rather than binding, and their ability to effect compliance rests primarily on the publicity of their reports rather than on formal prosecutorial competences.

Several international organizations have successfully established ombudspersons. Notably, the ombudsperson of the European Union (EU) has over the years established the office as an indispensable feature of EU governance. According to one author, the EU ombudsperson has provided EU citizens with “a cheap, flexible and accessible form of redress for individual grievances . . . has reinforced the rule of law in the Community . . . has complemented the role of the courts . . . and thus enhanced public confidence in EU institutions.”⁴⁸ Moreover, ombudspersons are seen as particularly useful in the early stages of developing an accountability framework in institutional environments initially unfamiliar with or inhospitable to the idea of accountability. For example, there have been various projects coordinated by nongovernmental organizations (NGOs) to create ombudspersons in the context of humanitarian emergencies.⁴⁹ Overall, the concept of ombudspersons would seem to provide an ideally flexible formula to address the UN’s accountability needs.

The UN’s Experience with Ombudspersons

The UN and its agencies are no strangers to the ombudsperson idea. In fact, under the catch-all heading “national human rights institutions,” the UN has considered (national) ombudspersons as a priority element of its “implementation and monitoring” methods as set out in the Vienna Declaration.⁵⁰ Through UN Development Programme (UNDP) or the UNHCR, the UN has supported many a nascent national ombudsperson institution.⁵¹

One interesting development is that the ombudsperson idea has been regarded as particularly relevant in postconflict scenarios, where it is seen to

serve as “a viable forum for the investigation and resolution of human rights complaints . . . [in situations] where the judicial system is weak, politicized, slow or otherwise incapacitated.”⁵² In this context, the international community has been increasingly solicited not only to advise states on the creation of ombudspersons institutions, but also to step in to actually manage some national ombudsperson institutions. For example, in the case of Bosnia, the human rights ombudsperson, created by the Dayton agreement, is appointed by the OSCE and has become an international civil servant.

The main responsibility of ombudspersons created by the international community has been to deal with complaints against various emerging national authorities and, in that respect, to serve as a model for future domestic ombudspersons. But, for our purposes, the significance of the ombudsperson in peacebuilding contexts where UN staff or troops with a UN mandate are deployed is that, for the first time and unlike in purely domestic settings, it also potentially brings the UN itself under the supervision of such institutions.

However, the UN’s reaction has been typical of the institution’s ambivalent attitude toward such developments, showing both the promise and the limits of its accountability. On the one hand, there are signs that the UN may slowly be picking up on the need to give its accountability-promotion approach a self-reflexive turn. As early as 1995, for example, the Secretariat’s Department of Peacekeeping Operations (DPKO) suggested the creation of an ombudsperson for each peacekeeping mission,⁵³ a suggestion that was then taken up officially by the secretary-general⁵⁴ and several UN bodies.⁵⁵ It has also been suggested that a unit be set up within the UN’s Department of Humanitarian Assistance that could “serve as ombudsman to which any party can express a concern related to provision of assistance or security.”⁵⁶ In a similar vein, there are discussions to establish special-issue ombudspersons for the most vulnerable groups—notably refugees, internally displaced persons (IDPs), women, and children. However, if one considers that some of the worst abuses occurred as early as 1994, it is noteworthy that it took a relentless campaign of sensitization before the secretary-general’s proposal was taken up by an informal working group of the Security Council in 2000,⁵⁷ where it seemed destined to further bureaucratic meandering.⁵⁸

The issue has nonetheless assumed a new dimension in the last generation of peace operations, where the UN exercises statelike functions or, as with fully international administrations, is the main sovereign in a particular territory. In Bosnia, even though the Office of the High Representative exercises some statelike functions and the human rights ombudsperson’s jurisdictional clauses were drafted in broad and seemingly all-embracing terms,⁵⁹ the immunity granted to the Office of

the High Representative and the International Police Task Force has meant that in effect UN behavior has been considered off-limits—although interestingly this has not prevented the ombudsperson from at least a measure of informal *bons offices* and even the occasional public communication to settle issues of accountability.⁶⁰

However, a major symbolic turning point seemed, for a while at least, to have occurred in Kosovo where an ombudsperson is specifically asked to “investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution.”⁶¹ The ombudsperson is managed by the OSCE and not by the UN, but it has clearly understood its mandate as covering both UNMIK and Kosovo Force (KFOR). The Kosovo ombudsperson has emerged as a key institution in the reconstruction of Kosovo, handling dozens of complaints covering the whole range of human rights, the great majority of which had either UNMIK or KFOR as respondents. The ombudsperson’s main input has been to monitor the conformity of several UNMIK regulations with international standards, but in some cases he has gone so far as to recommend that criminal proceedings be initiated against certain members of UNMIK. Specific deadlines have been set for UNMIK to modify certain regulations or to investigate certain cases of wrongdoing.

Despite these successes, this image of emerging accountability has been substantially blurred. The ombudsperson is essentially an OSCE institution, tolerated rather than supported by the UN. The UN’s cooperation and responsiveness record vis-à-vis the ombudsperson has been dismal. The ombudsperson has been denied access to prisons under UN administration contrary to the UN’s own regulations. Several if not most of his queries to UNMIK have not elicited any form of response from the international presence, even though they concern potentially grave violations of human rights. Of the few responses obtained from the special representative of the secretary-general (SRSG), many were either to the effect that UNMIK authorities basically “did not agree” with the ombudsperson’s viewpoint (implying that UNMIK’s own assessment of the issues at stake was more authoritative than that of the ombudsperson, who was set up for that purpose); that the violations were justified on the grounds of the existence of a “threat to international peace and security” (implying that a state of emergency was present even though the ombudsperson had clearly argued that it was not); or that UNMIK had “the full support . . . of key members of the international community” (implying that political support could be a substitute for adherence to the rule of law).

Most problematically, UNMIK has promulgated a regulation that grants immunity to both its staff and KFOR's staff.⁶² In his "Special Report No. 1," Marek Antoni Nowicki, the ombudsperson, decided that immunity for UNMIK and KFOR staff was "not consistent with international conventions for human rights and fail[ed] to protect individuals in [Kosovo] from arbitrary behaviour by UNMIK and KFOR or by their personnel." Just before UNMIK's deadline to repeal the legislation expired, the SRSG answered with a letter announcing "further consultations with UNHQ and others."⁶³ This is the last that has been heard of the UN's intent to deal with this embarrassing question.

The UN's mixed experience with ombudspersons in the specific context of peace operations would seem to have a variety of lessons to yield. The first is that when the political will is there, ombudspersons seem ideally suited to the UN's accountability needs and provide a much-needed channel for civil society to voice specific complaints. The second lesson is that institutional resistance remains high, and encouraging the creation of a public-oriented ombudsperson is likely to be an uphill struggle. The third, and perhaps most important, lesson is that, despite the difficulties, there seems to be nothing impossible in theory about having ombudspersons exercise vigorous scrutiny over the UN itself.

However, peace operations ombudspersons, even if they function satisfactorily, meet only a fraction—albeit an important and highly visible one—of the UN's accountability needs, which, as we have argued above, extend beyond the confines of such contexts. Moreover, there may be something about the ad hoc way in which they were created, not to mention their hybrid half-international/half-national status, that may have made them particularly unsuited to take on the UN. Therefore, the kind of general and truly comprehensive UN accountability envisioned here seems to point clearly toward the need for a truly systemwide ombudsperson.

Toward Full Accountability: An Ombudsperson for the UN?

Three reasons would appear to militate in the direction of creating an ombudsperson for the UN. First, the existence of an ombudsperson office would entrench the idea of accountability in the UN's structure, where the current forays in this direction are hampered by administrative inertia and political procrastination. The permanent availability of an ombudsperson would improve the system's reactivity, a key feature in ensuring that accountability is not simply an after-the-fact corrective but a continuous process. Second, a systemwide ombudsperson with a suitable mandate would give accountability the holistic perspective that it has so far lacked,

sending the clearest signal to date that the UN will consider itself accountable not only in certain specific contexts but in all its activities. Third, a permanent ombudsperson would have a continuity that would both safeguard its independence and allow it to develop the requisite know-how and authority. If nothing else, a UN ombudsperson office could contribute to the coordination and streamlining of the current sprinkling of accountability initiatives in diverse sectors of UN activity.

A systemwide ombudsperson institution would not replace existing ombudspersons institutions in peace operation contexts that have a reconstruction role and often provide the impetus for subsequent national institutions. But a systemwide institution could usefully take on all the issues within the ombudspersons' mandates in peace operations that are related directly to issues of UN accountability. Contrary to peace operations ombudspersons, a systemwide institution would do so from the standpoint and with the authority and confidence of a centralized organ integrated into the UN machinery, rather than from one of the UN's scattered outposts. It would also release some of the pressure on ombudspersons operating in reconstruction contexts by limiting their mandate to complaints against local authorities.

Such an ombudsperson could have several functions. Above all, the office could serve as a focal point within the organization for all issues related to accountability. It should be authorized to receive and follow up on complaints not only from "victims," but possibly also from any third-party individual or group or any UN staff member. However, like the EU ombudsperson, it should also be competent to act on its own initiative. It should have the broadest possible investigatory powers, including access to all relevant documents and possibly the competence to summon UN staff for hearings. On the basis of such comprehensive investigations, it would then make recommendations to the relevant UN authorities regarding appropriate remedies. The ombudsperson should be able to recommend transfer or dismissal of personnel, structural or organic reforms, and appropriate compensation to victims.

Ultimately, recommendations would probably be of an advisory nature, but they should be public and thus lend the ombudsperson some informal sanctioning power. In the case of outright noncompliance by UN agencies, the ombudsperson might be able to refer a matter directly to the General Assembly—as the EU ombudsperson can do in relation to the European Parliament—or, where applicable, to relevant domestic authorities, including national ombudspersons.

With regard to the ombudsperson's jurisdiction, the receivable complaints would have to be in relation to allegations concerning the adverse human rights impact of UN activities. The question of which

types of human rights violations would fall within the ombudsperson's jurisdiction is multifaceted and difficult to answer briefly. However, in principle, it would be hypocritical to exclude from his or her jurisdiction any of those human rights that are protected within a UN framework, notably those contained in the International Bill of Rights.

The UN should endorse accountability for all its organs, programs, and agencies—and for its immediate agents, within the exercise of their functions. Clearly the UN cannot be accountable for all behavior that is even remotely attributable to it. A test of proximity, of causality, and of the significance of the prejudice caused would be necessary. The UN is not accountable in the same way for its failure to prevent genocide in Rwanda, the routine shortcomings of its international administrations, and the sporadic outbursts of violence by a group of peacekeepers. But it is important to understand that, rather than an all-or-nothing approach, what may be called for is a capacity to find different types of responses tailored to the harm done.


In mixed jurisdiction contexts, such as peacekeeping operations, the ombudsperson should have jurisdiction over any conduct that is attributable to the UN, regardless of whether it may also be attributable to state actors. Even if primary jurisdiction is with state authorities, the ombudsperson should be able to seize the matter and—like the different special rapporteurs of the commission and subcommission—regularly be informed of the domestic investigation process and, where necessary, put pressure on domestic authorities to comply with international human rights standards. In emergency cases, the ombudsperson should be allowed to order interim measures before a complaint is formally investigated, to safeguard individuals from potentially irreversible violations of their rights.

With regard to the core characteristics of the ombudsperson office, the experience with the OSCE-sponsored ombudsperson in Kosovo clearly shows that a UN ombudsperson cannot really be contracted out and that a systemwide ombudsperson, to be taken seriously, needs to have an institutionally enshrined position. Yet, at the same time, an ombudsperson must be able to act independently, so that purely in-house attempts to ensure accountability risk reproducing some of the travails that gave rise to the accountability *problématique* in the first place.⁶⁴ Thus, to guarantee independence, the holders of the office should be chosen from outside the UN system—for example, from among national ombudspersons with a highly rated record of impartiality. In addition, the ombudsperson should enjoy security of tenure and full recruitment and budgetary competence.

In terms of an institutional arrangement, the ombudsperson could in theory be “niched” within an existing department or unit. One possibility is

for the inspector-general's mandate in the OIOS to be expanded to include a clear human rights focus. Another possibility is for the UNHCHR to be asked to take on the role of ombudsperson, given that the office is well equipped to oversee the UN's own human rights record. However, it is probably not coincidental that neither of these organs has taken up anything remotely resembling an ombudsperson-type role in the past, even though a creative interpretation of their mandate could have led them to do so. Also, it is inherently difficult to add a human rights brief to an organ like the OIOS, whose institutional culture is rooted in financial and management accountability. Another possibility is that there is a deeper contradiction involved between the UNHCHR's need for institutional support when carrying out general human rights activities and the risk of alienating key institutional partners as a result of internal scrutiny.

Hence, if the UN wanted to send a strong signal to the world community that it was serious about accountability, the best solution would point in the direction of a new, *sui generis* organ along the lines of the EU ombudsperson. The decision to create such an organ would most likely fall within the General Assembly's mandate, with the assembly possessing the power to elect the ombudsperson. In turn, and by analogy with the EU ombudsperson, the UN ombudsperson would report directly to the General Assembly, ensuring the ombudsperson's accountability. Although legitimate concerns about costs are bound to arise, centralizing the tasks of the ombudsperson in one organ would probably be a much more cost-effective measure than the multiplication of theater- or agency-specific mechanisms.

Clearly, much more research needs to be carried out on the precise institutional and jurisdictional configuration of a UN ombudsperson. But it should already be clear that a strong and authoritative institution with UN accountability as its primary goal could greatly help the UN approach the vision Secretary-General Annan expressed during his Nobel Prize acceptance speech—that is, to “place human beings at the centre of everything we do.”⁶⁵ 

Notes

Florian Hoffmann is assistant professor of law and the deputy director of the human rights center, the Núcleo de Direitos Humanos, of the Law Department at the Catholic University of Rio de Janeiro (PUC-Rio, Brazil). Frédéric Mégret is assistant professor of international human rights at the faculty of law at the University of Toronto. His research interests include international law and relations.

1. See, for example, Robert Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (The Hague: Martinus Nijhoff,

1968), pp. 168–196.

2. See Mats R. Berdal, “Whither UN Peacekeeping?” Adelphi Paper 281 (1993): 46–47; also see Philip Smucker, “U.N. Force in Bosnia Linked to Smugglers—Foreign Fighters Run Illegal Trade,” *Washington Times*, 9 August 1996.

3. See, generally, African Rights, “Somalia: Human Rights Abuses by the United Nations Forces” (July 1993).

4. Anthony de Palma, “Canada Accuses 47 of Misconduct in Bosnia,” *New York Times*, 18 January 1996.

5. See UN Doc. E/CN.4/2001/73 (23 January 2001) and UN Doc. A/51/306 (9 September 1996).

6. Amnesty International, “Federal Republic of Yugoslavia (Kosovo): Setting the Standard? UNMIK and KFOR’s Response to the Violence in Mitrovica,” 13 March 2000.

7. OSCE, Department of Human Rights and Rule of Law, “Kosovo: A Review of the Criminal Justice System,” no. 1 (September 2000–28 February 2001), section 3, II, (a).

8. Jarat Chopra, “The UN’s Kingdom of East Timor,” *Survival* 42 (autumn 2000): 31–34.

9. See Amnesty International, “Report—United Nations International Criminal Tribunal for Rwanda: Trials and Tribulations” (April 1998).

10. See Alexandra Zavis, “Sex Abuse of Refugees Widespread in W. Africa—Girls, Women Exploited Local Aid Workers at Camps, Study Finds,” *Washington Post*, 12 May 2002.

11. Guglielmo Verdirame, “Human Rights and Refugees: The Case of Kenya,” *Journal of Refugee Studies* 12, no. 1 (1999): 63.

12. “Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations,” UN Doc. A/RES/51/194 (10 February 1997), par. 15.

13. For example, in the context of gender issues, see “An Agenda for Development, Report of the Security Council,” UN Doc. A/49/665 (11 November 1994), par. 74.

14. On the need for greater World Health Organization (WHO) accountability, see Kent Buse and Amalia Waxman, “Public-Private Health Partnerships: A Strategy for WHO,” *Bulletin of the World Health Organization* 79, no. 8 (2001): 751.

15. See Florian Hoffmann and Frédéric Mégret, “The United Nations as a Human Rights Violator?” *Human Rights Quarterly* 25, no. 3 (May 2003): 314–342.

16. See, for example, UN Doc. E/CN.4/2001/73 (23 January 2001).

17. See, for example, UN Doc. S/Res. 1265 (17 September 1999).

18. There are, for example, the “United Nations Guidelines for Peace-Keeping,” UN Doc. TU-101/95.

19. United Nations, “Multidisciplinary Peace Keeping: Lessons from Recent Experience” (April 1999).

20. UN Doc. A/57/465 (11 October 2002).

21. Mark Malan, Phenyio Rakate, and Angela McIntyre, “Peacekeeping in Sierra Leone—UNAMSIL Hits the Home Straight,” Institute for Security Studies Monograph 68 (January 2001), note 48.

22. See, inter alia, SC Res. 1325 on women (31 October 2000); SC Res. 1379 on children (20 November 2001); SC Res. 1314 (11 August 2000); SC Res. 1261

(25 August 1999); SC Res. 1208 on refugees (19 November 1998); SC Res. 1318 on civilians in armed conflict (7 September 2000); SC Res. 1296 (19 April 2000); and SC Res. 1265 (17 September 1999).

23. UNTAET press release, 6 July 2001.

24. UN Doc. A/55/163-/S/2000/712 (19 July 2000).

25. Thalif Deen, "A Hard Look at UN Peacekeeping," *Daily Mail and Guardian*, 3 July 1997.

26. UN Doc. S/1999/957 (8 September 1999).

27. See, for example, UN press release, 24 June 1997 (UN Doc. SG/SM/6271).

28. UN Doc. A/57/465 (11 October 2002).

29. See Ingvar Carlsson, Han Sung-Joo, and Rufus M. Kupolati, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (New York: United Nations, 1999); and "Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: 'The Fall of Srebrenica,'" UN Doc. A/54/549 (15 November 1999).

30. Ray Murphy, "International Humanitarian Law Training for Multinational Peace Support Operations—Lessons from Experience," *International Review of the Red Cross*, no. 840 (December 2000): 953–968.

31. UN Doc. A/57/465 (11 October 2002).

32. Deen, "A Hard Look at UN Peacekeeping."

33. Jarat Chopra, *Peace-Maintenance: The Evolution of International Political Authority*, Vol. 4: *Routledge Advances in International Relations and Politics* (London: Routledge, 1999), p. 197.

34. Amnesty International, "Federal Republic of Yugoslavia (Kosovo)."

35. Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises, 13 June 2002, E. 10 (e) (emphasis added).

36. International Law Association, "Report of the Sixty Eighth Conference (Taipei)" (1998).

37. See, in particular, Pierre Klein's masterly opus on the question, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (The responsibility of international organizations in domestic and international law), (Brussels: Bruylant/Editions de l'Université, 1998).

38. See A/48/640 (23 November 1993), pp. 2, 4.

39. *Ibid.*, pp. 1, 20.

40. UN Office of Internal Oversight Services, "Office of Internal Oversight Services: Genesis, Mission, Methods, Impact" 3 (2000), available online at www.un.org/Depts/oios/oios_03.pdf.

41. For example, although the OIOS investigated the UN mission in Bosnia and Herzegovina (UN Doc. A/53/683 [20 December 1999]); the UN Angola Verification Mission (UN Doc. A/54/548 [16 November 1999]); the UNWRA office (UN Doc. A/54/367 [21 September 1999]); and the International Criminal Tribunal for Rwanda (UN Doc. A/55/759 [1 February 2001]), it did so, respectively, to examine management and service of ration contracts, allegations of fraud in travel, improper tenders, financial impropriety, and corrupt practices.

42. UN Doc. A/57/465 (11 October 2002).

43. UN Doc. E/CN.4/Sub.2/RES/1997/34 (28 August 1997).

44. UN Doc. E/CN.4/1998/96 (16 January 1998).

45. See E/CN.4/1998/96 (16 January 1998) and CAT/C/SR.446 (22

November 2000).

46. UN Doc. A/54/660 (10 December 1999).

47. See Carolyn Stieber, "57 Varieties: Has the Ombudsman Concept Become Diluted?" *Negotiation Journal* 16 (2000): 49.

48. Katja Heede, "Enhancing the Accountability of Community Institutions and Bodies: The Role of the European Ombudsman," *European Public Law* 3 (1997): 588.

49. Ombudsman Project, "An Ombudsman for Humanitarian Assistance? A Report on the Findings from a Feasibility Study," available online at www.hapgeneva.org/OMBUDSMAN/esum.htm (posted June 1998).

50. UN Doc. A/RES/48/134 (4 March 1994).

51. UNDP, for one, currently supports postconflict ombudspersons in twenty-one countries, in many cases jointly with the OHCHR; see Bureau for Development Policy, Management Development and Governance Division, *Survey of UNDP Activities in Human Rights* (New York: UNDP, 1999).

52. Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection," *Harvard Human Rights Journal* 13 (spring 2000): 1.

53. See DPKO Lessons Learned Unit, "The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM) April 1992–March 1995."

54. UN Doc. S/1999/957 (8 September 1999).

55. UNAIDS Expert Strategy Meeting on HIV/AIDS and Peacekeeping, 11–13 December 2000.

56. John Eriksson, "The International Response to Conflict and Genocide: Lessons from the Rwanda Experience," in *Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda* (March 1996): finding C-6, recommendation a(ii).

57. UN Doc. S/RES/1265 (17 September 1999).

58. The proposal has since been transferred to the Special Committee on Peacekeeping Operations of the General Assembly where it is still being discussed; see S/2000/119 (2000), and A/57/767 (2003). In a recent Report of the Secretary-General on the Implementation of the recommendations of the Special Committee on Peacekeeping Operations, he cited a DPKO policy proposal that would create the post of personal conduct officer, to "act as the mission's ombudsman," in each field mission; see A/58/694 (2004), par. 72.

59. See Article 2(1) of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina.

60. The Human Rights Ombudsman of Bosnia and Herzegovina, "'Nobody Should Be Above the Law'—The Human Rights Ombudsman Calls for a Swift Investigation of the Bilbija Case," press release, 26 February 2003.

61. See UNMIK Regulations, especially sec. 3, in UN Doc. UNMIK/REG/2000/38 (30 June 2000) (emphasis added).

62. UNMIK Regulation 47 (18 August 2000).

63. Letter of Hans Haekkerup to Marek Antoni Nowicki, 28 June 2001.

64. This is a criticism that has sometimes been made, for example, of the OIOS, notably in the context of the Western Sahara investigation.

65. See Kofi Annan, "We Can Love What We Are, Without Hating What—and Who—we Are Not," UN press release, UN Doc. SG/SM/8071 (10 December 2001), available online at www.un.org/News/Press/docs/2001/sgsm8071.doc.htm.