

*Civis Sacer: Peacekeeper Abuse and International Order*

by

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B.P.A.P.M., Carleton University, 2012

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of the Requirements for the Degree of

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## **Supervisory Committee**

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Dr. Scott Watson (Department of Political Science)  
**Supervisor**

Dr. Claire Cutler (Department of Political Science)  
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## Abstract

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Although United Nations Peacekeeping Operations (UNPKO) are said to protect humanitarian rights, peacekeepers are found to commit sexual assault, war crimes, and gross negligence. International legal immunities exempt peacekeepers and the UN from criminal liability and civil litigation. Whereas the literature on peacekeeper abuses conceptualizes the problem to be one of implementation of immunities, this thesis contends that such views are uncritical towards peacekeeping, immunity itself, and *international society* that organizes UNPKO. I theorize that the legal structures permitting such abuses (e.g. the UN Charter) render individuals expendable and hence *objectified* for the sake of international order. The argument presents a case study of the Srebrenica Massacre and ensuing legal cases to illustrate how immunities *objectify* individuals. Drawing on Agamben's theory of *homo sacer*, I introduce the term *civis sacer* to describe individuals excluded from international law with UNPKO immunities that *objectifies* them for the sake of maintaining international order.

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## List of Acronyms and Abbreviations

ARIO: Articles of Responsibility for International Organizations

ARS: Articles of Responsibility for States

CPIUN: Convention on the Privileges and Immunities of the UN

DRC: Democratic Republic of Congo

Dutchbat: Dutch Peacekeeper Contingent at Srebrenica

ECHR: European Convention on Human Right

ECtHR: European Court of Human Rights

HDC: Hague District Court

ICTY: International Criminal Tribunal of Yugoslavia

IR: International Relations

MOU: Memorandum of Understanding

NGO: Non-Governmental Organization

NSA: Non-State Actors

OIOS: Office of Internal Oversight Services

SOFA: Status of Forces Agreement

UN: United Nations

UNGA: United Nations General Assembly

UNPROFOR: United Nations Protection Force

UNSC: United Nations Security Council

VRS: Army of Republika of Srpska

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aleksandrs (sasha) kovalčuks

26.08.16

## Dedication

*For the Movement of Mothers of Srebrenica and Žepa Enclave*

## Introduction: Elegy for War

“Whereof one cannot speak, thereof one must be silent.”

– Wittgenstein (2001, p.89)

I do not know the smell, sights, or sounds of war, of its corpses, blood, and cries. And yet my field of study, to which I aspire to contribute, International Relations (IR), is obsessed with violence, suffering, and death. Like me, many of its authors know only representations of war, and some benefit from commenting on its spectacle. A humanitarian zeal characterizes many IR conflict and peace studies that present themselves as providing solutions. Rushing to solve the issue of war *omits* the stench of warfare that underlies their professional analysis and object of study (Muppidi, 2012, pp.3-7). But not all silences are made equal. Silence can both obscure a truth and produce meaning (Haidu, 1992, p.278). Moments of silence for remembrance can “ring loud”; conversely, silent bystanders can hush wails. Whether it is in politics, history, or law, any silence on death and suffering can serve to legitimize its causes and/or perpetrators. Thus, with great caution I will be engaging with the perennial issue of war and the normative calls to resolve it.

War distances the death of others from our experience placing them beyond moral consideration. War begets a morality faint to condemn the conditions which enable its practice. War frames life to be *disposable*, its occurrence as something other and outside ordinary human affairs, and taken as something of a given. Soldiers do not murder one another, and their slain enemies are “ungrievable” deaths (Butler, 2009, p.31), absent in their opponents’ memorials. These omissions do not necessarily *call* for action to resolve

war; automatically detecting such an outside call would be a rush to conclusions.

Respecting the war-dead, those who “rest in peace”, requires appreciating the silences that the term ‘war’ produces. So I will begin by taking heed of the role silence will play in this work.

Now the Sirens have a still more fatal weapon than their song, namely their silence. And though admittedly such a thing has never happened, still it is conceivable that someone might possibly have escaped from their singing; but from their silence certainly never.

— Kafka (1983, p.430)

This thesis concentrates on two silences regarding peacekeeping, one among practitioners and academics engaged in redressing peacekeeper abuses and another within international law itself, which actually enables the violence that abuses represent. And although scholars and policymakers may pass over with silence regarding their role in legitimating some forms of war, those silences cannot really be escaped.

### **Critiquing Order**

This thesis critiques how humanitarian interventions, in particular United Nations Peacekeeping Operations (UNPKO), perpetuate abuse and construct narratives demarcating structural critiques of peacekeeping as “off-limits” and ultimately unspeakable. One focal point is how policymakers and mainstream academics state that there exists a need for order in the international realm which justifies peacekeeping missions. Peacekeeping is undertaken by the international community for the sake of international order but paradoxically contributes to those legal structures that permit peacekeeper abuses. International law governing peacekeeping then serves to *objectify*

individuals by way of rendering them usable and ab-usable by peacekeepers. Justification and rationalizations for international laws governing peacekeeping entrench silences within the discourse that promotes international order. Essentially, individuals are objectified for the sake of international order, as will be shown in the case study of the Srebrenica Massacre, the United Nations (UN) response, and related legal cases from its fallout. This case study and subsequent analysis draws on the work of Giorgio Agamben and introduces the term *civis sacer* to describe individuals excluded from international law in ways that makes them vulnerable to violence and *objectification*. I will now elaborate on these points of interest in turn.

There is a disturbing irony when UN peacekeepers —soldiers meant to uphold and defend human rights — commit abuses on an institutional level. According to official UN figures from 2007 to 2015, 729 allegations of “Sexual Exploitation and Abuse” and 1851 allegations of “Serious Criminal Activity”<sup>1</sup> have been alleged against peacekeepers (Office of Internal Oversight Services (OIOS), 2016a).<sup>2</sup> Other isolated, though probably under-reported, allegations and incidents of abuse include murder, corporal punishment,

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<sup>1</sup> This category encompasses the following actions: “Serious or complex fraud, other serious criminal act or activity, abuse of authority or staff, conflict of interest, gross mismanagement, waste of substantial resources, all cases involving risk of loss of life to staff or to others, including witnesses, substantial violation of United Nations regulations, rules or administrative issuances.” These statistics include abuses by civilian officials and contractors. (United Nations General Assembly (UNGA), 2004, p.9).

<sup>2</sup> I chose not to collapse the two categories dividing peacekeeper abuses because those listed in Serious Criminal Activity were broad and all-encompassing, which risks obscuring the gendered dimension of some abuses. I note my decision because gendering analysis can potentially reify divisions that perpetuates the image of the feminine as being “weak” and whose concerns are different from “true” political issues. Gendering the analysis and highlighting women’s needs in UN efforts reinforces a binary in gender assumptions that reinforces a masculine dominated world (Orford, 2002, pp.282-3). Sexual crimes receive a lot of institutional and media attention that perpetuates the view, also evident in this research, that women have little agency during peacekeeping (Simic, 2012, pp.53-5; Higate & Henry, 2004, p.482). That division can be seen in the UN public statistics that separate sexual and non-sexual crimes. Moreover, Carpenter (2006) notes how the policy, scholarly, and legal fixation on the abuse of women and children suggest that men do not also experience wartime sexual abuse. So despite that UN peacekeeping has been around since the 1950s, it is only since the 90s that abuses have been recorded. Prominent and well-documented cases tend to involve sexual abuse and exploitation (Burke, 2014, 1, Odello, 2010, pp.348-50).

pillage, attacks against civilians, arbitrary arrest, unlawful detention, and torture (Knoops 2004, pp.12-23; Lewis, 2014, pp.596-8). Many of these peacekeeping abuses occur with the tacit complicity of superiors (Neudorker 2015, p.35; Burke, 2014, p.60). Continued UN efforts to tackle the issue have proven ineffectual (Simic, 2012, 40-51; Odello 2010, 391). This was made clear recently by Ander Kompass (2016), the whistleblower who revealed the most recent spate of peacekeeper abuses in 2014. He resigned in protest over the UN's systematically dysfunctional response to the abuse scandal.

Due to the endemic nature of peacekeeping abuses, it is no surprise that there exists a broad interdisciplinary literature on the subject (Zwanenburg, 2005, p.3). Condemnation and outrage towards abuses is consistent and it tends to seek accountability for those responsible for atrocities. When commentators are able to note that the United Nations (UN) and peacekeeping personnel are legally immune from civil suits and criminal prosecution — precluding “justice” and enabling impunity — the immunities become the problem. Such a state of affairs represents a *legal silence* with respect to those harmed individuals and their families for whom the law denies redress, including apologies from peacekeepers and the UN. Moreover, the focus on *international criminality*, as one proposed solution, obscures the manner in which international law contributes to abuses by perpetuating a discourse of individual passivity and victimhood (Henry, 2014, 104). Ultimately, the extent of peacekeeper abuses suggests a structural problem with how peacekeeping and international law *order* the world. States, as a community, *create continuity* in the world, in part with international law, by legitimating and using their coercive sovereign state power (Reus-Smith, 2004, p.43-4). Peacekeeping operations are one such example of a legitimized collective use of force by states. And

so, this thesis seeks to identify the *type of order* to which peacekeeping immunities contribute, a question necessarily bypassed in analyses that seek to improve the international law of peacekeeper immunities and the functioning of UNPKO. Before outlining the thesis organization, I would like to detail why I focus on silences of this issue and criticize those seeking a practical solution to the problem.

### Problématique of “Peace”

*“inter arma silent leges. Etiam si tacent, satis dicunt”*  
 (Among arms, laws are silent. Even if they are silent, they say enough)

— Cicero in Rengger (2013, p.156-7)

Yet, despite the widespread condemnation of immunities, they are presented as necessary for peacekeeping both in international law and in legal scholarship. UN immunity functions effectively to impede UN efforts to prevent potential member-state interference (Schmalenbach, 2015, 316, Burke, 2014, 68). Similarly, peacekeeper immunity guarantees contributing states that their troops will be protected from the precarious legal environment of conflict zones (Neudorfer, 2015, 16). So, efforts to rectify abuses concentrate on closing UNPKO immunities’ “accountability gaps” (Krieger, 2015), and “jurisdictional gaps” (Burke, 2014, 70), as well as untangling the “Gordian Knot” between the function of these immunities and a need for accountability (Schmalenbach, 2015).<sup>3</sup> For analysts, practitioners, and scholars striving for “peace,”

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<sup>3</sup> Kimberly Trapp (2015) does identify a silence she ascribes to a gap between international legal norms and their implementation with respect to genocide. She notes that states can legally continue to support Non-State Actors (NSA) who commit crimes in other states and remain free from responsibility for NSA crimes (pp.243-4). So, although it is laudable that *silence* is acknowledged, her account conceptualizes silence as an incongruity in the international law on genocide but not as a structural cause *per se*.

abuses in this way become by-products, unfortunate occurrences; and those harmed by abuses are treated as mere pieces in a puzzle to solve (Richmond, 2005, 155). In this manner, practices draw on humanitarian rhetoric that may actually cause the very human casualties about which the literature is notably *silent*. So in addition to addressing the meaning of the abuses, and the role of international law in its *silence*, this thesis seeks to problematize approaches to peacekeeper abuses that ultimately legitimate the ends of the *international order* peacekeepers uphold.

Peacekeeping, seemingly operates as militaries do, unable to hear and respond to the harms it causes. The literature writing about peacekeeper abuses interpret *silence* as if it is war that *quiets laws* during conflict. Yet those writing about international *legal silences* do not speak to what the structural role of international law says about the meaning of peacekeeper abuses. I aim to problematize appeals to use law to solve the very problems that law creates. When read in legal terms, peacekeeper abuses reinscribe the normative order that the law serves to uphold. Putting aside all the pitfalls of undertaking any representation of violent events, with the near impossibility of doing them “justice”, legal interpretations efface their causes, effects, and solutions. Using the law to oppose the legal treatment of those harmed by peacekeepers and their families co-opts their cause by being the same law that justifies, configures, and tolerates the *type of violence* done to them. With humanitarianism justifying both international law and UNPKO, the causes and the grounds for apology for abuses are conflated. Both the international law and humanitarian discourses of UNPKO are tied to the interests of the states involved, and those discourses cannot redouble against their political origins. In that sense, calls for the law, in the name of humanitarian ideals, cannot address the

violence of peacekeeper abuses; they inherently speak over/past the abuses' politics, thus creating a *legal silence* with respect to the political origins of UNPKO abuses. The violence of peacekeeping stems from a harmful *objectification* of individuals by a structure, *international society*, which permits and contributes to harm and even the loss of life during peacekeeping activities as an expedient means of upholding *international order*. This thesis conceptualizes peacekeeper abuses in a way that emphasizes how their *violence* originates in UNPKO international legal immunities that *objectify* individuals and whose deeper meaning is *silenced* within the discourse in order to appear consonant with international law.

### **Thesis Organization**

Chapter one details the obfuscation of peacekeeping harms by UN and state policymakers, established NGOs, and human rights groups. This is a literature I label *peacekeeper unaccountability* within what I term the *paradigm of accountability*. Since these approaches interpret peacekeeper abuses as international legal failings and engage with international law to remedy the issue, they both instantiate and help to legitimize peacekeeper violence that emanates from the community of states (read: *international society*). The paradigmatic definition of the term *accountability* accepts the validity of international law as a solution to crimes and the primacy of states to determine those laws. By way of an internal critique of the literature on *peacekeeper unaccountability*, peacekeeper immunities can be interpreted as stemming from collective state actions which comes to reveal the structural role of *international society* in enabling peacekeeping abuses. The field of *peacekeeper unaccountability* simply assumes and accepts the primacy and legitimacy of state sovereign subjectivity because within its

*paradigm* it is the state that ought to punish wrongdoing peacekeepers or provide compensation to those it harmed. Moreover, the humanitarian rhetoric in the *paradigm of accountability* maintains that individuals are (mistreated) nascent international subjects in international law. This view of individuals glosses over how they are in effect *objectified* for the sake of *international order*. As in the cases of women, children, and slaves, but also refugees, migrants, and soldiers, international law creates the potential for states to *dispose* of individuals to advance the cause of “true” subjects (states in this case). This much can be seen in the convergence of the purposes of the UN Charter and *international society*; both require state subjects to have exceptional *sovereign* powers to suspend their laws and utilize all possible means, population and territory alike, to maintain a stable *domestic* and *international order*. International law, however quiet to peacekeeper abuse, *says enough* about the legal structures that enable peacekeeping harms.

Peacekeepers are but one manifestation of this *objectification*, one in which those they harm are treated in international law as an unfortunate *cost* but a *cost* that is nonetheless *expedient*. Those whom peacekeepers harm become a *cost* to be borne, by states and the UN, who assume responsibility for those affected by peacekeeping. Toleration and rationalization of harms becomes an expedient means by which to shore up the international order.

Chapter two provides a case study of the process of *international societal objectification* of individuals during UNPKOs and the international legal processes that accomplish it. Specifically, this chapter evaluates the history, reasoning, and the legal scholarly analysis of the case *The Mothers of Srebrenica v. The Netherlands and the UN* heard by Dutch courts and the European Court of Human Rights (ECtHR). There,

representatives of family members of individuals slain during the Srebrenica Massacre argued before a Dutch civil court, and eventually before the ECtHR. They sought an apology, damages, and compensation from the Dutch state and the UN for both actors' decisions during the UNPKO of the Bosnian War, the UN Protection Force (UNPROFOR). The case resulted in two notable decisions. First, a precedent-setting ruling by the ECtHR in 2013 that upheld UN immunity as inviolable.<sup>4</sup> Second, a ruling by the Hague District Court (HDC) in 2014 that found the Netherlands liable for damages.<sup>5</sup> For posterity, as legal scholarship would have it, the former case is hailed as protecting UN immunity and, however imperfectly, the practice of peacekeeping, whereas the latter case is decried for threatening future UNPKO and by extension *international order*. In the end, however, individuals register as objects in relation to states and both rulings confirm as much by rendering those harmed either as completely expendable for the sake of the UN or as a cost to be incurred by the Netherlands.

Chapter two draws on Giorgio Agamben to illustrate the *international societal objectification* of individuals. Agamben identifies within *state sovereign exceptionality* the ability to suspend lawfulness and /or exempt lawlessness for the sake of a legal order that makes individuals *disposable*. How do peacekeeper immunities enact these legally exceptional exclusions? To specify the type of *objectification* that occurs during UNPKO, the second chapter introduces the term *civis sacer*. The term extends and redeploys the notion of *homo sacer* devised by Agamben (1998). He draws the term from Roman law

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<sup>4</sup> *Mother of Srebrenica v The Netherlands and the UN*, LJN: BW1999, Dutch Supreme Court, 13 April 2012 and *Stitching Mothers of Srebrenica and Others against The Netherlands*, App. No. 65542/12, European Court of Human Right, 11 June 2013.

<sup>5</sup> *Mothers of Srebrenica v the Netherlands* District Court of The Hague *Case No. C/09/295247 /* (Judgment of July 14<sup>th</sup> 2014).

the category for exiled individuals and who were subject to extra-judicial killing having being placed outside the state and its legal order. *Homo sacer* is an individual excluded from a sovereign's protection by losing their status of citizenship. Agamben applies the term in a contemporary setting to the figure of a concentration camp inmate or refugee, who is not executed within, but is invisible and outside law, making it possible to do violence to them. Sovereign power is used to maintain a distinction between those individuals to whom the law applies and to those who it does not. Resulting harms or death onto those excluded are *sacrificial* in nature because the violence committed towards them are an extra-legal ritual, being outside the parameters of the law. Sacrifice is denoted in the term *sacer* meaning sacredness.

Whereas the *homo sacer* refers to how states sacrifice individuals for the sake of a state's sovereign order, *civis sacer* denotes a similar process in *international society*. *Civis sacer* is an individual who is cast out of international law by peacekeeper and UN immunities, making it possible for *international society* to *objectify* and to render them dispensable. Both categories share the characteristics of being *objectified* for the sake of an order — whether of a state or international society. Peacekeepers represent an international legal order surmised of a body that attempts to maintain a semblance of civilized order within the decentralized, anarchical and brutish international political sphere. Peacekeeping is applied to pacify threats to international order that increasingly emanate from within states. *Civis sacer* is a sacrifice for the order international law upholds. That order centers around to maintain the capacity of states to exert their sovereign power over their citizens. The term *civis* signifies this linkage of citizenship to peacekeeping. *Civis* denotes civilian, citizen, and civility, from their root *civitas* (*state* in

Latin) and represents the inter-state legal system that is centered on the institution of citizenship (Pons, 2014, 141, Balibar, 2009, 24-5).

How is *civis sacer* a sacrifice? Peacekeeper abuses occur outside international law, beyond its reach. Violence inflicted onto *civis sacer* and *homo sacer*, originates from the *ability* to harm those individuals situated outside legality. Proponents of peacekeeping will point out that UN and peacekeeper immunity does not explicitly demand abuse. For those proponents, abuses appear as a rupture in the international political order and as an anomaly to humanitarianism. Framing the problem of abuses as one of *peacekeeper unaccountability* simply overlooks the structural preconditions for immunities — that abused individuals were *objectified* with their possible use and abuse for an international order which peacekeepers are sent to uphold. To maintain otherwise, regarding the nature of peacekeeper immunities begets a *silence* over those abused by peacekeepers.

silence is the antiword of speech, and at least as polyvalent, constitutive, and fragile. The necessary refuge of the poet, the theologian, and the intellectual, it is equally the instrument of the bureaucrat, the demagogue, and the dictator.

— Haidu (1986, p.278)

### **Thesis Limitations**

However unspeakable these atrocities may appear, responses aimed at resolving them, whether institutional or scholarly, do not necessarily give voice to individuals *silenced* in/by international law. I fear, however, that in my naming and identifying these *silences*, as in the field of *peacekeeper unaccountability*, this research also remains quiet. To answer Smith's calls to *sing* the world into being with care demands abnegating IR's gaze, imperceptible to others' suffering, and serving its own interests (p.514). Although this is admittedly a now tired observation, IR's obsession with war as a series of

naturalized events, with always already existing state actors, has caused the field not to question the premise of state primacy in their analyses (Smith, 2003, p.510). IR's own disciplinary origin is beset by such baggage, claiming Aberystwyth University as its birthplace, which took as its founding purpose the study of war in order to contribute to its eradication (Schmidt, 1998, pp.149-55). Speaking of *international* phenomena has effaced peoples worldwide who have too long been placed outside IR analysis (Smith, 2004, pp.514). International Legal scholarship and IR together have served to legitimate dispossession and sovereign violence done onto others in the name of the state (Anghie, 2005, pp.4-12). Those two fields gloss over not only war, but also imperial, colonial, and capitalist practices, which they depict as natural, normal, and acceptable. Although the study of international law now acknowledges as much, it skims over the role that its scholarship played in legitimating European colonialism (Neocleous, 2014, p.18). Herein lies the risk of reading into international law and IR to solve suffering so long invisible to these disciplines. In that vein, the research herein cannot provide concrete recommendations to solve the problem I present. To do so would be to reproduce the *instrumental logic* of the literature I will critique. Instead, I will speak to the *institutional silences* of contemporary political, bureaucratic, civil society, and scholarly rhetoric surrounding peacekeeper abuses.

## Summary

The Literature grappling with peacekeeper abuses has made the issue *sensible* (knowable) by framing the problem of *unaccountability* in terms of immunities. But rendering something knowable does not reveal whom any account of knowledge serves and addresses. To remain critical requires identifying and calling out larger structures that

enable *violence* (Cox, 1994) rather than simply ameliorating violent practices. As Balibar (2015) observes, political thought has tried to discern the historical processes producing social relations that determine the repetition of violence (p.9). Violence can *silence* a great deal – people and their will, nations and their movements — with its extraordinary and exceptional force. Violence in its original form defies representation and imagination, injecting horror into experience, leaving voids of meaning within and amongst affected individuals and communities. To make sense of the explosive capacity of violence, dialectical processes of narrative and representation crystallize into hegemonic discourses in history, politics, and sociology — discourses that seek to grasp the absolute and awe-striking capacity of violence that eludes understanding (Balibar, 2015, p.34). Just as Haidu (1994) critiques the trope of the Holocaust leaving history speechless, accepting such *silence* would equate to accepting the histories and discourses that makes Events incomprehensible understandable. Once a violent event is cast as unique, as an *Event*, something beyond comparison, as is done with Nazi Genocide, it becomes de-historicized and separate from conditions that exist to this day (pp.294-5). Atrocities are not singular events, and neither is encountering the ‘other’ that is any human being. Both are enmeshed in wider social, economic, cultural, and political phenomena (pp.282-3).

In that spirit, this research argues that it is in the nature of states and their society to perpetuate the violence (whether passively or actively) in the abuses discussed here. If abuse is rendered as a mere aberration, *silence* endures with respect to a key phenomenon: *state objectification of individuals*. This silence in turn enables the sort of abuses that most horrify humanity. Rejecting these grand narratives of *peacekeeper*

*unaccountability*, this thesis introduces the idea that international laws surrounding peacekeeping immunities *objectify individuals*. This *objectification* reveals itself in the brave work of *Movement of Mothers of Srebrenica and Žepa Enclaves*, and other *human rights-based* challenges to UNPKO immunities that have forced national and international courts to declare as much: *international order* requires *objectifying individuals*. Even in legal victories, and some legal settlements, international law grants a pyrrhic victorious *voice* for those slain in the name of keeping peace; they are heard only to be reabsorbed into the very order that enables slaying.

## Chapter 1 – Peacekeeper Abuses: Individual Evil, Societal Necessity

*Peacekeeping unaccountability* emerged as a distinct policy problem in the 1990s and again in the 2000s when the United Nations' Security Council (UNSC) mandated the expansion of its use of military force to what has come to be known as 'robust peacekeeping' (Nsia-Pepira, 2014, p.54). Peacekeepers have since evaded punishment for widespread criminality (Neudorfer, 2015, p.32), including trafficking (Simic, 2012, pp.41-2), war crimes (Knoops, 2004, pp.11-23), torture, arbitrary violence, and sexual assault (Lewis, 2014, pp.597-8). This enablement stems, in part, from the legal immunity from foreign and international criminal prosecution granted to peacekeepers as a legal mechanism used by the international community to sustain peacekeeping. Set under the UN Charter, the 1946 Convention of the Privileges and Immunities of UN Personnel (CPIUN), and the 1994 Convention on the Safety and Protection of UN Personnel, states hosting UN Peacekeeping Operation (UNPKO) are obliged to grant peacekeepers immunities. Peacekeeper troops and officials enjoy protections similar to those of diplomats however theirs does not emanate from customary international law or solely a special agreement. Peacekeeper immunities are *functional* and *absolute* legal protections (Burke, 2014, p.68) linked to the *exceptional* powers of the UN; the organization entrusted to maintain "international peace and security" (UN Charter, art. 1) to which the UN requires immunities "necessary for the exercise of its functions" (art.104). In sum, peacekeeper immunities are in a league of their own linked to the very maintenance of international order itself understood as "peace".

The resultant *peacekeeper unaccountability* stemming from this legal arrangement is couched in the language of "humanitarian ends justifying interventionist means";

peacekeeper abuses become the price of these international legal immunities in what amounts to an exchange of human lives for the institution of peacekeeping.<sup>6</sup> Abuses are an inherent component to legal immunities; immunities which reassures contributing states that their nationals will not be subject to potentially uncertain or threatening legal environments in countries experiencing instability (Burke, 2014, p.17; Jain, 2012, p.245; Neudorfer, 2015, p.16). Such an exchange for immunities depends on international society *objectifying* individuals; to serve its subjective interests and to sustain its members' sovereign identities.

As it stands, calls for *accountability* have resulted in a legalistic approach that seeks to expand and to impute individual criminal liability and responsibility toward soldiers, commanders, and other officials. Framing *peacekeeper unaccountability* in terms of individual criminality raises two issues. First, to focus on punishing individuals, for retributory or deterrence effects, does not fully address the structural or systemic causes for abuses (Drumbl, 2007, p.xii). On the contrary, using an individual as a scapegoat for larger ills (sometimes even based on false accusations) can serve to mystify the abuses and violence based on metaphysical notions of evil (Ainley, 2008, p.57). Placing the onus of accountability on individuals-obfuscates the role of states and international organizations that organize and legitimize UNKPO, which is known as the 'international community'.

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<sup>6</sup> Also, during this period, the cost of sending troops abroad on peacekeeping tours increased substantially (Sheehan, 2011, p.117). As a result, Western states switched solely to financing missions that were increasingly fought by developing states, which has now entrenched into a global division of labour (Daniel, 2013, p.p.44-5). Exacerbating these factors, peacekeepers were increasingly coming under attack (Knoop, 2004, p.27). Despite setbacks and being under-resourced, peacekeeping has become *a distinct institution* for maintaining international peace and security (Sheehan, 2011, pp. 69-70; Bellamy and Williams, 2013, pp.26-9). Nevertheless, procuring state contributions of troops and resources for UNPKO remains an ongoing challenge, especially with respect to persuading states to contribute a supply of troops with expertise (p.4).

If peacekeeping is understood as a state practice that in part *orders* the world, individualizing liability — whether with respect to individual soldiers, officials, or even specific states — diverts scrutiny from the structural nature of UNPKO abuses. The UN represents a state system whose primary concern is to maintain *international order*. Through CH. VII in the Charter, which authorizes and mandates peacekeeping, the *international community* speaks through the UN. The UN gains the prerogative, and other states come under the obligation, to enforce *international order*. Within this framework, individuals are necessarily *objectified* because states are obligated at the very least not to hinder UN efforts and to contribute if possible. In a sense, states must always retain the potential to place their territory and population at the *disposal* of upholding the *international order* of the inter-state system, as in the case of UNPKO. I argue that the ‘international community’, or what is commonly referred to in International Relations (IR) as *international society*, maintains through international law a state’s subjective and latent power to *objectify* individuals within its borders, and that such a power defines and creates international state subjectivity. UNPKO are but one instance in which individuals are *objectified*, manifesting epiphenomenally in the form of peacekeepers’ legal immunities and ensuing violent abuses.

Given that international law is an attempt, and practice, to order inter-state behavior, it follows that it corresponds to the content and shape of *international order*. *Peacekeeping abuses* often occur in areas ridden with ongoing conflicts, but despite the seeming lawlessness, these areas are still rules-governed. UN peacekeepers, even in their wrongdoings, take part in a state practice meant to uphold an *international order* that is fostered by an *international society*. Peacekeeping has been shown to uphold imperial

and liberal modes of governance by powerful groups of states (Richmond, 2004, pp.95-6; Nsia-Pepira, 2014, pp.29-30; Cunliffe, 2013, pp. 229-30) and the literature that detects such purposes in UNPKO suggests that peacekeepers are indicative of how states *order* the world. By applying Hedley Bull's (2012) understanding that *international society* seeks foremost to maintain the integrity of the inter-state system, understood to revolve around the concept of state sovereignty, it becomes evident that peacekeeping is tied to institutionalizing *state subjectivity* in the world. The *international order* of the world figures states as the foremost *subjects* in international politics — not the sole agents, but possessing certain exclusive international legal and political rights. Specifically, states are considered the exclusive holders of the sovereign capacity to exert violence over their territory and people. Coupled with Bull's observation that maintaining *property* is a fundamental norm of any society, the *sovereign subjectivity* of states corresponds with an *international order* premised on states *possessing* individuals and land.

In this chapter, I re-read and build on Bull's remarks on the maintenance of *property* relations as integral to a societal order and I apply his observations to the international laws that uphold peacekeeping practices. I incorporate into Bull's initial account of *international society* to demonstrate the centrality of *subject-formation* and individual *objectification* within international law. Focusing solely on re-establishing lawful peacekeeper conduct (by disciplining troops and circumventing their immunities from prosecution, or by addressing the culture of impunity that shields them) passes over in silence the type of *international order* that governs UNPKO. Specifically, international humanitarian law "governs" state behavior during conflicts, such as during peacekeeping operations that depend on the international societal *objectification* of individuals.

Whether UNPKO upholds civilizational projects, or plays a part in balance of power calculations,<sup>7</sup> or takes the form of neo-colonialism;<sup>8</sup> *peacekeeper abuses* stem from the *use* of individuals, effectively *objectifying* them, to accomplish whatever *ends* are deemed necessary to maintain *international order*. Appeals to *international law* to address abuses legitimize and perpetuate the very institution that problematically and inherently *objectifies people* in its humanitarian ‘*means to an end*’ logic.<sup>9</sup>

This chapter begins with general claims on the nature of immunities which implicitly carry exceptional powers. Exceptionality is at the center of the possibility to render individuals *disposable* for the sake of maintaining order. Individuals being rendered *disposable* serves to signify their *objectification*. Peacekeepers have immunities that makes their conduct exceptional and outside the law, serving a functional purpose. Therefore, I demonstrate how the international laws, such as the aforementioned UN Charter and Conventions, governing peacekeeping immunities are exceptional powers

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<sup>7</sup> Balance of power connotes the practice between states to maintain an equilibrium of forces/strength in relation to one another, usually in military terms (Bull, 1977, pp.65, 91).

<sup>8</sup> Much of the criticism directed toward the English School highlights how its emphasis on successful international societal ordering covers up its colonial and imperialist tendencies. This results from Hedley Bull’s and his disciples’ Eurocentric starting point for analysis, which takes European civil society as the standard yardstick by which to measure other inter-state relations throughout history. For more detail see Keene (2002).

<sup>9</sup> Objectification is not irredeemable. Like violence, it must be evaluated in its context. Protests and civil disobedience in a sense objectify individuals who risk themselves for a cause and whose practices also objectify the individuals they inconvenience. Politics has an inherent objectifying tendency. As Merleau-Ponty (1969) observes by quoting Weber: “to treat one’s fellow as an end not as a means is a commandment strictly inapplicable in any concrete politics. By definition, politics combines means and consequences” (pp.xl-xli). How else could we describe the recent *politicization* of the Toronto Pride Parade by Black Lives Matter (BLM) activists, who halted the Parade (Keleta-Mae, 2016), using it as a means to an end. The task herein is to judge a specific instance of *objectification* with respect to the values in whose name it is carried out. Merleau-Ponty adds that “the curse of politics is precisely that it must translate values into facts” (p.xxxv). My objective is to critique *international societal objectification* and the values it espouses. Again quoting Merleau-Ponty: “where it is clear that the purity of principles is not put into practice, it merits condemnation rather than absolution. To understand and judge a society, one has to penetrate its basic *structure* to the human bond upon which it is built; this undoubtedly depends upon legal relation, but also upon forms of labor, ways of loving, living, and dying” (emphasis mine, p.xiv). I want to thank Dr. Watson for engaging me on this topic by suggesting the example of the BLM protest to illustrate the nuances of *objectification* in politics.

and places those peacekeepers harm outside the law and *disposable*. The question of peacekeeper abuses becomes *who* grants such exceptional powers and for *what* order? To answer, the discussion turns to defining *what* are state subjects and how they behave as a society that determines an *international order that objectifies* individuals.

The second chapter conceptualizes the type of *object* that results from peacekeeping. Agamben's theory on sovereign exceptionality featured here in chapter one really applies to a domestic order. His theory helps illustrate the extent to which exceptional powers *constitute* subject-object relations through law and how such law-making powers are present in the UN Charter and its authorization of peacekeeping and peacekeeper immunities. Chapter one introduces the role of exceptionality that is central to this project, figuring the UN and their member states as having extra-ordinary immunities during humanitarian interventions, with peacekeeper abuses as permitted exceptions to the rule. Chapter two develops how peacekeepers particular exceptional powers creates a specific type of *objectified being* distinct to Agamben's theory of *homo sacer*. Chapter two posits that *civis sacer* is that an object of *international society* whereas *homo sacer* is one of a domestic society. The full significance of the term comes to the fore in the legal cases of *Mothers of Srebrenica v. the UN and the Netherlands*, (henceforth *Mothers*) involving families of those slain during the Srebrenica Massacre. They sued the UN and the Netherlands for compensation and an apology, charging that Dutch peacekeepers present at the time of the massacre were complicit in it. In the various rulings, Dutch Courts and the European Court of Human Rights (ECtHR) upheld UN immunity from prosecution effectively signifying that the slain Srebrenicians were

*disposable*; the *cost*, albeit unfortunate, of maintaining *international order* in the guise of the UN.

### **Immunity and Exceptionality**

As was alluded to in the introduction, peacekeeper abuses strike a particular silence associated with violence. Agamben (1998) identifies in exceptional powers a divine-constitutive nature and emphasizes it with Schmitt's political *theology* that reads into sovereignty's religious character. That divinity brings a silence, the way Walter Benjamin conceptualizes sovereign violence as pre-religious, as *constitutive violence*, an explosive force that evades human understanding, is unspeakable, and humanity attempts to suppress its occurrence (in Haidu, 1996, pp.283-4). The section below reads into how the silence that peacekeeper immunities invoke through international law signifies the presence of violence with a *constitutive* character. *Constitutive violence* concerns the creation of institutions and importantly the law, which at its inception appears as an awesome incomprehensible force. This is what Benjamin calls “law-making” violence and traces it to how constitutions create its subjects (in Bernstein, 2013, p.83). And so the *constitutive violence* in peacekeeping suggests subject-formation and a corollary objectification elaborated below.

International laws of peacekeeping immunities are exceptional in nature which *potentially* renders an individual *disposable* for state use during UNPKO. Individual *objectification* does not exclude the possibility of individual agency in international law, a possibility that Higgins (1994) notably contributes through her work. Rather, *objectification* is a set of legal relations in which individuals are seen by states and international law as objects and is present during peacekeeping. I argue that being outside

international law operates in the same manner that Agamben (1998) identifies with respect to domestic sovereignty. Sovereignty requires states to expel and exclude certain individuals in order to define the remaining community as that which it is not and which it can *dispose of* (pp.110-1). Whereas his analysis concerns a *state's* sovereignty, here it will be applied to the sovereignty of *international society*. From *disposability* flows the indicia of objecthood in the form of property: *possession* and *exchangeability*.

As it applies here, a state *maintains the potential right to* enact emergency powers — for instance, in providing legal immunity for violence committed by peacekeepers during their missions. This is a legal relation that realizes the sovereign's *exceptional* and *absolute* power to excuse the *disposal* of its objects: territory and populations. Legal immunities from criminal, civil, and administrative sanction and liability for corporate bodies (states, organizations, and their representatives) can equally imply exceptional powers. An immunity enables the use of emergency powers whereby whoever is immune is *exceptional* to the law and beyond reproach from any liability they incur. Thus, people harmed by an individual or group protected by immunity, such as when states grant its representatives *sovereign immunity*, will not be seen as subjects. Immunities become the index of their violence within legal and political institutions, such as in the *Mothers* case explored in chapter two. This section traces the necessary terminology for relating immunities to the notion of exceptionality that enables the *constitutive* violence at the center of state subject-formation and objectification. Each of these terms are defined along with *where* these formation processes occur — *international society*.

## Sovereignty and Objectification

State sovereignty carries characteristics of *objectifying* individuals as per their status in international law. International legal rights of states define a state's relation to individuals that mirror a subject-object dichotomy. At the root of *objectification*, before labelling any such objects, it is important to identify who is doing the *objectifying* and how it occurs. The pre-condition to *constitute* subject-object relations is the ability of subjects to retain exclusive prerogative over objects in relation to other subjects. As Mieville (2005) observes, state violence is linked to coercive powers of possessiveness, “mine-ness” *vis-à-vis* other subjects (p.126). *Objectification* underlies how states have proprietary relations to one another regarding *their* individuals and territory. Thus, the assertion and presence of state sovereignty indicate a relation of *possession* towards whom it applies. Having the potential to possess presupposes an *object* being *possessed* which is in so many words is understood as property. “[Both] private property and territorial sovereignty are concerned with control *of things* [emphasis added]” that is reducible to their “excludability” (Barnes, 2009, p.15). *Possession* by states can be further defined in terms of what a subject may *potentially* do to an *object* — a thing:

the right to use; the right to manage; the right to the income of a thing; the right to the capital of the thing; the right to security; the rights or incidences of transmissibility and absence of term; the duty to prevent harm; liability to execution; and the incidence of residuarity. Given that these incidents may describe the composition of any form of property, be it private, collective or common property, what appears to be crucial is how the *quality and content of the bundle of rights varies in practice and who holds them*. (emphasis added, p.23).

There are competing definitions of property, from single variable essentialist definitions (excludability), but also multi-variable (a “bundle of rights” including

control, excludability, transferability etc.), and nominalist (property may be anything that people call property); there is no fixed essence but instead an open set of factors, none of which are conclusive (Ziff, 2005, pp.4-5). I decide to focus on the single variable of *exceptional sovereignty over an entity* as the definition of property. I argue that it is the *sine qua non* for property claims, and though it involves societal organization, the chief characteristic of property is a subject's *right* and ability to *enact sovereign will over it*.

Individuals relate to sovereign states and the inter-state sovereign order as objects to be *acted upon*. In trials, in law, and within an order, individuals are *acted upon* by agents. It is not the case that individuals always lack agency. However, within the international order, they lack the subjective capacity to engage other states or international organizations with the full agency that those others have under international law. An interesting development emerges in how transnational investors are increasingly winning agency in the international realm in relation to states. Nevertheless, the *potentiality*<sup>10</sup> of a sovereign state to enact violence in the name of the law, whether through imprisonment, exile, and/or seizure of property/goods, remains at the sole discretion of states and this is considered an ultimate right of a state. The degree to which individuals are *potentially acted upon* by the sovereign state-subject definitely relates to the individual's class, race, gender, etc... However, under international law, states remain the only subjects

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<sup>10</sup> *Potentiality* can be read plainly however in a deeper context the term connotes an underlying condition whose possible (though not actual) appearance defines a relation. Agamben (1998) defines the *potentiality* in sovereignty akin to *potentiality* in language. Language presupposes the non-linguistic/nonsensical which does not *appear* however *that potential* grants words their power as being part of a linguistic system that creates sense. Individual laws also require such a presupposition which is lawlessness or exceptional circumstances. Law relates to a *potential* of its disappearance/lack in order to grant validity to individual laws (pp.20-1).

who can *act upon* objects. Depending on the state in which they reside, an individual who is an *object* of law might also be a *subject* in another capacity. However, sovereignty, as it is organized in international law, is held by a closed set of agents: states and their communities (Walker, 2010). These are the agents who collectively have determined individuals to be objects upon which they maintain the exclusive power to act. In international law one can deduce this definition of state subjectivity in Article 2(4) of the UN Charter that codifies territorial sovereignty as the ability and right of a state to exclude all other sovereign wills from its domain (Barnes, 2009, p.229).

The UN Charter as international law operates to codify the *constitutive* characteristics of states subjects' law-making powers (Onuf, 1994). The UN Charter may easily be considered having such *constitutive* characteristics being an international law that creates a social world with subjects and objects.<sup>11</sup> Thus, the international laws granting peacekeepers exceptional powers expose the UN Charter's *constitutive* subject-formation powers. Peacekeeper abuses are *constitutive* because UNPKO derive their authority and immunity from the law-making powers of the UN, that trace back to stabilizing the postwar order of 1945 that imbue the Charter with extra-ordinary reach (Maus, 2014, pp.680-2).

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<sup>11</sup> Kelsen (1951) prescient on the logic of the UN Charter allowed for the organization to be law-making since its power created its own limitations. He writes "For the [Security] Council would be empowered to establish justice if it considered to be considered to be just though not in conformity with existing law. The decision enforced by the Security Council may create new law for the concrete case" (pp.295).

## International Society and Subjectivity

Peacekeeping needs to be interpreted with the actions and behaviours covered in CH.VII of the UN Charter, which such missions. The UN Charter functions to achieve the first prerogative of *international society*, which for Hedley Bull (2012) is the maintenance of a stable *international order* (p.64). This is duly enshrined as the purpose of the in Article 1 of the UN Charter (1964):

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

Thus, establishing states as coherent entities with sovereign wills, and the ability to act upon objects, in a sense to *possess* them, corresponds to international society's need to maintain (stable) social order (Bull, 1977, pp.5, 16, 18). Implicit in his original conception of *international society*, states define subject-object relations within the inter-state practices. States mutually recognize and create state personalities (international legal subjectivity) that establish a state's domain (jurisdiction) over its territory and population (2012, pp.251-2).

Forming and creating state subjects occurs through processes of *subjectivation* whereby a contained agent is constituted so as to possess will that they may exert over objects. The subject is an encapsulated "I" performing the inclusion and exclusion of the qualities it possesses and does not. Subjectivity abstracts onto someone their social relations by assigning rights, limits, duties, and so forth which correspond to a distinct actor. (Butler, 199, p.196). State *subjectivation* similarly relies on a fundamental subject-

object dichotomy, which requires a community or society to recognize the difference between who and what is, and can be, a subject and/or an object (Butler, 2009, p.31). States form and create themselves in parallel with each other and within *international society*. This resonates with the fundamental insight in Marxist legal analysis that the construction of legal persons serves a particular societal order (Marks, 2008, pp.35-6). As it works elsewhere, law operates as a *mode of production* to construct sovereign subjects (persons) and their ability to express their *will over objects* (Pashukanis, 1983, 110-1). Individuals are part of public international law insofar that international legal subjects exclude individuals from having full international legal agency so to be sovereign over them. As Agamben (1998) writes on state power and its necessary exclusion, “What has been banned is delivered over to its own separateness and, at the same time, consigned to the mercy of the one who abandons it — at once excluded and included, removed and at the same time captured” (p.110). Individuals are in international law insofar that they are banned from being subject within it.

The circularity of states and peoples co-constituting one another defies establishing the sequence of constitution. As Onuf explains, paraphrasing Giddens (1994), “The co-constitution of people and societies is a continuous process. Rules are central to this process because they define agents in terms of structures, and structures in terms of agents, but never definitively” (p.7). Though states may appeal to “the people”, the people are always born into already constituted states which create their own sovereignty and authority. Derrida (2005) refers to this self-positing as ipseity. “Iipseity”

is the capacity for self-causation: “the power that gives itself its own law” (pp.10-12).<sup>12</sup> Tautology ensues when attempting to discern which comes first, the statehood that rules and shapes a people, or a pre-determined people who create the state. Regardless of the constitutive direction, statehood becomes determined by other states recognizing an another's statehood, belying the notion that a state is a matter of internal law or outward declaration by a people, nation, or government (Portman, 2010, p.249). This becomes evident when non-state actors, such as unrecognized states and rebel groups or partisans, no matter the legitimacy of their claims or empirical strength, are denied both international legal standing and a states’ recognized right to self-defence, one which also upholds and secures state identities and territoriality (Trapp, 2015, p.696; Milanovic & Hadzi-Vidanovic, 2015, pp.262-4; Marauhn & Ntoubandi, 2011). Those denied international subjectivity, such as unrecognized states, may have their territory violated and find it nearly impossible to conduct diplomacy, enter into agreements, and sign treaties; ergo they are excluded from international societal relations (Harvey and Stansfield, 2011, p.12; Bakke, 2011, p.90). Thus, recognized international legal personality allows for state agency to enact its will onto objects.

Thinking of states literally, to visualize them as *legal personalities* representing actual bodies<sup>13</sup> illustrates the *possessive individualist international order* laden within the

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<sup>12</sup> The term comes from the Latin intensive pronoun ‘ipse,’ which means ‘- self,’ as in ‘himself’ (ipse), ‘herself’ (ipsa), ‘itself’ (ipsum).

<sup>13</sup> Statehood is also a jurisdictional demarcation determined by the community of states in ascribing *international legal personality*. The concept of *international legal personality* personifies legal relations into a ‘legal person’ of the state and includes its reach, limits, and ability to act (Kelsen in Nijman, 2007, p.32). *Personality* gives collectives and groups representation through one individual, who acts on their behalf (Cassese, 1986, p.10) and is internationally limited to an arena of diplomats and heads of state representing states (Paulus, 2013). The state is a legal being, delimited by jurisdiction and personified as a body, and understood to be a subject, an entity with agency, a “*dramatis personae*” (Cassese, 1986, p.74) within a community of other embodied states set on a stage (p.10). A state’s sovereign legal standing

*order's* defining norm — sovereignty. A state's membership in *international society* is expressed as, and defined by, whether or not it establishes what is known as internal sovereignty by maintaining jurisdiction over its objects, individuals and territory. *Individual possession* transforms objects into property. Through its jurisdictional boundaries, sovereignty defines subjects in terms of agency: with and without capabilities of *will* and *right* over objects (Whatmore, 2003, pp.211-3; Hegel, 1991, p.108; Frost, 1996, p.146). Though recognition, *international society objectifies* and produces *sovereign subjects* in a Hegelian dialectical manner, constituting *state subjectivity* in much the same way that domestic law forms the individual (pp.151-2). Sovereignty grants the state a *potential* capacity to *possess* (i.e. to hold jurisdiction) over territory and rule over populations, which is in turn exchangeable in the form of the sovereign right to *render a disposable individual* to another sovereign. For all intents and purposes, state *objects* are registered as property, and property language pervades the international law related to state sovereign control over territory in a way that mirrors how individuals relate to their property (Barnes, 2009, p.224).<sup>14</sup>

The simplest and most overt example of how states are defined as subjects — with individuals, territory, and resources as their objects — is that states are granted the right to maintain their sovereignty.<sup>15</sup> A given state's subjectivity comes to be embodied

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depends on being recognized as an *actual* legal body that can stand and participate in international courts, public fora and international organizations, and can enjoy international legal rights.

<sup>14</sup> As Barnes (2009) notes, “this observation hails from the object theory of the State, which holds that even if we concede that territory is more inextricably linked to the existence of the state than other tangible property is to individual existence, this does not preclude the conceptual analysis of territory as property.” (note 45 on p.228)

<sup>15</sup> The Montevideo Convention is considered to this day the standard criterion of determining statehood which consists of: a permanent population, defined territory, a government, and capacity to enter into diplomatic relations with other states. However, there have been notable exceptions to this rule to conclude that the

through other states' recognition of its internal sovereignty. The UN Charter codifies that right in art.2(4) stating "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations", Here, the international community, read *international society*, constitutes in the UN Charter the base condition for states to enjoy and practice sovereignty within their own borders. State subjects in turn establish sovereignty as the principle ordering their (international) society. This principle is again reiterated in art.2(7) that limits the UN in infringing on sovereignty:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Note however that the Charter serves to *order* state matters and provides a means to do so with CH.VII that authorizes forceful intervention into a state's internal affairs. In this way, the Charter retains those extra-legal powers to *constitute* and maintain the order of international subjects and objects. For the state system to be an order requires something beyond purely law, meaning exceptional powers, to maintain the legal institution of sovereignty itself — internationally and domestically.

Inherent to being sovereign, and maintaining the international institution of exclusive state sovereignty, requires the state's capacity to mobilize all that is within its domain to engage in the practice of warfare. Implicit, in article 2(4) and what follows in

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criteria do not alone suffice to determine statehood. International jurisprudence such as the ICJ have ruled that states require international recognition to be truly international legal subjects (Portman, 2009, pp.250-3).

later articles is a state's right to self-defence and the state community's practice of enforcing collective security (Fassbender, 2009, pp.112-3). In sum, sovereignty entails states ability to declare the exception, to defend itself, or *international society*, in a process that necessarily would *objectify* people. UN Charter art. 51 that specifies the right to self-defence, in the event of foreign aggression, recognizes the essential and normal component of international political life to maintain a standing army in case of warfare. During war, states retain the right and prerogative to invoke a state of exception, whereby their constitutional obligations towards their citizens and population are suspended, and everything can be rendered *disposable* for the state's war-ends. What makes this possible is the right of a state to invoke *exceptional powers* that stand outside the law that defines the state's sovereignty in terms of its power to decide life and death (Agamben, 1998. pp.87-8).

### **International Order — Possessive States, Disposable People**

Conceiving *sovereignty* as the potential of states to render individuals *disposable* (by declaring a state of emergency) for the purpose of maintaining *international* and/or *domestic order* is the basis for the *international order* that upholds the institution of *state subjectivity*. Bull's (2011) observation that state sovereignty is the second priority of *international order* — however imperfect its stability (p.16) — makes clear the necessity for *states* to possess the exclusive prerogative to exercise *exceptional powers* over their populations and territory. Essentially, the *international order* is based on a *possessive individualist* ontology<sup>16</sup> wherein state subjects are defined by their capacity to exert the

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<sup>16</sup> *Possessive individualism* describes a system that defines subjects and their relations through the prism of property. Subject are those with *possessive rights* and whereby *possessions* express the recognition of a

exceptional powers that could potentially *objectify* individuals for the sake of *using them* to maintain state and/or *international order*.

What follows from the imperative of *order* is for states to maintain the capacity to exert *sovereign power* over their population and territory. Emergency powers allow states to maintain order at home and abroad; far from being *exceptional* or rare, those powers are the normal means by which states maintain *order*, whether international, capitalist, or humanitarian (Neocleous, 2006, pp.193, 195, 206-7). The necessity of exceptional sovereign powers underlies the importance attributed to maintaining independent *state subjects* as the exclusive agents with *sovereign power*. For that purpose, the UN Charter entrusts public “emergency powers” to the UN Security Council (UNSC) (Tzimas, 2015, pp.20-1). It should be understood that CH.VII captures considerations not purely of law but *order*, one of which is the first priority of *international society*, entrusted to the UNSC and by whose directives/orders states must abide. Under CH.VII, the UNSC not only authorizes the deployment of humanitarian intervention (Article 41 & 42)<sup>17</sup> but defines threats to international peace and security (Article 39).<sup>18</sup> It is no embellishment to call these articles exceptional powers, especially if read with Carl Schmitt in mind<sup>19</sup>; they

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subject in society. Thus property rights represent the process of mutual recognition and constitution of *subjective* identity and those who uphold it (Macpherson, 1962, p.96)

<sup>17</sup> Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 43: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

<sup>18</sup> Article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

<sup>19</sup> “Sovereign is he who decides the exception” (Schmitt, 1998, p.5)

empower the UNSC to define its friends and enemies. CH.VII embodies the primacy of *international order* over international law, which is something Hans Kelsen recognized in his analysis of the UN Charter in 1951. “The purpose of the enforcement action under Article 39 is not: to maintain or restore law, but to maintain, or restore peace, which is not necessarily identical with the law” (p.294).

Peacekeeping explicitly depends on this relationship between states and their populations because peacekeepers use a state’s armed forces to achieve UN-sanctioned *international societal ends*. Peacekeeper immunities express such an extra-legal exemption of the UN, peacekeeping states, and the inviolability of state sovereignty itself that orders *international society*. CH. VII is so crucial since it allows for the expression of the primacy of *international order* over states, which requires them to have the potential to use individuals as *means* to maintain the *end* of stability of that order. So that states can fulfill any such obligations to maintain international peace and security, they require sovereign powers over their population and territory. For UNPKO to function, a *sovereign right* of states to prepare for warfare and to maintain standing armies must exist. The hierarchy of the UN’s potential for emergency powers in CH.VII requires that states maintain sovereignty in order to put their population and territory at the disposal of maintaining *international order*.

Analyzing peacekeeping and the international laws surrounding their immunities requires an inquiry into the actions and behaviors that make the abuses possible, as well as their structural nature. Jurisdiction becomes the way to discern that *international order* which peacekeeping upholds and represents. Reinterpreting the command and force of CH. VII to reveal *international order*, and not solely legality, brings the discussion back

to interpreting the jurisdictional issues of *peacekeeping unaccountability*. Jurisdiction is a process of inter-state understanding and recognition that is demarcated via the participatory rules and processes for international law, which include those related to peacekeeping (Engdahl, 2007, p.33-4). Jurisdiction codifies assertions of state sovereignty and its limits with respect to legitimate ownership, use, and control over its own matters “relative to those of other states” (Orakhelashvili, 2015, p.15). International law delimits the process through which states determine the legitimate jurisdiction of their sovereign power (p.10; Malanczuk & Akehurst, 1996, p.12), whether it is prescriptive (power to legislate), related to enforcement (power to exercise force) or adjudicative (power to compel appearance and submission to courts) (Ryngaert, 2015, pp.54-8). Thus, because it is in a *jurisdictional* manner that peacekeeper immunities operate, their effects are indicative of *international order* to an extent.

### **Structural Unaccountability**

I outline the legalistic approach to peacekeeper abuses which is taken up by the *problem-solving* character of *the paradigm of accountability* discussed later. Focusing strictly on legality, that characterizes literature on *peacekeeper unaccountability*, diverts attention from the order that laws ultimately create, obscuring the distinction between *law* and *order*. Below illustrates how a focus on state and international organizations’ legal obligations places *peacekeeper unaccountability* in a *legalistic* analysis. Such an interpretative frame evinces the same ontology dividing responsibility between states and individuals by which the inter-state structure — ergo *international society* — evades blame. What remains misleading is that individuals and states actually clash as a result of these international legal jurisdictions rather than being smoothly structured by them.

The legal architecture of immunities is *structured* such that targeting any one *subject* fails to address the type of violence that occurs during *peacekeeper abuses*, which is *the objectification of individuals*. UN immunity exemplifies an international structure in which harmed individuals are denied international legal standing; there is no UN dispute resolution commission but criminal accountability falls onto and is sought for individuals. Simply put, peacekeeping immunities operate through a process in which actions attributed to states and international organizations, whether by courts or in the literature, are beyond international redress and beyond any jurisdictional reach, whereas individuals are solely susceptible to disciplinary measures. When a state disavows officials or soldiers and waives their immunities, these people are deemed to have been acting outside the state's capacity and they are liable for misconduct.<sup>20</sup> This discrepancy shows how projects for international legal accountability are a "false alibi"<sup>21</sup> for sociopolitical-international structures. This occurs when the UN, other international organizations, and states relying on international law, engage in conflicts (including humanitarian interventions) with inevitable abuses.

UN immunities are granted for state participation through a standardized policy that is rooted in mitigating potential insurance claims and private litigation against UNPKO (Rashkow, 2014). To this end, the UN devised template agreements for the parties

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<sup>20</sup> This is nowhere more evident than in the 2007 International Court of Justice ruling in the *Case Concerning of the Convention on the Prevention of the Crime of Genocide Case*. It stipulated that the crime of genocide could only be attributed to an individual and not to state actors. What perplexes many observers of peacekeeper abuses is how abuses are not considered part of official UN business, which is immune from national jurisdiction, but states and the UN nonetheless still invoke it (Schmalenbach, 2015).

<sup>21</sup> The 'false alibi' is the notion that the prosecution of the Nazi leadership in Nuremberg did not address the fundamental problem of German collective responsibility for the Holocaust (Geras, 1998, p.19).

involved in peacekeeping missions. Legal immunities from criminal prosecution and the UN's immunity in all national courts is codified in the following international laws:

1. **Article 103 and 105 of the UN Charter:** Formally these articles stipulate that the UN is exempt from any and all national interference, including via domestic courts, to ensure that the organization can function. In a sense, these articles are the source for all other immunities, which are rendered in further detail by other international laws.<sup>22</sup>
2. **Conventions:** The Conventions for *Privileges and Immunities of UN Personnel* (1946)<sup>23</sup> and *Safety and Protection of UN Staff and Personnel* (1994)<sup>24</sup> formally define who is considered staff and how to settle disputes between the organization and its members. Peacekeepers are notably absent in the 1946 Convention and straddle somewhere between being a UN expert and an official. The 1946 Convention fails to define who qualifies as a UN official and it fails to fit peacekeepers into its categories (Odello, 2010, pp.360-1; Deen-Racsmany, 2014, p.255). The 1994 Convention similarly omits a specific status for peacekeepers (Odello, 2010, p.361) but criminalizes attacks against them (Zwanenberg, 2005, p.177; Klappe, 2010, p.533)

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<sup>22</sup> Article 103: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 105: The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

(1) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

<sup>23</sup> Article V, s. 18. Officials of the United Nations shall:(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

Article VI, s. 22. Experts (other than officials coming within the scope of Article V) performing missions for UN shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions.

Article VIII, s. 29: The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

<sup>24</sup> Article IV: The host State and the United Nations shall conclude as soon as possible an agreement on the status of the United Nations operation and all personnel engaged in the operation including, inter alia, provisions on privileges and immunities for military and police components of the operation.

3. **Status of Forces Agreement**<sup>25</sup> (SOFA) which the 1946 Convention provides the wording for all SOFAs: This agreement delineates the legal status of soldiers (their rights and responsibilities) within a host state's territory (ideally with the host state's consent) (Voetlink, 2015, pp.8-10). This Agreement is between the host state and the UN; when no other agreement exists, the terms of this model agreement apply. It stipulates that the sending state(s) maintain exclusive criminal jurisdiction over its (their) officials and soldiers deployed in UNPKO (Zwanenburg, 2005, p.196; Voetelink, 2015, p.17; Deen-Racsmány, 2011, pp.6-7; Neudorfer, 2015, p.15; UN General Assembly, 1990) and who maintain immunity that the UN cannot waive (Deen-Racsmány, 2014, p.257).
4. **Memorandum of Understanding** (MOU) which the 1946 Convention also provides the wording for all MOUs: this is an agreement between the UN and a state that is contributing resources and troops to a mission. It stipulates the conditions for the contribution and clarifies any relevant jurisdictional issues, such as disciplining troops<sup>26</sup> (UN General Assembly, 2006; Miller, 2006, p.81; Deen-Racsmány, 2011, p.9). MOUs are deemed international agreements, akin to treaties, between the contributing state and the UN (p.11). MOUs also include dispute settlement mechanisms between the UN and the contributing state (p.22).

Despite attempts to include accountability measures within these mechanisms, two problems persist. First, the immunity is never spelled out as an *explicit* immunity and thus creates ambiguity. That is, personnel under UN authority gain immunities, for which

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<sup>25</sup> para. 46: All members of the [UNPKO] ... shall be immune from the legal process in ... all acts performed ... in their official capacity.

para. 47: (b): Military members of the military of [UNPKO] shall be subject to the exclusive jurisdiction of their respective participating States...

para. 51: ... any dispute or claim of a private law character to which [UNPKO] or any thereof is a party and over which the courts of [host country/territory] do not have jurisdiction... shall be settled by a commission...

<sup>26</sup> Article 7, sec.1. The Government acknowledges that the commander of its national contingent is responsible for the discipline and good order of all members of the contingent while assigned to [the UNPKO].

peacekeepers qualify; however, soldiers also remain part of their national military structures and are subject to their own national laws that still apply (Kondocho, 2010, pp.519-20; Odello, 2010, p.357). Second, this ambiguity is compounded by the legal status of the UN and that of peacekeepers within it: peacekeepers are not mentioned at all within the UN Charter (Findlay, 2002, pp.16-7), and unlike other international organizations, the UN has special international legal status, with no court competent to judge it (Fleck, 2010, p.109; Kondocho, 2010, p.516).

These unclear parameters complicate any inquiry into the responsibilities of both the UN and member states. Both states and the UN can feign ignorance or abuse of authority by subordinates. The immunities are presented in law as unproblematic but misused. Because there are no written orders, laws, and/or policies linking peacekeeper jurisdictional immunities for the express purpose of abusing individuals, abuses are not linked to the chain of command of either the UN or the sending states (Neudorfer, 2015, p.32). Lack of written grounds for determining responsibility compliments state and UN evasion of responsibility. This legal reading creates an ambiguity for analysts with a problem to solve, in attempts to clarify chains of command, rather than critiquing the overall structure of immunities which serve military<sup>27</sup> and state interests in UNPKO.

The following section introduces discussions that advocate enforcing and reforming the jurisdictional limits that enable peacekeeper immunity. These discussions perpetuate a non-critical silence towards abuses by already accepting the legitimacy of *unaccountable* state agents and their monopoly on the sovereign prerogative to punish culprits. This sets up the analysis to a consideration of how the rush to address the *legal*

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<sup>27</sup> Militaries believe the war experience accrued through peacekeeping may aid “domestic legitimation” and “socialization” (Bellamy & Williams, 2013, pp.16-7).

*silence* with respect to peacekeeping abuses fails to appreciate the meaning of the *legal* silence, i.e. the confounding *unaccountability*, toward abuses. *Accountability* overlooks international legal subject-object relations by presuming that individuals are subjects within the international legal order that governs UNPKO.

### **Legal Attribution - Counting Guilt**

Pursuing *peacekeeper accountability* first involves finding out *who* should be brought to account, which depends on the jurisdiction under which the peacekeeping official (whether military or civilian) was operating. Ascribing responsibility involves an act of *attribution*, outlined as follows:

- **Attribution:** Immunities depend upon which entity the peacekeeping soldier/official is considered to be a part of. The International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR) have employed *control 'tests'* that determine accountability depending on who had power/authority to command and oversee operations, and whether liability falls upon the individual, state, and/or the international organization (Buchan, 2012, p.284). These tests are further discussed in chapter two.<sup>28</sup>

Once the commander of the accused is identified (by a court or by a report, depending on the context), then two possible remedies for abuses are available under international law. Those are:

- **Waiving immunities:** The UN Secretary-General may waive UN immunities held by the organization itself and/or held by an individual found to have

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<sup>28</sup> For now, it will suffice to say that there are two tests to determine control. One inquires into effective control (the officials' ability to order troops) and the other into overall control (the legal delegation of immunity and power to an official/agent would suffice in itself to attribute wrongful conduct to the delegating entity). Which of the two is or will become the international legal norm is an open question (Buchan, 2012, p.301). The nuance here illustrates the different ways in which responsibility is conceptualized, whether in *empirical* or *legal* fact. See chapter two for a discussion of how the *Mothers* court case attempts to settle the debate on how to interpret peacekeeper's use of force.

committed abuse. Theoretically, states could waive the immunities of their own soldiers and/or officials, but such a process is akin to extradition and remains speculative. Instead, states are responsible for disciplining their own soldiers in military or civilian fora. One subcomponent of this option is UN and state military investigations that determine whether an abuse occurred. These investigations require alleged victims to file a complaint with UN commanders (who have a record of being, in various degrees, complicit in abuses). The complaint process is very slow and bureaucratic and even in cases of confirmed abuses, it does not trigger any action.<sup>29</sup>

- **UN claims commissions:** As outlined in agreements detailed above, international laws governing UNPKO and setting out immunities are supposed to establish dispute settlement mechanisms in the event of abuses. No such mechanism has ever been established (Schmalenbach, 2015, p.320). Even if they were to be established, their jurisdiction would only include private law matters (such as contract and insurance issues) that might result in damages, but this too is not properly defined and would be at the discretion of peacekeeping states and the UN (p.321).<sup>30</sup>

What becomes apparent is that international law, designed by and for states, omits any explanation for how states cannot themselves be found guilty. Instead, abused individuals become sacrificial lambs in atrocity. However, these prosecutions of war

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<sup>29</sup> Investigations of abuse proceed as follows: first, after a commander of peacekeepers receives a complaint, it is forwarded to a Special Representative of the SG (SRSG), who does a preliminary investigation. Second, if there are grounds for the allegation, the SRSG can appoint a Board of Inquiry (BOI) with 3 members (one of whom will be of the same nationality as the accused) to conduct a formal investigation. Finally, the Board's report is then passed to the accused peacekeeper's state. The UN has no further power in relation to the accused (Neudorfer, 2015, p.15).

<sup>30</sup> Both the Status of Forces Agreements (SOFA) and Memorandum of Understanding (MOU) (see p.38) guarantee individuals access to a private dispute settlement mechanism, but it has yet to materialize. This absence was the legal basis upon which the plaintiffs relied in *Stitching Mothers of Srebrenica v. The Netherlands and the UN* (2013). That case alleged that the human right to a fair trial in article 6 of the European Convention of Human Rights was denied due to the immunity. The long case history addresses the issue through civil litigation but does not impute state or UN political responsibility for criminal prosecution and instead assigns private responsibility for damages resulting from UNPKO. I develop this in more detail in chapter two.

criminal are strictly not sacrificial since they occur within the law and the punishments are sanctioned. Sacrifice denotes extra-legal killing, not execution, but an extra-legal killing that nonetheless sustains a given order. International crimes since the Nuremberg Trials register state-perpetrated abuses as an individualized evil with respect to sentencing for atrocities (Ainley, 2008, pp.56-7; Sloane, 2007, p.89). The summary execution of German officers considered by Stalin and Churchill would have instantiated sacrificial logic.<sup>31</sup> That was Arendt's observation, emphasized by Agamben (1998): a criminal will still retain legal rights whereas the *homo sacer* does not (pp.84-86). International law, through these control tests, then establishes the legal relation and obligation towards whichever state is required to *legally* dispose of a civilian, citizen, soldier, official, or leader to answer the crime of atrocity. Abused individuals are sacrificed. The second chapter specifies how international law provides identifiers of sacrificial *objectified* individuals that can be described as *homo sacer* and *civis sacer*.

The following sections takes issue with the literature that studies and advocates against *peacekeeper unaccountability*: an epistemic position emerges, a paradigm, that does not question the legitimacy or role international law plays in perpetuating peacekeeper abuses. The differences in the literature of *peacekeeper unaccountability* do not amount to much; their use of *attribution* (identifying a culprit of abuse) seeks *accountability* against a singular subject when the abuses are systemic/structural, involving a collective of subjects qua states.

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<sup>31</sup> Their proposed solution was to execute German officials summarily in order to punish the state apparatus. Stalin "half-seriously" recommended shooting 50 000 German officers, a sentiment Churchill echoed. Even Pulitzer recommended killing 1.5 million Nazis. To avoid this sacrificial calculus, the idea of a trial became a "cleansing ritual of moral condemnation founded on legal objectivity," consecrating the "triumph of liberal values" (Akhavan, 2012, p.105).

### **Paradigm of Accountability: Counting Abuse-Abilities**

Approaching abuses in terms of *accountability* becomes not only a means to whitewash the complicity of international law in *peacekeeping* abuses but also serves to endorse both the international legal mandates and objectives of UNPKO. I ascribe the UN's problematic use of international law to *the paradigm of accountability* that contains epistemological and ontological premises that lead to appeals to international law, eliding how international law constitutes the very problem it sets out to remedy. Even within these accounts of *peacekeeper unaccountability*, one detects the *paradigm of accountability*; they aim to improve and perfect the UN's use of force, which leads to the problematic *objectification* of individuals by *international society*.

The *paradigm of accountability* passes over in silence the structural nature of UNPKO abuses. Paradigms set out to solve problems with an "explanatory framework" that is assumed to be unproblematic. A paradigm is an epistemic outlook that uses a common set of terms to define a discipline (Bevir, 2010, p.1014). The term paradigm, though used more for research projects, is apt in describing how the creation of knowledge is wed to tacit assumptions that will prevent a given analysis from seeing its own inherent deficiencies (Jackson, 2010, p.55). Now, the literature on *peacekeeper unaccountability* will be shown to identify *abuses* as a technical jurisdictional issue of legal immunities. *Peacekeeper unaccountability* implicitly takes state action as its primary object since the literature understands international law to be created and agreed upon by states. That technical reading creates puzzles for legal scholarship concerning how to bring *accountability* to wrongdoing peacekeepers, but it lacks the terms with which to *name* and *blame* the structural feature of *peacekeeper abuses*. The literature is,

in Robert Cox's (1994) terms, *problem-solving* theory that seeks to paper over symptomatic tensions within wider structures but not to (in order not to?) confront them directly. Even though *problem-solving theory* proves to be problematic discourse, the theory does acknowledge and describe the world's fundamental condition but does not seek to change it (p.110).

The idea of *accountability* embodies some of the worst elements of Western jurisprudential thinking, which hinges on an abstracted individual who is positioned at the center of all social problems and their solutions. This thinking fails to engage with properly institutional injustices such as poverty, racism, sexism, and oppression.<sup>32</sup> *Accountability* as a framework targets individuals as the sole *object* for retribution whereas structure is not taken into *account* for generating the *ability* to abuse. How this pertains to *peacekeeper unaccountability* should become clear. Yes, wrongful soldiers do deserve punishment. *However*, individual peacekeepers, and even individual militaries, cannot alone confront the structural causes of UNPKO abuses.

How do international structures come to be overlooked through a focus on individual *accountability*? One way is by fundamentally separating the political nature of law from its implementation/enforcement. In other words, the belief, or fetish, that the law is neutral and addresses evil removes the political and subjective nature of collective abuse/harm. Holding individuals to *account* through law assumes that laws are just and

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<sup>32</sup> As Marxist legal thinkers have charged, holding only individuals *accountable* enables larger structures to intervene in the name of their liberty, but only in order to re-inscribe deeper systemic causes of social ills, such as exploitative practices (Arthur, 1983, p.18, Head, 2008, p.5). I chose to use the term 'atrociousness' in order to problematize prevalent discourses framing international law, foreign policy, and wider understandings of the events discussed. The term captures the societal element in these horrific events and moves away from focusing on the individualized pathology of the perpetrators (Drumbl, 2007, p.8). I do not categorize the duty to stem atrociousness as a 'Responsibility to Protect' because the latter is only one policy position and there is a separate body of literature discussing its implications for humanitarian intervention in general.

that crimes represent evils that can be cognized legally. There exist three predominant targets for assigning *accountability*, which register different causes of violence, and each addresses those causes in different ways: crimes of impunity, states, and individuals (Sikkink in Steele, 2013, p.3). Though tackling impunity and targeting states does to some extent address structure, it is the individual that dominates approaches to *accountability* with respect to explaining causes and advocating solutions. In the simplest terms, *accountability*, as it is being used, takes shape via a codified, depoliticized, and individualistic understanding of violence. Someone must be responsible for harm, neutral laws should be cited, and individuals — as opposed to their political contexts — are the source of blame. As the term relates to a *paradigmatic* way of thinking, it reads violence through a formal legalistic lens, its norms reflect a Western humanism assumed to be objectively good, and finally, it associates, identifies, and promulgates/supports institutional efforts to realize the universalization of the international law that presumes accountability.

Humanitarianism, whether used in rhetoric to justify interventions, or to categorize law, is a conceptual misnomer that purports to incorporate the role of individuals into the *international order* of the world, but plays a part in the literature of *peacekeeper unaccountability* concomitant with an inter-state structure based on sovereignty. Humanitarian *institutional approaches* catalogue and recognize abuses but do not register their structural causes. As Rancière (2004) notes, human rights, at their heart humanitarian devices, are a means to count harms only so as to register other individuals and groups harmed by larger structures. Human rights count harms in a way that universalizes specific individuals experiencing specific harms by transmuting

those harms into affronts to *humanity*. Hence, harmed people are aggregated into larger structures of oppression (and this is reflected in the human rights discourse of tribunals, boards, and organizational reports). In that way, human rights — both conceptually and in how they are used in international laws — appropriate the suffering of others in order effectively to become a right to enforce the humanitarianism defined by and through existing structures (pp.305-8).<sup>33</sup> Contrary to the narrative that human rights challenge or disturb *international law* centered around states, as Rudi Tietel famously argued (2011, p.94), Charles Beitz (2009) has identified how international society is at the center of *the idea of human rights* because human rights (p.109) remain a state-conceived project dependent on a sovereign will (p.128).

These priorities and dispositions in the *paradigm of accountability* manifest through its uncritical acceptance of, and advocacy for, *international legal* approaches to atrocities. So although *accountability* as a term is couched in a specific historical context, as is any discourse, precluding any universal definition, the paradigm figures *humanitarian norms* as universal despite colonial histories (Mégret, 2006, p.312). This is because the *international legal accountability* analyzed here took shape in the Nuremburg Principles that individualized guilt for genocide perpetrated by Nazi Germany. By assigning responsibility for action to states, and guilt to individuals, the paradigm is indebted to an ontology set out in the Nuremburg Tribunal (Gattani, 2009, p.106-7; Fletcher, 2016, pp.454-5). What became decontextualized in pushing for

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<sup>33</sup> Take for instance how the International Commission on Intervention and State Sovereignty addressed marked failures of UNPKO of the 1990s in a report whose title reflects the concept it introduces: the ‘Responsibility to Protect’ (2001). In order to ensure that those who abuse human rights are held accountable, the Responsibility to Protect obligates state members to engage in humanitarian intervention (Busser, 2014, pp.10-30).

*international criminal law* is the ontological separation of responsibility for atrocities wherein states and the inter-state system (*international community*) are integral parts of the solution/order dependant on the institution of exclusive state sovereignty. ‘Crimes against humanity’ cast individuals, not states, or even peoples, as evil. In assigning responsibility for German atrocities, the Nuremburg Trials separated the Nazi leadership *qua individuals* from the state and the German people (whose participation ranged from tacit to direct) (Morgan, 1988, pp.39-42). Calls for *international legal accountability* continue to operate through this distinction, to this day. When states are linked in various ways to atrocities, whether by sponsoring guerilla and paramilitary groups, or supporting regimes that commit abuses (fashionably labelled ‘new wars’), international humanitarian law shifts state responsibility for atrocities during conflict onto non-state actors, such as individuals, who commit them despite state sponsorship. International humanitarian legal *accountability* is an order in which individuals remain the sole objects of punishment and guilt, whereas states are made legally invisible, nowhere to be seen.

The Nuremburg Tribunal epitomizes a paradigmatic view that *international law* has discovered the objective standard to characterize and combat evil, which leads to promoting and researching how best to apply *international law*. Having assumed that *international criminal law* has transcendental validity, moralistic *accountability* becomes the objectively good criterion; it is relied upon in the action-oriented solution to the individualized evil associated with atrocities (Brownlie, 1998, p.499, 495). By pushing solely for *accountability* as defined by international law, the *paradigmatic* outlook assumes those differentiated principles of responsibility between states and individuals. *Accountability* as a term shifts from assessing *what type* of responsibility is assigned and

instead concentrates on analyzing the many possible ways responsibility is enforced; this correspondingly shifts the inquiry from larger issues of responsibility (e.g. individual versus collective) to establishing which method is merely most effective *within* the individualized frame.

Tying these three elements of ‘objective’ humanist morality, validity of international law, and evilness of individuals into the *paradigm of accountability* is key. These elements reinforce the sovereign prerogative to coerce and enforce law *violently*, which is entrusted to the state, and when required, upheld by *international society*<sup>34</sup> to maintain such an institution in the name of *international order*. At its core, *accountability* relies on the idea that there exists a sovereign right and imperative toward punishment, and that this right remains with the state. *Accountability* largely follows retributive notions of justice that look to sovereign power to realize international law (Sikkink in Steele, 2013, p.62). As such, the *paradigm of accountability* rests on the necessity for the *international community* to *order* the world by using *exceptional power*. Going back to Nuremburg, the prosecution of Nazi leadership required *exceptional* measures (in a legal sense). The Allied Powers established a criterion and a court to circumvent certain fundamental legal principles. For instance, the Allies allowed retroactive justice and barred sovereign immunity (Buchanan, 2001, p.682; Fletcher, 2016, p.460). As Meister (2011), notes, today, with the end of the Cold War, Nuremburg-inspired *international law* has become a project that must be realized by any means possible; if abuses occur along

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<sup>34</sup> Note how *international society* operates along lines of the aforementioned concept of *ipseity*. *International society* serves as a function of states who authorize themselves through international societal legitimation whenever states experience difficulty asserting their sovereign rights. Any such difficulty states experience, instability or threats to their territorial integrity, threatens their self-authorization which is required for them to authorize international society. This process, namely through the principle of recognition, is a sort of groundless (and endless) reciprocal self-authorization, wherein both states and international society constitute one another based on the need to stabilize their identities.

the way, well, having found the objectively vindicated version of justice, humanitarian ends justify any interventionist means (pp.3-6).The differentiated ontology for responsibility continued to emerge in international law, where the *structural accountability* for atrocities was never codified and the *international community* took on the duties to reform or impose changes on offending states, such as those imposed in Germany and Japan (pp.456-7), which are now models for post-intervention state-building (Barakat, 2005).

The following section presents both the literature and the paradigm as imbued with *problem-solving* thinking that presents the UNPKO role as vital to maintaining international order, and which accordingly justifies peacekeeper legal immunities. For the purposes of the following section, what is important is the role that the literature on *peacekeeper unaccountability* plays in justifying peacekeeper immunities. Those justifications do not condone peacekeeper abuse, but they do legitimize a certain *objectifying violence* inherent to a state's and *international society's* right to exercise the exceptional powers it deems necessary, such as peacekeeper immunity.

### **Peacekeeper Unaccountability Literature — Abuse Accountants**

The literature on *peacekeeper unaccountability* consists of UN and member state policymakers, international legal scholars on conflict law, and professional human rights non-governmental organizations (NGOs) that debate on how best to respond to the UNPKO abuses. Within the first group, which I will categorize as an *institutional* approach, policymakers, academics, and NGO advocates have converged on a standard analysis of *peacekeeper abuses*, framed as a *policy problem* loosely subsumed under the category of *peacekeeping unaccountability*. The second activity, which I categorize the

*activist* approach, is set of actors involved in the issue of *peacekeeper abuses* are victim-rights groups and affected individuals who pursue civil litigation against UN or peacekeeping-contributing-states, citing human rights violations; they seek compensation and/or apologies for peacekeeping related harms and/or deaths. Both groups contain a set of shared presuppositions abiding to *the paradigm of accountability*: the dominant narrative that displaces the locus of responsibility for eliminating atrocity away from the *international community* and placing culpability squarely on individuals within a criminal framework. Both groups problematically legitimize the structural component of *objectification* within peacekeeper abuses.

In the peacekeeper unaccountability literature, peacekeeping abuses are castigated using terms for responsibility defined and set in international law. Actors responding to the abuses differ in *how* they cite and engage international legal obligations for the UN, member states, and individuals involved in UNPKO. Abuses are read against a set of ‘legal facts’ surrounding the peacekeeper’s immunity. Between the two distinct approaches, their main difference revolves around which international legal responsibility is emphasized and what type of *accountability* is sought. For *institutional* actors, it comes down to reform whereas *activists* pursue compensation and apology. Neither, however, question the larger *structure* of international law but rather, both seek to *solve a problem* using it. Roughly speaking, the actors fall into those two camps:

- **Institutional actors** include UN and member state officials such as: Office of Internal Oversight Services (OIOS), UN Secretary-General, and UN High-Level Panels. Also working closely with them and within their terms of reference are advocacy groups and professional NGOs like Providing for Peace (2016), Code Blue Campaign (2015), International Peace Institute (2016) and International Crisis Group

(2016). Another set of actors engaged in *institutional* thinking includes scholars and researchers who study ways to achieve UN or state objectives and evaluate the success of peacekeeping in general. The objective for *institutional* actors is largely to reform international law, UN policy, and/or state behavior.

- **Activist actors** include family members and communities affected by UNPKO, as well as those who represent them, such as victim's rights groups who engage in activist lawyering. Activist lawyers (however oxymoronic that may sound) hope to establish precedents that might bring about future changes. Examples include the Institute for Justice and Democracy in Haiti in conjunction with Bureaux des Avocats Internationaux (2016), the Center for Constitutional Rights (2016), and Movement of Mothers of Srebrenica (2016). *Activist* actors are concerned with addressing the specific grievances of those harmed or killed and/or their families. However, they couch their strategy in terms of preventing future abuses.

These approaches to *peacekeeper unaccountability* differ according to which international legal obligation they rely upon for change. *Accountability* approaches seek to have the law exact punishment on a specific *physical* body that corresponds to whichever level — local, national, international — commits an atrocity (Steele, 2013, pp.65-70). For *institutional actors*, abuses are *attributed* to an individual whom a legal entity is responsible to punish and/or begin the punishment process. And for *activist actors* *attributing* abuses to organizations, compensation must be pursued against those individual legal subjects. For both approaches, the issue of peacekeeping abuses becomes one of how peacekeeping immunities violate differing higher obligations, whether unenforced UN protocols, human rights, or rights to civil litigation. However, the *paradigm of accountability* has largely accepted the humanist discourse that cloaks peacekeeping missions. Thus, a seemingly false dichotomy emerges whereby the literature on *peacekeeper unaccountability* sees a clash of jurisdiction between

individuals and states, in international law, where in fact there is none. Both approaches cannot perceive the quandary because they evaluate peacekeeper abuses in a technical manner how international laws that establish immunities relate to states and international organizations. In this way, both approaches do not question state objectives in UNPKO but instead concentrate on finding an objective way to realize their own goals, whether advocating for peacekeepers or for those peacekeeping whom has harmed.

### **Institutional Reformers**

Much of the progress in reporting and reforming peacekeeper abuses stems from internal and ‘in-house’ work conducted within, or commissioned by, various organs within the UN. In this *institutional approach*, lawyers, policy analysts, diplomats and delegates create reports and set forth resolutions. These actors seek to reform peacekeeping from within the system, and they often encounter institutional resistance from states and the administration of the UN.<sup>35</sup> Sexual assault has proven to be the most prominent scandal and has led to substantial investigation and reports to reform UNPKO (McGreal 2015a, 2015b). Below is a brief history of the major reforms of peacekeeping practices.

1. **The Brahimi Report** (The Panel on United Nations Peace Operations, (UN General Assembly (UNGA), 2000): Following the disasters of Srebrenica,

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<sup>35</sup> Namely, militaries support absolutely immune legal status for peacekeepers and a “zone of tolerated criminality and corruption” (Haas and Kernic in Neudorfer, 2015, p.168). This is because many commanders were still being implicated in or had participated at some point in similar activities; either way this has disincentivized any substantial investigation into the matter (Harrington and Barry in Neudorfer, 2015, p.32). There is also the fact that the UN bureaucracy has a weak bargaining position and can contribute only prestige and reputation (Neudorfer, 2015, pp.21-3). For this reason, the UN guards information on the nationalities of those peacekeepers who engage in abuse and does not readily publish detailed information about abuses (p.22). National bureaucracies’ proclivity for allocating resources for their own national defense impedes their contribution to peacekeeping (Bellamy & Williams, 2013, p.430). In that same spirit, Schmalenbach (2015) argues that civil litigation against the UN would damage its credibility (p.324).

Rwanda, and Somalia, Secretary-General Kofi-Annan commissioned what was then the most extensive review of peacekeeping. This report recommends that peacekeeping should entail an enforcement role in missions, increased resources, and standardized training (Findlay, 2002, p.333). Although the report did not address abuses directly, it was the first to target the failures of peacekeepers themselves.

2. **The Zeid Report** (The Comprehensive strategy to eliminate future sexual exploitation (UNGA, 2005): The same UN Secretary-General commissioned a report to respond to the allegations of peacekeeper's sexual abuse in the Democratic Republic of the Congo (DRC) by rights groups. Recommendations include applying codes of conduct for UN staff to peacekeepers as well, monitoring allegations (Simic, 2012, p.48), and segregating peacekeepers from the local population (p.68).
3. **Comprehensive review of the whole question of peacekeeping operations in all their aspects** (UNGA, 1990): Renewed attention on peacekeeper assaults made international headlines and spurred significant activity in the area (Bryce, 2016; Crossette, 2015). The Comprehensive Review was undertaken before the scandals and expanded the scope of reform-minded peacekeeping review beyond the Brahimi Report (UNSC, 2015). However, it must be read in context with other recent notable documents that include a leaked internal investigation of peacekeeping sexual assaults (Aworu et. Al, 2013; Donovan, 2015), an internal oversight review (OIOS, 2015) and an independent investigation into the CAR allegations (Deschamps et al., 2015). The Comprehensive Review's recommendations directly address accountability by reiterating the need for better military discipline and by pressuring states to investigate abuses. As with the Brahimi Report, its primary focus remained on improving military responses to humanitarian offences (UNSC, 2015).

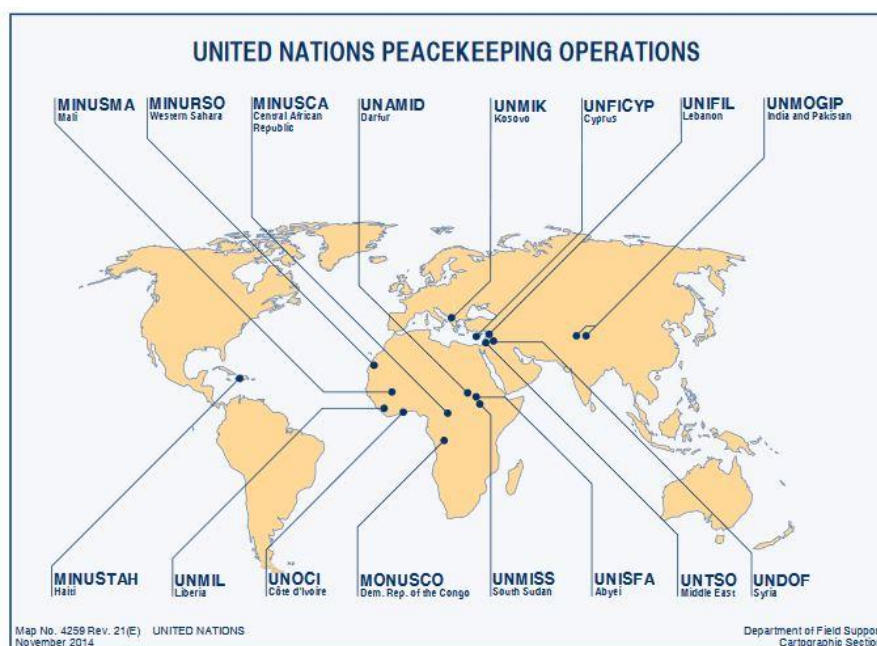
A more recent example of UN efforts is the establishment of the High-Level Independent Panel on Peacekeeping Operations (UNSC, 2015).<sup>36</sup> And in another major development, the UNSC passed resolution 2272 (2016), which requests, upon the General-Secretary's call, that states repatriate whole peacekeeping units found to be committing abuses. All of the reports focus on individual case studies of abuses rather than taking a systemic approach. This individualization occurs, for instance, in the work of Inter-Agency Standing Committee (IASC, 2015), an inter-governmental body that coordinates responses to humanitarian crises between various international organizations and NGOs, that promotes bolstering investigations and enforcement against allegations of abuses. Similarly, when the Office of Internal Oversight Services (OIOS) at the UN looks into allegations of abuses, such as in response to the *Save the Children Reports* from within the DRC, they are only responding to individual allegations (Neudorfer, 2015, p.34).

How is this problematic? Investigating cases of abusive behavior is laudable, but it fixes the locus of abuse in one spot. However, trafficking, for instance, is a fluid and dynamic crime, with networks spanning continents. These networks are tied to criminal elements and to a large (underground) political economy. For instance, Michael Shapiro (2015) deconstructs a map of locations of ongoing UNPKO as symptomatic of a stasis inherent in reading crime as confined within certain locales. Looking at the map (see Figure 1 below), he points out, suggesting, that crimes do not

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<sup>36</sup> This year marks another push to reform the absolute immunity for UNPKO personnel with the publication of the 'Comprehensive review of the whole question of peacekeeping operations in all their aspects' (UNSC/A/70/95-S/2015/446) by an independent high level UN Panel in light of the mounting sexual scandals of peacekeeping officials in the Central African Republic (Laville, 2015; Donovan & Lewis, 2015; York, 2015).

solely occur and need to be addressed *there*. Those positions betray the existence of criminal peacekeeping networks. In the same way, focusing on individual peacekeeping soldiers provides cover for institutionalized military complicity; investigating one locale and a spat of abuses erases the map of the structure within which those abuses occurred and continue to occur (p.27). Individualism does not address structure, whether in characterizing abuses as *individual events*, attributing them to *individual* organizations, or most prevalently, attributing *abuse to lone individuals*.



<b>MINURSO</b>	United Nations Mission for the Referendum in Western Sahara	established: 1991
<b>MINUSCA</b>	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic	established: 2014
<b>MINUSMA</b>	United Nations Multidimensional Integrated Stabilization Mission in Mali	established: 2013
<b>MINUSTAH</b>	United Nations Stabilization Mission in Haiti	established: 2004
<b>MONUSCO</b>	United Nations Organization Stabilization Mission in the Dem. Republic of the Congo	established: 2010
<b>UNAMID</b>	African Union-United Nations Hybrid Operation in Darfur	established: 2007
<b>UNDOF</b>	United Nations Disengagement Observer Force	established: 1974
<b>UNFICYP</b>	United Nations Peacekeeping Force in Cyprus	established: 1964
<b>UNIFIL</b>	United Nations Interim Force in Lebanon	established: 1978
<b>UNISFA</b>	United Nations Interim Security Force for Abyei	established: 2011
<b>UNMIK</b>	United Nations Interim Administration Mission in Kosovo	established: 1999
<b>UNMIL</b>	United Nations Mission in Liberia	established: 2003
<b>UNMISS</b>	United Nations Mission in South Sudan	established: 2011
<b>UNMOGIP</b>	United Nations Military Observer Group in India and Pakistan	established: 1949
<b>UNOCI</b>	United Nations Operation in Côte d'Ivoire	established: 2004
<b>UNTSO</b>	United Nations Truce Supervision Organization	established: 1948

**Figure 1: Current United Nations Peacekeeping Operations**

However, it must be said that this internal reformist approach can also wield major influence. The work of the International Legal Commission (ILC) that wrote the Articles of Responsibility for International Organizations (ARIO) has had a direct effect on the interpretation of UN immunities (Gaja, 2014, pp.7-8). Notably, in the case of *Stitching Mothers of Srebrenica v. the Netherlands* (2013), the European Court of Human Rights (ECtHR) cited the ILC's work directly. Though the Court's interpretation of the articles was crucial for dismissing the cases brought against the UN for abuses, the Hague District Court (a lower level court) in 2014 used the same articles to award damages to a select few families for having lost members to peacekeeper inaction. The normative argument is strong; all courts hearing the cases acknowledged this by calling the accusations "grave" (*Mothers*, 2013, para 158) and "serious" (*Mothers*, 2012). However, the principle argued against the UN, that any and all complicity in genocide (of the sort that had occurred in Srebrenica) should negate any immunity, rung hollow with the judges. So just as they sided with CH.VII in its clash against *jus cogens* norms against genocide (Momirov, 2016, p.440; Krieger, 2015, p.263), courts sided with the immunities needed to make CH.VII-authorized UNPKO operate.

A plethora of institutes and think tanks advises the UN and conducts research with the explicit aim of helping the institution undertake peacekeeping in a way that aligns with its legal obligations and mandate. Such examples include *The International Peace Institute* (which runs *The Brian Urquhart Centre for Peace Operations* and the *Providing for Peacekeeping Research Network*), *Centre for UN*

*Reform Education*, and the *International Coalition for The Responsibility to Protect*.

Their respective positions support different international legal institutions and their expansion and/or mandate implementation. For instance, one aims to “strengthen normative consensus for [Responsibility to Protect (RtoP)] at the international, regional, sub-regional and national levels” (International Coalition for the Responsibility to Protect, Founding Purposes of the Coalition, 2016), and another aims to “promote the prevention and resolution of conflicts between and within states by strengthening international peace and security institutions.” (International Peace Institute (IPI), About the IPI, 2016).

What is problematic is how Western civil society appropriates the mantle of human suffering for the purposes of power. Whitworth (2005) rightly slams NGOs supporting the international legal projects and the better functioning of the UN because these NGOs foreclose the political questions associated with their conduct:

Once the goal becomes helping UN bureaucrats or military personnel become more effective in their work, a whole series of questions are ruled out of bounds; for example, whether UN peace operations are best conducted by militaries; whether peace and humanitarian operations are a form of imperialist practice, or whether the United Nation’s embeddedness in liberal assumptions and its many peculiar organizational characteristics undermine arguments that require (non-essentialized) discussion of difference (p.124).

*Institutional* scholarship addressing peacekeeper immunity, or at least that which is friendly to the UN, hails from three disciplines: international legal thought<sup>37</sup>,

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<sup>37</sup> Legal monographs coming out of law schools aim analytically to disentangle in a practical manner various peacekeeping legal issues (Howe et. Al, 2015). For legal scholarship, peacekeeper unaccountability is usually subsumed within a range of other debates surrounding other legal concepts. For example, there are separate monographs for the protection of peacekeepers that deals that with ‘state and [international organization] immunity’ (Engdahl, 2007) whereas the prosecution of wrongdoing peacekeepers focuses on ‘criminal responsibility’ (Zwanenburg, 2005).

policy studies<sup>38</sup>, and International Relations (IR).<sup>39</sup> Each shares the same approach, which is to hold the UN *accountable* in all of its activities, based on its own standards. They read the UN's role through relevant international law, providing recommendations to governments, or advancing a political-normative case. The UN's analyses frame abuses as harming the overall mission and suggest that reform is required to sustain peacekeeping as an institution (Cunliffe, 2013, p.8). Alex Bellamy and Paul Williams (2010) typify this line of thinking by writing: "such crisis *can only* (emphasis mine) be resolved by the recalibration of legitimacy through the belief, practice, or policy in question" (p.436). Like the NGOs, the academic disciplines dealing with peacekeeping focus on functional issues related to improving the logistics of UNPKO. The way they speak about reducing "costs", financial or in terms of human lives, fails to question the "peace" the UN brings (Richmond, 2005, p.155). In such an analysis, individuals affected by UNPKO are submitted to a logic of equivalence in which their lives become commensurable with financial costs or questions of effectiveness. In that sense, academic interpretations of peacekeeping alienate peacekeeper abuses from their societal context and render the value of the lives of those harmed equivalent to other mere objects.

Professionalized NGOs are a subcategory within the category of *institutional* reformers. They advocate for reforms, but they work closely with the UN in many

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<sup>38</sup> Political science scholarship like that of Roland Paris (2010) and Alex Bellamy (2013) looks into myriad economic and governmental figures to support a particular recommendation. This field also sees a lot of policy briefs from think tanks and research centers such as New York University's Centre on International Cooperation and the International Crisis Group.

<sup>39</sup> IR analyzes peacekeepers in many subfields, such as global governance, international ethics, or security studies. All largely look at peacekeeping through the lens of humanitarian intervention and/or state building (Richmond 2004, 2005, 2013; Lang, 2010, p.328). *International Peacekeeping* is the prominent multi-disciplinary peer-reviewed journal dedicated to the field writ large, but it publishes little international law scholarship.

capacities and work side-by-side with it in the field. Media attention to peacekeeper unaccountability generally arises because aid organizations in regular dialogue with the UN, and who work alongside it in conflict zones, approach the mainstream media. For instance, it was *AIDS Free World* and *Save the Children* who broke the story regarding peacekeeper sexual abuses in Mozambique in 1993 (Simic, 2009, p.40). By seeking publicity and media attention, these NGO's also seek the buy-in of states and relevant UN bodies ultimately to endorse and implement their proposals to waive select peacekeeper immunities (Odello, 2010, p.349). Recently, *AIDS-Free World* launched the Code Blue Campaign (2015a), calling for non-military peacekeeping officials who commit sexual abuse to have their legal immunity revoked. *AIDS-Free World's* approach has been consistent since the 2000s, when it began to propose reforms and demand responses from the UN. Their first proposed reforms did not advocate for any changes to international or national law, but rather sought reliable enforcement of existing legal frameworks (UN High Commission on Refugees, Save the Children-UK, 2002, p.18). *AIDS-Free World* can also claim to have sparked the *Independent Review of Abuses* in the Central African Republic and the subsequent leak of a 2013 report on an internal review of sexual assault that amplified pressure on the UN (Donovan & Lewis, 2015, Reuters, 2016). Arguably, their demands and successes resemble the goals and desires of other institutional reformers pressuring for change, like the UN Office of Internal Oversight Service (OIOS) (2016). A notable difference is that NGOs aim to garner media attention to the issues on an international scale (Richmond, 2005, p.140).

Advocacy-oriented groups vary in their mandates and capacities, which range from providing humanitarian services to raising awareness. They aim to hold institutions

like the UN accountable to the spirit of international norms, such as human rights. Advocacy campaigns for UN accountability do not disavow international humanitarian interventions but do speak to how UNPKO should be fulfilling the UN's mandate – not to mention how the failure to do so undermines the legitimacy of the UN altogether (Code Blue Campaign 2015a). Advocacy groups hold that states can be held accountable, and that the route to accountability *is through changing international law*. For instance, major past successes under this approach include framing the guidelines for the sexual conduct policy under which peacekeepers operate during missions (Simic, 2012, p.46). This resulted in the NGO-spearheaded UNSC resolution 1325, which introduced gender mainstreaming, the policy addressing gendered dimensions in UN practice (Cohn, 2008, p.185).<sup>40</sup>

But despite repeated scandals involving peacekeeper abuses, sexual assault being most prominent, advocates suffer the same fate as other institutional actors. They reproduce the fundamental structure that *objectifies* individuals in peacekeeping. For advocates, the value of those harmed during UNPKO is measured in relation to the value produced by the mission. The task of advocates, like that of academics, in-house officials, and think-tanks, is to promote better peacekeeping. Valuating individuals in such a manner necessarily *objectifies* them since they are measured in terms of a means to an end that is outside their control. Marx (1959) noted how value is created when *objects* are judged by characteristics that lie outside the object itself. The object is judged by what it accomplishes for subjects entangled within wider social relations, rather than being an

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<sup>40</sup> Gender mainstreaming is a UN policy that addresses the lack of consideration toward women in UN practices. The policy aims to introduce changes so the UN can meet *gendered* needs. For example, UNPKO reforms included incorporate more women into the institution and their input in updating personnel training and guidelines (Cohn, 2008, pp.2, 14-5; Higate & Henry, 2004, p.487).

end in itself (p.72). *Institutional* reformers of peacekeeping look at individuals in relation to the *international order* peacekeeping maintains. Not only does this valuation of those harmed overlook harmful structural *objectification*, but such an approach plays an active part in legitimizing the use and abuse of individuals for *international societal ends*.

### **Activist Litigants**

There has been a noticeable rise in the number of groups representing individuals harmed by international institutions and/or actors, resulting in many more lodged civil suits against them. These groups use international humanitarian law in civil litigation before domestic courts, resulting in successful cases against multinational corporations such as Pfizer, Talisman, Exxon, and Nestle (Green, 2014). This legal action has been made possible by the overlap between international human rights, humanitarian law, and civil law (Wardle, 2012; Simone and Macklin, 2014, pp.2-3). These civil legal actions are not well-publicized in the mainstream media, but scholars are paying more attention to them because of their implications for peacekeeping policy and international law (Boon, 2014).

The issue of peacekeeping abuses also engages states and *international law* in an activist manner, confronting *unaccountability* by using the law confrontationally. Activist civil litigations pit the norms behind the *paradigm of accountability* (which legitimize peacekeeping in the first instance) against the legal rights of international societal institutions, such as the UN and sovereign states. This can be seen in the argument made by the plaintiffs in the *Mothers* (ECHR, 2013) case that the UN could “...waive immunity, as in cases of serious human rights violations” (p.21). Activist litigation, however, takes *international legal norms* at face value and instead bears the full brunt of

*international societal objectification* when courts uphold the rights of the UN and states to *dispose* of populations during UNPKO.

Using international law in an activist way relies on the notion of private accountability in civil litigation to enforce the universal reach of humanitarian ideas with the hope of superseding sovereignty (Donovan and Roberts, 2006). Nevertheless, activist litigants run up against the limits of the UN's jurisdictional immunities, which the ECtHR (2013) confirmed in the *Mothers* case when it upheld precedents shielding the UN in the name of the international community's prerogative under the UN Charter. The ECtHR's ruling happened in the context of national courts dealing with civil liability to domestic litigation concerning international organizations (Krieger, 2015, p.262). Activist litigants have successfully won compensation in civil court by suing the UN and/or states. For example, The ECtHR *Waite and Kennedy* decision overruled international organizational immunities during a contract dispute for an employee denied labour redress (p.264). Though unsuccessful thus far, the case of the *Haiti Cholera Outbreak* is also part of this civil movement. It is being brought against the UN by the Institute for Justice and Democracy in Haiti (p.275) and it is being litigated in American federal courts (Rashkow, 2014). Whereas some institutions attempt to apply-international law and some advocacy groups seek to change it, the activist approach *confrontationally invokes* international law. There is no doubt some notable successes, even against the UN, such as in *P. Kadi and Al Barakaat International Foundation v. Council and Commission* (2008), in which the ECtHR ruled against the UN Security Council (UNSC), which subsequently set up an ombudsman (Krieger, 2015, p.275).

An activist litigation approach to the issue of *peacekeeper unaccountability* was sparked by the *Behrami* and *Samarati* cases heard by the ECtHR in 2007. They concerned peacekeeper's malfeasance and the ruling established precedents cited in future *attribution* legal deliberations (*Mothers*, 2013; Villalpando, 2016, 319). Similarly, the *Stitching Mothers of Srebrenica v. the Netherlands* (2014) ruling by the Hague District Court was a victory because it *held accountable* the Netherlands for the conduct of Dutch peacekeepers during the Srebrenica Massacre. The principal argument by activist litigants in these cases against states and the UN is that there are no legal mechanisms for individuals to bring claims within their own states, which is guaranteed in the International Covenant on Civil and Political Rights (UNGA, 1966). Article 14(1), for instance, states: "All persons shall be equal before the courts and tribunals." This should guarantee everyone access to courts. In the *Mothers* case, the same basic idea was read into article 6 of the European Convention of Human Rights (ECHR), which guarantees due process and recourse to the law and to the courts (Council of Europe). Activist litigation groups see their clients as endowed with international legal rights, and admirably so. In a sense, they adopt the *humanitarian* argument, which for Rancière (2004) incorporates "the count of the uncounted—or the part of those who have no part [of a community]" (p.305). Individuals suing states for redress and suing the UN for peacekeeper abuses are inaudible due to the structure of UNPKO immunities. In a sense, their civil litigation efforts demand private/monetary *accountability* for the abuses from those subjects responsible for the actions of the perpetrators (such as states and the UN). But in addition, these efforts also demand that individuals be counted in the international

legal order by invoking the “‘right to humanitarian interference’ — a right that some nations assume to the supposed benefit of victimized populations” (p.308).

Bids for both recognition and compensation encounter resistance from the UN, peacekeeping member states’ national counsel, and international legal scholarship. Arguments against this approach mirror the rationale for peacekeeping that relativizes peacekeeper abuses and harms with UN ends. So, activist litigation is not judged by legal scholarship and other *institutional actors* on its own merits but in comparison to the *international order* and its norms. Legal scholarship and policymakers interpret cases that achieve compensation as entering dangerous territory because they have the potential to create precedents that can interfere with legitimate UN business (Spirik, 2014; Krieger, 2015, p.270). One example of this type of criticism is how these domestic civil actions can lead to “forum shopping” in which activists will continually sue the UN in courts known to be friendly to such claims (p.275). Schmalenbach (2015) echoes this assertion because if activist claims are universal in nature, such as with *jus cogens* violations, favourable decisions “would throw open the gate for domestic [cases]” (p.318).

At the heart of the criticisms against activist litigation is the primacy of *international order* and how peacekeeper immunities are symptomatic of that primacy. Any interference with the UN or states that contribute to peacekeeping hampers the *functional necessity* of the immunities. CH.VII of the UN Charter, which upholds the use of force by the UN Security Council and UNPKO, is generally interpreted to represent the interests of the international community (Burke, 2014, p.68). Even if states themselves were to interpret the relevant UN policy decisions, that would constitute interference. This is best illustrated in the *Certain Expenses of the UN* decision by the

International Court of Justice (ICJ), which ruled that even if national courts were to investigate UN wrongdoing, that would involve making active inferences about UN processes, which would implicitly interfere with the UN's functioning (Schmalenbach, 2015, p.318). Since states are obliged to comply with the CH.VII actions, and jurisprudence that upholds peacekeeper immunities, *individuals* are tethered to the *functional necessities* of UNPKO.

*Activist* litigation represents by far the most promising way to confront peacekeeper abuses because it calls into question the institutions that states use to evade responsibility. For instance, the established practice among peacekeeping states is to hide behind UN immunities for any sort of peacekeeper abuses (Brölmann, 2015). With that said, *activist litigation* remains a key way to criticize state conduct during UNPKO. In that sense, the cases against states and the UN, however unpopular, result in shoring up an institution that is problematic to begin with.<sup>41</sup> *Activist* approaches allow injustices to become depoliticized through humanitarian law. To illustrate what I mean, we can look at feminist legal scholarship criticizing the stratification of human rights law or *jus cogens* considerations into distinct legal categories.<sup>42</sup> International legal categories such as human rights and *jus cogens* undergird a masculinized international political order, and

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<sup>41</sup> Consider how the use of human rights in civil litigation results in improving the administration of organizations. For example, a Swiss Federal Court ruled in *NADA v. Seco* that recognized Swiss attempts to solve the UN accountability problems (of a terrorist sanction list) were sufficient proof that Switzerland was meeting its state obligations. It therefore dismissed a suit against the Swiss government (Krieger, 2015, p.267, *Mothers*, 2012). Although the decision was reversed at the ECtHR (2012), the logic is clear: human rights *improve* the management of international order and civil suits signal to states and international organizations the deficiencies of that order. Another example shows how increased human rights liability, stemming from civil litigation precedents, leads to internal reforms. The *Smith and others v. Ministry of Defense* decision by the British Supreme Court attributed abuses committed by British troops in Iraq to possible training omissions. (Krieger, 2015, p.274).

<sup>42</sup> For instance, the Dutch Supreme Court in their *The Mothers of Srebrenica* decision cites extensively the ECtHR *Al-Adsani* decision that upheld state immunity in the face of torture allegations. There, the ECtHR had set aside the question of whether it was *jus cogens* to begin with and “dismissed the gravity-argument.” Instead the Court emphasized how the Mothers case was a civil claim (para 158, p.49).

serve to isolate and obscure gendered violence as something other, invisible, and subordinate to political interests, thereby mitigating the perpetuation of abuse (Charlesworth and Chinkin, 1993, p.69; Charlesworth, 1995, p.105).<sup>43</sup> Feminist legal scholarship elucidates implicit jurisdictional lines that are explicitly rendered into *de facto* limitations beyond political responsibility (Aolin, 2011, p.286-7). Though *activists* push the limits of law and reveal the international legal rationalization of immunities in the name of *international legal order*, this approach succumbs to reifying the distinct responsibilities between individuals that also exists in the *paradigm of accountability*. *Activists* engage in litigation on behalf of particular groups, such as dispossessed indigenous peoples, Haitians, or Srebrenicians. However laudable these efforts are, the organizations that support those harmed by multinationals, states, and UNPKO, nonetheless promote and spread the notion that *international law* is a universal redress mechanism, which promulgates the Western universalism inherent in peacekeeping (Richmond, 2005, p.141).

Literatures interpreting *peacekeeper unaccountability* are focused on the content of immunities. While *activist litigants* confront states and how immunities are used, they do not confront their form or the structure from which they emanate. Critics of human-rights inspired civil litigation make unfounded assertions that *activist* cases undermine or risk unravelling UN functionality (Boon, 2016). At worst, some critics are worried that

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<sup>43</sup> Human rights-based challenges of immunities have caused some courts to dismiss complaints altogether. Take for instance how US courts treat human rights claims as distinct from, and irrelevant to, matters pertaining to immunity. Such reasoning has also been cited as precedent for the denial of Haiti cholera claims against the UN. See e.g. *Georges v. UN et al.*, *Mandalier v. UN and Belgian State* (1969), *Enrico Corp. Ltd v. UNESCO* (2008), and *Brzak v. UN* (2010) (Schmalenbach, 2015, p.325).

these efforts could bankrupt the UN (Brölman, 2015),<sup>44</sup> confirming critics' rather uncritical position. The use of immunities is problematic; their existence is not. The acceptance of *immunities* is more evident in the *institutional* approach to *peacekeeper unaccountability*. For instance, the Code Blue Campaign (2015) concedes "...the legitimate and crucially important purpose of UN immunity." Similarly, the International Law Commission (ILC) drafted Article 25 (b) in the Articles of Responsibility for International Organizations, stating that immunities are necessary to ensure nothing "...seriously impair[s] an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole."

### **Objectifying Violence During Peacekeeping**

The problematic element of the *paradigm of accountability* is its acceptance of the necessity of the UN right to maintain *international order*, which is premised on ensuring the primacy of the inter-state system/state sovereignty. Reading immunities as an extension and part of *international order* reveals a violent *objectification* of individuals which renders them *disposable* and *exchangeable* for *international societal* ends. This reading of *international society* and *state subjectivity* does not necessarily lead to wholesale condemnation of the international law that codifies *international order*, although it undergirds my reservations about international law. The issue instead arises when the *international societal* process of *objectification* leads to egregious violence, especially when individuals are used for political objectives without their having a say in those processes.

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<sup>44</sup> The *Mothers* and *Haiti* cases differ in the large amounts of individuals, potentially thousands, seeking damages that potentially (Krieger, 2015, p.260).

Peacekeepers, representatives of an *international order* that states take upon themselves to enforce and realize, *use* (and sometimes *abuse*) people in their care. States, and collectively, *international society* implicitly require that their peacekeepers be immune from prosecution for abuses. Since UN policies and laws, established and implemented by states, enabling peacekeeping immunity are to procure troop contributions (Jain, 2012, p.245; Neudorfer, 2015, p.16), individuals under the ‘care’ of UNPKO are thus implicitly *exchanged* between states and an international community that is well aware that abuses do occur. Peoples are objectified via this contract. As Burke (2014) states:

despite all the rhetoric on the subject of criminal accountability, in practice impunity was assured all the way down the line. Host States... could [at best] refer suspects to the United Nations. Since the United Nations could not punish them, they were sent back to their countries of origin, which often did not want to publicly admit the misconduct of their nationals and were therefore reluctant to prosecute them (p.60).

In this sense, the peacekeeper immunity afforded by international law emulates the rise of government-condoned practices of prostitution to meet military needs (Jeffreys, 2008). Make no mistake: militaries engaged in peacekeeping rely on their absolutely immune legal status, which permits a “zone of tolerated criminality and corruption” (Haas and Kernic in Neudorfer, 2015,p.168), whether or not commanders are implicated or were at some point (Harrington and Barry in Neudorfer, 2015, p.32). The *order* of peacekeeper immunities creates soldiers who operate as superior “imperial” subjects; this arrangement gives soldiers an exemption they can use to *objectify* locals for their use (Simic, 2012, pp.51-2). Such an order, and such abilities, are part of the deal-making that makes peacekeeping possible. States exchange participation in peacekeeping for immunity; in

effect, those immunities are an exchange of exceptional powers for the exceptional ability to dispose of others, i.e. the others' *objectification*.

In UNPKO, those individual objects harmed by a mission, such as combatants and civilian casualties, become disposable when the respective contributing states carry out their international and political aims. The violent actions that result from immunity are in this sense a *price* and condition for state participation. When abuses occur, it is *those who are abused*, and not states, who “pay the price.” In the case at hand, those harmed by peacekeepers are (de)valued merely as a humanitarian war spoil (Charlesworth & Chinkin, 2000, p.253). By working within *the paradigm of accountability* and its *problem-solving* frame, the literature concerning peacekeeper abuse underscores how the international law governing UNPKO immunities contains an explicit *exchange of objectified individuals who become sacrificial and disposable* for the sake of *international order*.

### **Conclusion – Fog of Peaceful War**

The international community has legitimized and condoned the collective use of force in international politics (Willmot & Mamiya, 2015, p.375-6), from meagre UN bystander observation missions to robust peace enforcement mandates. Despite marked failures, atrocities, and scandals during these missions, states remain committed politically, financially, and legally to solidifying and entrenching UNPKO interventions as an international institution (Findlay, 2002, pp.389-90). Peacekeeper abuses are part of the institution of peacekeeping. Too often, the discourse views conflict areas engendering abuses, and eliminating conflicts is priority. While some propose peacekeeping as the solution, there remains little question that peacekeepers partake in wars. To chalk up

peacekeeper abuses to the chaos of conflict conceals its systemic occurrences. Even if peacekeepers warre,<sup>45</sup> war is an *ordered* phenomenon.<sup>46</sup> What remains to be determined is the nature of such *international order* that currently exists and perpetuates these abuses, ascertainable by the use of legal immunities.

Legal agreements governing UNPKO immunities exchange the *potentiality* of one state's sovereign power, to *potentially* use and abuse of individuals, for the achievement of peacekeeping political aims. The value of human life according to international law is determined according to these subject/object relations between states and individuals. State objectification of individuals appears through the manner in which states can *exchange* them as if they were objects. It must be noted that not all individuals face the same degree of *disposability* or *exchangeability*; people with differing gender identities, classes, and races, face disproportionate state violence in this process. Take for instance the live-in caregiver program/agreement between Canada and the Philippines. Philippine migrant workers, typically female, are granted work in Canadian homes and are then fired and deported – essentially *disposed of*, once no longer of use to their sponsoring Canadian family (Santos, 2009). Another example is the manner in which the European Union and Turkey resettled Syrian refugees to Turkey in exchange for monetary compensation and visa privileges for Turkish citizens (Mortimer, 2016). Soldiers are another example of objectified individuals who are *disposable* by states in battle, or

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<sup>45</sup> A reference to Hobbes (2006), “that condition which is called Warre; and such a warre, as is of every man, against every man” (p.101).

<sup>46</sup> This observation forms the basis for Contemporary Military Theory starting with Clausewitz seeing an internal logic to war, Martin van Creveld likening war to a game, and Keegan & Lynn who see it play a part in identity formation. As with IR English School, Military Theory also abides by the idea that war is more of a policing action preoccupied with maintaining international order. (Angstrom, 2015, pp.15-8).

exchangeable as contributions to foreign military missions, including UNPKO. National citizenry as a category remains difficult to dispose of, but states do retain a prerogative to remove individuals' citizenship or to deport, exile, or expatriate them. Though there are limits on *the objectification of individuals*, they remain country-specific. *International society* uses international law *only* to limit *what* state subjects can do with their objects and property; not the state's inherent power to do so.

Similarly, the recourse to international law to end UNPKO abuses is based on accepting some legitimacy in the collective actions of states and their powers. The *paradigm of accountability* takes this exact view by focusing on identifying or changing international legal obligations that compel states to enforce individual responsibility during peacekeeping. The debates surrounding peacekeeper abuses involve claims regarding the collective responsibility of state and international lawgivers to enforce *accountability*. That perception results from viewing peacekeeper abuses as a technical *jurisdictional* conflict that states can and should resolve through international law, premised on the primacy of state sovereignty. However, *international society* constitutes division in the *jurisdictions* it establishes to evade responsibility. In that way, the structural process of *objectification* goes unnamed.

Therefore, notions of *accountability* that attribute responsibility only to the individual body, and not to the state, reify that jurisdictional line. The state has a right to possess the sole *means of violence* over individuals. This is clear because states responsabilize soldiers who cease to represent the state (when their state waives immunity), and because individuals are tried either within the state or internationally. The literature of *peacekeeper unaccountability attributes* responsibility to an individual agent

involved in UNPKO – not to their structure. *Attribution* of responsibility for wrongful peacekeeper actions depends on finding an individual, a state, or the UN *accountable* as a legal subject by citing specific international legal texts; this overlooks how one category (the individual) is not like the others. The focus on individuals creates a ‘false alibi’ that misdirects attention away from, and thus expunges, the political wrongs committed through harmful *objectification*. Questions regarding *accountability* should not devolve into how to punish states, nor into ascribing a pure form of responsibility that would presuppose an objectively true viewpoint and assuming a true means to achieve justice. Such an approach risks reproducing the *problem-solving* logic criticized earlier. For the moment, I concentrated on the telling *silence* within the epistemic context of *peacekeeper unaccountability* and the literatures quiet towards the *objectifying violence* inherent in the immunities discussed.

There are multiple processes of *objectification*, so in the next chapter, I will propose a specific process of *objectifying violence*. This process exists alongside the objectification of refugees, migrants, citizens, soldiers, and others — each of whom warrant their own respective analyses. For instance, I argue that Agamben’s (1998) theory of *homo sacer* demonstrates how sovereign states *objectify* those individuals it deems to be *bare life* (thus utterly disposable), such as refugees and concentration camp inmates. A similar process takes place in international society, whereby states render individuals disposable for the purpose of international order. I posit the phrase *civis sacer* to refer to these individuals. The chapter includes a reading of the civil litigation of the *Mothers of Srebrenica* against the UN and the Netherlands for peacekeeping abuses that occurred during the Srebrenica massacre.



## Chapter 2 - Srebrenica and Humanitarian Sacrifices

In this chapter, I examine interpretations of (*Stitching*)<sup>47</sup> *Mothers of Srebrenica Citizen Association* (henceforth Movement of Mothers) and their *legal cases* as it relates to UNPKO immunity and unaccountability (italicized *Mothers* refers to the cases). The Movement of Mothers brought civil cases seeking damages and an apology from the Netherlands and the UN for the conduct of Dutch peacekeeping troops in the Srebrenica massacre — a massacre that saw eight thousand Bosnian men and boys killed by Serbian Bosniak forces in 1995. Mothers directly challenged the source of peacekeeper immunities set in UN Charter Articles 103 and 105 — arguing that they should not apply to bar them from suing the UN and the Netherlands. After long court battles in Dutch courts, the UN's immunities were upheld by the European Court of Human Rights (ECtHR) in 2013, a court of last resort, and with that ruling, ending the Movement of Mothers legal efforts against the UN. Along the way Dutch Courts implicitly revealed the *objectification* discussed in the previous chapter, upholding the *means-to-end* logic of the UN immunities:

- In 2008 the Hague District Court (HDC), the first hearing the case cases, justified UN immunity for “effective implementation of duties by international missions [...] under UN responsibility” (paragraph 5.22).
- The Appeal Court's in 2010 stated: “a substantial general interest is served if the United Nations is not forced to appear before a national court of law.” (paragraph 5.9)
- And in 2012 when the Dutch Supreme Court maintained that the relevant clauses granting immunity “serve a legitimate purpose” (*Mothers*, paragraph,

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<sup>47</sup> There are two separate cases where the same group took on a different name. The organization was simply *Mothers of Srebrenica* in the case that resulted in the 2013 European Court of Human Rights (ECtHR) ruling. Their permanent name is *Movement of Mothers of Srebrenica and Žepa Enclaves*.

4.2) because the UN maintains a “*special* [emphasis added] place in the international community” (paragraph, 4.34).

In effect, UN immunities, and those it caused harm, were merely a consequence of the justified *means* for peacekeeping *ends*. Whether the legal rationalization was “effective implementation”, for a “general interest”, or “a legitimate purpose”, UN immunity necessitated excluding those it harmed from legal redress against the collective actions of states the UN represents.

However, the Movement of Mothers, having lost the case against the UN, regained considerable attention when in their case solely against the Netherlands resulted in a 2014 ruling from HDC<sup>48</sup> which found the Dutch State civilly liable for conduct of peacekeepers, and for compensation to families of those lost (Spirik, 2014). Yet, the ruling proves wanting. Far from questioning peacekeeper immunities, the ruling's logic demonstrates how the use of international law converts peacekeeper *violence* into an civil legal issue. Through such legal proceedings violence committed by peacekeepers is transformed into a private legal issue stripped of important political questions. Private law frames concerns to be resolved between individuals, such as property disputes, downplaying crimes of capital and dispossession, and their *institutional* character (Cutler and Gill, 2014, p.17; Cutler, 2003, p.2). In the eyes of international law, and as confirmed by the *Mothers* case and related rulings that span from 2007 to 2014, individuals become *objects*; they cannot get redress against the international community, which the UN

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<sup>48</sup> The HDC is a lower court and its decisions are subject to appeal though none were pending at the time of writing.

represents. Whereas redress from states, injuries and/or deaths, are merely a cost to be borne, and require initiation by those who were harmed.<sup>49</sup>

*Value*, in the grand sense, is a manner to discern the societal relations mapped onto objects. The way people *value* objects, for use or exchange, expresses their relation to the structure that produces such objects (Marx, 1959, p.49; Zizek 2014). *International society's* structural role in peacekeeper abuses becomes discernible within international legal processes that address immunities. Through law human beings are transformed from persons into abstract entities — such as a cost and objects. The *Mothers* and related cases designate peacekeeper abuses in the language of private law such as tort obligations, contract, and property. The cases show how international law, in its practice and study, frames individuals as *disposable* and thus *exchangeable* in an economic register that is consistent with rhetoric about “quantifiable costs” and “calculable values.”

*Mothers* litigation proved successful only when targeting the *contract obligations* of the Netherlands of *possession* of those harmed in Srebrenica under the care of Dutch peacekeepers. The HDC (*Mothers*, 2014) established state liability for a breach of contractual *duty of care*. The Court ruled the Netherlands committed a tort<sup>50</sup> for acts for which peacekeepers were responsible:

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<sup>49</sup> Successful reparations and compensation fare poorly to capture the true nature of costs of abuse. Economic language pales at addressing the emotional and physical “price” of injuries. Whether harms with long-term effects are convertible into damages, or tortious remedy ever “make a person whole”, there remains a question whether any crime can be declared “undone” or to a rectified with an exchange of a finite measure of money deemed equivalent to the infinite suffering incurred. Law serves to render those who suffer abuse as a cost whose best redress is have states “pay the bill”.

<sup>50</sup> Tort law covers situations in which one legal subject wrongs another, but not the public order, or the state. The wronged individual can claim they have been wronged based on a *reasonable expectation of care* from another legal being. Notably, the wrong does not necessarily emanate from contract or criminal law but norms regarding how people treat each other (Ripstein, 2005, pp.1-5). E.g. hitting someone may constitute “battery” in Canadian tort law even if it is not litigated as criminal battery.

- (i) abandoning the blocking positions [defending Srebrenicans in their care];
- (ii) not providing adequate medical care to the refugees [on the peacekeeper's compound];
- (iii) handing over weapons and other equipment to the Bosnian Serbs [who committed the massacre];
- (iv) upholding the decision throughout the transition period not to allow refugees entry to the compound;
- (vi) separating the male refugees from the other refugees during the evacuation, in so far as this constitutes assistance by forming a lock and guiding the refugees to the buses in turns)

The UN itself, being exculpated from its role during the massacre by the ECtHR in 2013, epitomizes the UN's extra-legal powers of the *international order* manifest in their *absolute* immunities.

This is where Giorgio Agamben's (1998) reading of the Roman legal category of *homo sacer* becomes useful. He takes the term, originally for banished citizens, to signify and capture how sovereign states ensure their own order by rendering individuals *disposable*. Human rights to Agamben indicates the presence of *homo sacer*, understood as "bare life," describes those expelled from the political order into a space demarked through law as outside (pp.133-4). *Homo sacer* is created through the very human rights claims that purport to prove such violations but actually end up doing nothing more than testifying to the existence of a political order, of *biopolitical sovereign power*, that produces bare life (p.131). This "order" is a forceful organizing structure that shapes prevailing understandings about the world and possible actions within corresponding identities. By evoking/expanding Agamben's damning account of sovereignty, this chapter links peacekeeping abuses to his reading of the historical context in which *international society* and *international law* find themselves. UN immunity deems the fallen kin in *Mothers* to be outside of, and thus excluded from, international law. Once

people are rendered as objects it becomes easier to sacrifice them for a cause (namely, international order).

Srebrenicians perished for the *international order* peacekeepers uphold. This chapter proposes the term *civis sacer* as the indicator of said order, predicated on subject-object relations between states and individuals. *Civis sacer*, in the same vein as Agamben's term *homo sacer*, designates those individuals who are excluded from public international law by *international society*. The term comprises of *civis*, meaning 'civilian,' 'citizen,' 'civility,' from the Latin *civitas*, meaning state. *Civis*, represents the logic of the inter-state legal system, centered around sovereignty that underpins the institution of citizenship (Pons, 2014, p.141; Balibar, 2009, pp.24-5). *Civitas*, also with its root in Roman Law, signifies a specific and distinct universality of state law, understood to apply to all societies (Kelly, 1989, p.130). *Sacer* maintains its original definition of sacredness that includes the notion of sacrificing individuals for a higher order (Wydra, 2015, p.8). Thus this notion of *sacrifice* in the term *sacer*, denoting sacred "innocent victims", as in *homo sacer* and *civis sacer*, inscribes individuals' *disposability* by the state or by *international society* respectively. *Civis sacer*, because of their *objectification*, reflects the "functional" aspect of sacrifice believed by many as necessary to upholding international order. The rights of *civis sacer* emerge by transmuting its loss via the measure of property, understood as *disposability* and *exchangeability*. Balibar (1994) states how the divisions of specific rights (in this case, the plaintiff's recourse to international legal or domestic civil redress) create, and result from, the categories used to measure property and the manner the individual controls oneself (p.53). Noting the manner in which torts (of an international legal nature) were applied to award "redress"

the *Mothers* case, the similarities are striking. In short, through *civis sacer* human beings become symbolic “victims” sacrificed for the purpose of maintaining order and, ironically, “preserving humanity.”

## Outline

The chapter begins on how the Movement of Mothers’ legal challenge incited rulings that reveal international order. In *Mothers*, the argument against UN immunity, exempting the organization from liability, was that it amounted to a violation of *jus cogens* due to the nature of the UN peacekeepers involvement in genocide at Srebrenica. *Jus cogens* norms (prohibiting aggression, torture, and genocide) are supposed to reflect the universal political order, expressing the ideals of states and by extension humanity (Orakhelashvili, 2006, p.38). Moreover, the supremacy of *jus cogens* is set in international legal precedent, such as in the International Court of Justice (ICJ) ruling in *Certain Expenses of the UN* that held that *jus cogens* supersede any functional considerations and were absolute ends in-of-themselves (Schmalenbach, 2015, p.318). *Jus cogens*, is a legal term, and one tied to *jurisdiction*, understood to reflects how *international society orders* the world. One way to read *jus cogens* is as a catalogue of historically contingent types of *international orders* of *international society* (Reus-Smith, 2004). In that way, the failure of the Movement of Mothers’ *jus cogens* challenge contradicts the view that *international order* is humanitarian in nature. Instead, UN immunities comes to disclose the type of *international order* that international law upholds. This section discerns the content of *jus cogens* in the manner the loss of human life in *Mothers*, was measured in terms of material damages incurred to a state or treated

as an unfortunate necessity — humanitarian collateral lost by the *international community*.

After establishing the exclusionary nature of UN immunities and in its *exceptionality*, the section defines the term *civis sacer*, as per distinguished from *homo sacer*. Peacekeeping abuses, stemming from immunities, are understood as a manifestation of the inherent *objectification* associated with *international order*. *Civitas*, the root for *civis* is further discussed as an emblematic term to describe the order peacekeeping upholds which is the primacy of exclusive sovereign of states through international law by *international society*. *Civis* and its root of multiple meanings from Roman Law connoting civilizing power and a state-based humanism is taken up (Kelly, 1989, pp.145-6).

Returning to the *Mothers* rulings provides legal terminology of international civil liability which indicates the presence of *civis sacer*. Both *Mothers* ruling, of the ECtHR upholding the UN immunity and the HDC imputing civil liability onto the Netherlands, relied on legal reasoning of *control tests* used to discern the sovereign reach of a given international subject, a state or international organization. *Control tests* are a form of *attribution* reasoning to calculate which entity *controlled* the wrongdoing individual acting in a sovereign capacity. Attributing wrongful peacekeeping acts determines the liable subject who was in *possession* of the wrongdoer(s), and who is thus required to pay the *costs* of “damages” (aka the loss of life and harm). In other words, *control tests* helped determine UN or state *possession of objectified individuals*. Another legal development in the cases was the emergence of the doctrine of *dual attribution*, whereby multiple forms of could be incurred by one set of peacekeeper actions. The doctrine is

read as property relations between states and *international society*. That way, *Mothers* legal developments confirms that those harmed by peacekeepers were sacrificed by *international society* who *objectifies civis sacer* for the cause of *international order*.

### ***Jus Cogens* and International Order**

In *Mothers* were challenges to the immunities using *jus cogens* norms and in a sense invoked those norms to supplant political questions. *Jus cogens* is taken as a direct representation of international public order defined by *international community* that is understood as *international society* (Christenson, 1987, p. 585). The Movement of Mothers argued *jus cogens* as *universal legal norms* of responsibility applicable in all domestic courts that supersede all immunities. Starting in 2007 (and culminating in the 2013 ECtHR ruling), the Movement of Mothers plaintiffs accused the UN of violating *jus cogens* norms and invoked both the European Convention of Human Rights Article 6 and the International Covenant on Civil and Political Rights (ICCPR) Article 14 as inviolable in international law (*Mothers*, 2007, P5.17, p.9).<sup>51</sup> However, throughout the legal proceeding, courts deemed the UN immune from such a legal challenge (*Mothers*, 2013, paragraphs 5.26, 6.1, p.11). UN immunity's international legal status confirms that the Movement of Mother's fallen kin were in legal relations to the UN essentially excluded from redress against *international society* for maintaining *international order*.

Taking the UN as an approximate representative of the international community, the organization enjoys absolute immunity from national courts in Articles 103 and 105

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<sup>51</sup> The Movement of Mothers argued that “article 105 subsection 1 of the UN Charter is incompatible with mandatory standards derived from, inter alia, international law on genocide (the Genocide Convention) and articles 14 ICCPR and 6 ECHR.”

in the UN Charter (1946).<sup>52</sup> These articles contain the blanket immunities of the UN, which enable UNPKO. CH.VII is political in nature, and it is applied in a discretionary manner having not to do with legal threats, but to address contextually and contingently defined threats to *international order* (Orakhelashvili, 2006, pp.416-7). The immunity as opposed to purely diplomatic or a sovereign type, is functional for enable the international community to function (Burke, 2014, 80). The Movement of Mothers assumed the content of *jus cogens* to be humanitarian in nature, arguing “The immunity of the United Nations was grounded in a political interest. A court of law, however, should apply *the law*, (emphasis added) [a requirement that] therefore overrode a political interest.” (*Mothers*, 2013, paragraph 86).

The Movement of Mothers reading of peacekeeper abuses was of an intractable contradiction between international norms creates the perception that immunities reflect conflicting jurisdiction, incomplete law, or an unrealized potential of international law. As with *peacekeeper unaccountability literature*, the Movement of Mothers read international human rights law substantively by ascribing subjective qualities to individuals and in turn qualifies legal ineffectiveness as transitory, part of a yet to be realized, true law of humanity.<sup>53</sup> However as Beitz (2009) notes, human rights are a state

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<sup>52</sup> Like other immunities in international law, peacekeepers enjoy those similar to those of diplomats, international organizations, and state officials. Those other immunities have their own unique histories which albeit related are beyond the scope of this thesis. The arguments made here could *theoretically* extend to other immunities.

<sup>53</sup> Krieger (2015) argues that the rise of human rights in international law demands that peacekeeper unaccountability be addressed at the international level (p.259). Having accountability only be accessible through national courts undermines the idea of enforceable human rights. The language and term he uses is ‘accountability gap’ that pits states against an idealistic view of international law. It seems Krieger questions whether the *Mothers* case is progress or reflective of an outdated view (p.262). Krieger identifies two developments that bolster the calls for reform: first, that international organizations are now “influential global governance actors” but problematically only answerable to member states (p.261); and second, that the individual is now used as a justification and is central to our conceptions of security. Krieger also

practice and reflect their interests (p.128). So, in a paradigmatic manner, the Movement of Mothers interprets this legal architecture of peacekeeper immunity as a straightforward conflict between international legal norms, between humanism and a parochial inter-state system. Their argument encountered the following tension: international law espouses a universalistic humanitarianism that is supposed to transcend, but ultimately depends on, an anarchic statist order (Tietel, 2011, p.17). In doing so, the Movement of Mothers is found repeating dissenting opinions in other rulings that challenged but failed to overcome UN immunity. They submitted the following to the Dutch Supreme Court (whose decision was then appealed to the ECtHR) citing a dissenting opinion in the Al-Adsani ECtHR decision:

The view that the UN's immunity weighs more heavily in this instance would mean *de facto* that the UN has absolute power. For its power would not be subject to restrictions and this would also mean that the UN would not be accountable to anyone because it would not be subject to *the rule of law* [emphasis added]: the principle that no-one is above the law and that power is curbed and regulated by the law. Immunity of so far-reaching a kind as envisaged by the appeal court is incompatible with the rule of law and furthermore undermines the credibility of the UN as the champion of human rights" (in Morimov, 2016, 441-442).

The inability to circumvent UN immunities conforms to the view that the international organization represents something *extra-legal* and exceptional — it is absolutely *above the law*. In denying this argument, the ECtHR in 2013 upheld UN immunity from a civil suit, which confirms the content of *jus cogens* is linked to the extra-legal powers entrusted to the UN to maintain *international order*. The *Mothers* case comes to confirm that even in face of grave abuses, including those of supposed *jus cogens* character,

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characterizes this as a shift in paradigm that is at odds with the state-centric mode of responding to abuses (p.262).

international law upholds the importance of the functionality of *international order* above all else (Krieger, 2015, p.263). Such a legal exception reveals characteristics *potential capacity* of sovereignty contained in UN immunity from which peacekeepers derive their mandates.

### **International Sacrifices**

Such exceptional immunities set in the UN Charter could be read to support what RBJ Walker (2006) argues in *Lines of Insecurity* that Kelsen saw international law possessing a distinct sovereignty and exceptionality over states (p.73). There is a more a fundamental point to be made, which is taken up by Hedley Bull (2011): *international law* is but one of many institutions through which states *order the world*, alongside engaging in diplomacy, war, and fostering culture/norms (pp.62-71). *International society*, as it is broadly understood, is a group of states that share a specific bond forged through an amalgam of common elements including culture, norms, and law, which then distinguish the group as a *civilized* sociopolitical order. All else that is *other*, outside of this group, is labelled uncivilized and ‘barbarian’ (Keene, 2002, p.116-7; Richmond, 2005, p.225). Barbarian status almost certainly guaranteed the *objectification* of outsiders by European *international society*, which through colonial and imperial rule rendered the ‘other’ into *property* (Neocleous, 2014, p.112; Anghie, 2007; p.52-4).<sup>54</sup> Whatever *international society*, deems outside international law becomes *objectified*. International law grants such *international sovereign exceptionality* to peacekeepers which renders adversary individuals as a non-subject. Attacking peacekeepers is criminal in

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<sup>54</sup> To be clear, this process is still ongoing, and international law still supports those civilizing notions in the vein of imperialist development projects, international monetary and fiscal control, and until only recently, territorial trusteeships (Bain, 2003, p.74; Bain, 2006, pp.527-35).

international law (Roberts in Rodin and Shue, 2008, p.247). To resist a peacekeeper is unlike engaging in war, it is a war crime to do so (Klappe, 2010, p.533). Individuals relate to the peacekeeper as if towards a sovereign force that possesses *exceptional power*. In that manner, *international society*, in their practice of peacekeeping *possess* a state sovereign's exceptionality.

UN and peacekeepers immunities represent *international societal* efforts to maintain such order premised on property relations. As, Richmond (2013) argues that underneath UNPKO is the fundamental interest of the supreme reign of state formation in international politics in terms of Westphalian sovereign violence (pp.307-8). *International order* is synonymous with maintaining sovereign identities of state subjects on a *possessive individualist* logic whereby states come to see territory as property. In the notion of peacekeeping itself is the sense of pacification, violence for social construction, which imposes and constitutes political practices (Neocleous, 2014, p.34). Such tendencies pervade a new generation of peacekeeping that has generalized into a global governance mechanism that incorporates all economic, social, and cultural aspects of life (Richmond, 2005, pp.157-9). Peacekeeping is, in reality, *peacebuilding* that also enforces the international conception of order and statecraft based on the framework of human rights (Richmond, 2013, p.308). When peaceful relations increasingly fail within states, 'robust' peacekeeping, aka peacekeeping *by all means necessary*, enforces a kind of *order* over conduct deemed disorderly, threatening, or risky. That threat, is also, recalling Schmitt (1985), defined as if by a sovereign — the UN Security Council (UNSC) who mandates peacekeeping.

The manner international society *orders* the world follows the logic of distinguishing between the ‘good life’ from that of a state of nature (pure war). This distinction in *international society*, of being ‘in’ its ‘good life’ or being expelled from it, grafts neatly onto Agamben’s theory of *zoe* and *bio*. International society can be seen to correspond to a political space of its own sovereignty in which subjects come to define the good life through sovereign power (and in which *bare life* dwells) (Prozorov, 2013, p.xvi). Agamben (1998) derives his theory from combining Arendt’s insights to the advent of *biopolitics*<sup>55</sup>, which has come to define citizenship as the delimitation and distinction between two logics: the *bio* (the good life i.e. political life) and those falling outside of it, who inhabit *zoe* (bare life i.e. the state of nature). According to Agamben, this is how contemporary sovereignty organizes itself and it results in individuals having to claim *human* rights because they have been reduced to the basest of *human* (*zoe*) characteristics (p.171). Sovereignty for Agamben can be understood as the assertion of both the political order (*bio*) and the state of nature (*zoe*). Agamben terms the individual in this condition *homo sacer* after the Roman legal punishment of exile whereby individuals were expelled from the political order into the space that the law itself defines by constituting that which it is not (p.7). For Agamben, *biopolitical* citizenship is the currently operating order within which states practice sovereignty, inherently producing *homo sacer*; therefore, it remains a possible condition for all individuals in the contemporary era (pp.175-80). This transforms them into sacrificial beings abandoned to

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<sup>55</sup> *Biopolitics* is a broad term that for the purposes of this chapter signifies the reduction, conceptualization, and governance of individuals solely in terms of biology. Foucault developed the idea in conjunction with his theory of governmentality to describe how state and private power was increasingly exerted over the individuals and collectives “conditions of birth and death, health and disease, race and sexuality, and other dimensions of human well-being” (Castree et. Al, 2016)

the state of nature and who succumb to the whims of nature (the pre-political order). Individuals and groups expelled by the sovereign are placed beyond the limit of the legal-political order, subsisting where lawlessness reigns and hence subject to extra-judicial killing (pp.126-35).

Sacrifices *objectify* such individuals via an 'antiviolence' *violence* that is associated with maintaining *order*. Sacrifices accumulate to become historical events and narratives, mapping the bloody course of world history. This leaves traces to interpret and decipher that show how the idea of civility is used in violent processes that create political order and its institutions (Balibar, 2015, p.34). Thinking of the inter-state system as a political community, this practice also has the effect of producing an outside realm, or in other words, an 'other'. Political orders create, define, and constitute their members through the negation and removal of those who are not themselves (Wydra, 2015, p.10). This negation and removal appears through sacrificial rituals of violence done onto, and defining, the outcasts, criminals, and exiles, who come to symbolize an order established through the act of having violence exerted onto them (p.11). One way exceptional power presents itself and sacrificed others is in how European *international societies* justified their colonial and imperial dispossession of others by *objectifying* them and placing them outside international law. To the great detriment of many peoples around the world, *international society* has historically defined its *order* through European imperial and colonial projects; international legal norms reflect as much (Mégret, 2006, 234). *International law* relates, then, to *international order* as a productive force of *international society*. In that manner, the possession of populations as property traces

back to the international legal practice of placing people outside of public international law and thereby submitted to the hegemonic logic of costs and value.

Those harmed by peacekeepers are *sacrificial* and their *objectification* mirrors this functional aspect of sacrifice necessary to establish and maintain the subject-object relations between states and individuals. The manner in which *international society* exerts *objectifying violence* bears the historically contingent characteristics of the current *international order*, expressed through international law. For international law, the *paradigm of accountability* and the prevalence of human rights discourse betrays the contradictory nature of the current international political order. This stems from the movement in the postwar period of 1945 onward, which saw a wave of decolonization that universalized citizenship and the nation-state into the current, dominant institution that defines political units worldwide (Bain, 2003, p.67). As a result, political rights are associated with the citizen-subject defined by the respective nation-states to which they belong. This leaves by the wayside the stateless, those without citizenship, those citizens nowhere, all of whom are left to exist in vulnerable liminality. On the one hand, it is steeped in rhetoric about defending human dignity above all else; but on the other hand, it is premised on the Westphalian nation-state system that makes sovereign states the fundamental political unit in the world. The human in this instance has taken on the symbol of “the victim” that is sacrificed in order to maintain the international political order, which is itself justified in the preservation of humanity. *Peacekeeper unaccountability* is no different; it reflects the contradictions inherent in the citizenship-based inter-state order that periodically results in the sacrifice of human lives during UNPKO.

### **Civis Sacer**

*Civis sacer* is an identity referring to individuals harmed by the *objectifying violence of international society*. Although all violence serves a purpose, and thus people becomes a means to some end whenever force is used against them (Arendt 1970, p.79)<sup>56</sup>, *objectifying violence* is implicated in the use of force for political ends subsumed into creating lasting state institutions. Such institutions involve relations of power between strong and weak states, international political economy, the law, and the sociopolitical order (Balibar, 2001, pp.27-8). Peacekeepers' use of force, and by extension *international society's* use of force, is *civil/civic* in the sense that this violence does not react to violence or its brute suppression. Rather, it is meant to be a salutary use of force (justified as "anti-violence") that is necessary for establishing order (Balibar, 2015, p.36). Peacekeepers represent such a use of force for international order, which as it stands, simply means the stability of the inter-state system premised on state sovereign subjectivity that is endowed with the possessive rights implied in its exceptional powers.

Individuals *objectified* by *international society* inhabit a variant of Giorgio Agamben's (1998) theory. *Homo sacer*, understood as *bare life*, has in effect the status of an object — a being utterly *disposable* to the sovereign - standing outside law. Being beyond a sovereign's realm means an individual is outside the public international legal realm. The situation of standing outside the public international legal realm is captured in the principle of non-interference, which prevents one state from interfering in another's

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<sup>56</sup> In her study, Arendt identifies multiple uses of violence such as coercion, domination, and punishment. These uses all have an end, however short-sighted. Order set only by violence cannot substitute for lasting power or institutions. That said, it can maintain their survival in the face of resistance and/or dissidence (Arendt, 1970, p.56). *but* she notes the difficulties in distinguishing forms of violence and its regular use in maintaining societal institutions of order (pp.41-6).

internal affairs (Carty, 2007, p.99, Mieville, pp.136-7) such as the treatment of individuals within a state's domain. *Civis sacer* can be broken down in the following manner:

***Civis***: in Roman Law this meant 'civilian' or 'citizen' and derived from *civitas*, meaning a state or city to which one belonged (Pons, 2014, p.141; Balibar, 2009, pp.24-5). This term encapsulates the historically contingent value of order that international law seeks to uphold. *Civis* represents both the ends of *civilizing* people through state powers of denying *civic status* ("civic death") (Kelly, 1989, p.146)<sup>57</sup> and granting such universal powers exclusively to states (p.130). The current form of the international order (the inter-nation-state sovereign system premised on citizenship) mirrors those encapsulated in *civitas* wherein states are defined as the exclusive bearers of powers over the institution of citizenship.

***Sacer***: this refers to sacredness that accompanies a universalism/ideal/logic on which an order is premised and which demands sacrifice (violence) to sustain (Wydra, 2015, p.8). The *homo* in *homo sacer* denotes the sacred violence in distinguishing the *bio* from *zoe*, referring respectively to individuals qua citizens (with political rights of the state) and qua humans (with human rights tied to logic of *biopolitical sovereignty*) (Agamben, 1998, pp.8-9). Beneath this conceptualization of sacrifice is a *functionalism* that understands violence as a means to idealized ends.

Employing the term *civis* gestures towards the trinity of the citizen-citizenship-inter-state system that characterizes the dominant understanding of our historical period and order from a hegemonic point of view (Balibar, 2001). As Hannah Arendt (1973) noted, the citizen is the central concept that justifies and grounds modern politics worldwide; the

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<sup>57</sup> Civic death is the exclusion of an individual from all legal standing and rights, and thus dead to all courts. The term is a "legal fiction" meant to disenfranchise slaves and prisoners (Guenther, 2013, pp.xvii-xx, 47).

state-system revolves around this idea (pp.293-7). The international use of violence, such as in peacekeeping, contains traces of this historical moment that manifest in intractable antinomies that result from placing the citizen and the nation-state at the center of politics (Nyers, 2006, pp.33-6). Arendt (1973) famously declared that those being deprived of any substantial rights are to identify with human rights (pp.293-4). She identified how appeals to human rights in actuality expressed someone's lack of rights. Instead, all actualisable rights depend on the *right to have rights* - which invariably required belonging to a nation-state (pp.296-300). Statelessness, seen by Arendt and Agamben to represent the abject condition of our time, and from which the call for human rights originate, demonstrates how the term 'human' indicates how the inter-state system is the dominant political order of the world.

*Civis sacer* is sacrificed for the *international order* determined by *international society*. That *order* is premised on *possessive state subjectivity*, which renders individuals *disposable* and *exchangeable* for and by international society during peacekeeping operations. Sacrifice is within the term *civis sacer* alludes to the same *homo sacer*, as the sacrificial element, human (*homo*), but done in the service of *constituting* international society and its subjects. Sustaining the inter-state system, premised on institutions of citizenship and humanist rhetoric, necessitates a violent *civic* sacrifice of *homo sacer*. Where else but amidst the very maintenance of *international peace and security* by *international society* do we have an offering of *civis sacer*. Individuals bearing the

identity of *civis sacer* perish for the sake of the *international order* organized around the institution of sovereignty — an institution shrouded in the sanctity of civic humanism.<sup>58</sup>

## Srebrenica

The *Mothers* cases reveals how peacekeepers immunities embody an *international order* premised on the *objectification of individuals* who, in Srebrenica, were sacrificial objects. The cases call into question international legal responses to peacekeeping abuses. The fact that the loss of human life in Srebrenica was rendered equivalent to other types of property loss, to be measured in monetary terms, highlights a populations' *objectification* within UNPKO. As mentioned before, the relegation of the Movement of Mothers claims into private law signals an exclusion of that the sort that sovereign exceptional power can bestow. The UN immunity being upheld, from the liability of peacekeeper conduct in Srebrenica, emulates a power that of a sovereign, being able to determine its own exception to international law. As Schmalenbach (2015) observes “the UN draws a definite line between claims of a private law character and claims of a *public international law nature* [emphasis added]; the latter embraces all claims that are based on the harmful effects of policy decisions by UN organs as well as damage linked to a particular for or manner in which these decisions are implemented on the ground” (p.321). In other words, what is public business for the UN, and thus exempt

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<sup>58</sup> I wish to mention an obscure discovery of *civis sacer* mentioned in the Leonine Sacramentary which I could not research enough due to time constraints. However, only for illustrative purposes, I did find another mention in The Ecclesiastical Review, (Vol XLIV, 1911) with a Chapter titled ‘A Non-Compulsory Offering to the Holy See (Civis Sacer)’, therein there was an interesting parallel that to serve Christ requires non-compulsory support and his holy state of the Vatican, also termed *civis sacer* (p.346). In a way, if this ‘Civis Sacer’, in the sense of a holy state, is transplanted onto a universal secularized notion of sacred order represented by peacekeeping, then *civis sacer* as a sacrificial victim, aptly mirrors such an international structure. The parallel is in line with peacekeeping contribution being optional for states and that are seen to be a sacred duty in upholding humanism.

from legal liability, is a decision reserved for the UN. *Mothers* cases show that there is evidently a misreading regarding the content *jus cogens* norms or their status in international law. Either they are humanitarian in nature and applying *jus cogens* to violations “would throw open the gate for domestic [cases]” against the UN (p.318). Or, perhaps, *jus cogens* norms represent an international order predicated on the sacrifice of individuals for the sake of *international societal ends*.

Before analyzing the cases, some background about the Srebrenica Massacre is called for. During the Bosnian War (1992-5) amidst the dissolution of Yugoslavia the UN mandated a peacekeeping mission (UNPROFOR) to protect residents of the city of Srebrenica. Dutch peacekeeping troops (Dutchbat) stationed in a compound in Srebrenica were in charge of administering the UN-designated safe area encompassing the city. On July 11th 1995, Serbian-Bosnian forces of the then-separatist Republic of Sprska (VRS) took control of the city after having laid siege to it for three years (*Mothers*, 2013, pp.3-6). Fighting alongside the VRS troops were foreign volunteers and paramilitary groups, including The Scorpions that were under the ‘control’<sup>59</sup> of the Serbian Ministry of Internal Affairs. The *international community* anticipated Srebrenica would fall to VRS troops but withheld resistance so as not to jeopardize peace negotiations with the Federal Republic of Yugoslavia (composed of Serbia and Montenegro at the time) (Perelman, 2015) and in order to keep peacekeepers safe (Blanton & Willard, 2015). A mass exodus of Bosnian civilians and Bosnian soldiers ensued, however many were trapped by the VRS forces.

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<sup>59</sup> The meaning of 'control' is discussed later but it should be noted that despite Serbia disputing this fact there is clear institutional and substantive links that existed between the two entities. (Petrovic, 2014, pp.98-9)

Dutchbat, composed of 600 lightly armed soldiers, did little to resist the occupation. They were outnumbered, outgunned, and some were captured as hostages. Many of their weapons, vehicles, and uniforms were seized or destroyed. Dutchbat's requests for air-strikes against the Serbian-Bosnian forces went unanswered, except on one day when the fate of Srebrenica was a *fait accompli*. On July 12<sup>th</sup>, VRS forces began massacring what would amount to 8000 Bosnian men and boys over the subsequent days. Dutchbat's commanders were in regular contact with the Dutch government and were instructed to act only in self-defence, and to avoid engaging in combat if possible. Dutchbat did not intervene, nor did it resist the removal of the men from their compound, and it helped VRS troops to separate the men from the women and children to be bussed to Bosnia (Hague Justice Portal, 2008, *Mothers*, ECtHR, 2013, pp.3-6, *Mothers*, HDC, 2014).

In effect, Srebrenicans were sacrificed for the sake of *international order*. Individuals slain in Srebrenica during the Bosnian War were first rendered objects, *homines sacri*, when they were abandoned by Bosnia and Serbia and rendered into *bare life*, to the whims of the international state of nature. Later in the war, the UNSC, for 'humanitarian' purposes, took *possession* of Srebrenician civilians by designating the city as a 'safe area' with peacekeepers. But UN *possession* meant that *international society* could dispose of Srebrenica however it saw fit. The *right of disposal* manifested when the relatives of those lost in Srebrenica were denied redress against the political actions of an *international society* that sacrificed the city. Legal redress only came when the Netherlands was found liable to pay. As representatives of *international society*, the

Dutch peacekeepers was in the legal sense in *possession* of Srebrenica on the UN compound.

As one can imagine, the cases are not discussed in such political theoretical terminology. Arguments by the Movement of Mothers and the Netherlands (on behalf of the UN that does not appear in Court), address concerns in the language of state and international organizational duties, responsibilities and, ultimately, the conduct of Dutch peacekeepers (Dutchbat). Ultimately, the Netherlands argued that their troops were UN and thus implicitly exempt from liability (*Mothers*, 2008, paragraph 1.1). The Movement of Mothers arguing both the UN and the Netherlands responsible (paragraph 2.1). The legal issue comes down to *who possessed* the slain Srebrenicans that were *objectified* by being abandoned in a state of war and then taken up by *international society*. The *jurisdictional* language in which that enabled the ruling was *dual attribution* and *effective control*.

### **Dual Attribution**

*Mothers* formalization of the doctrine of *dual attribution* — a legal interpretative technique used to discern legal liabilities. *Dual attribution* established different sets of accountability emanating from one set of peacekeeping actions. Thus, Dutchbat actions could be attributed to the UN *and* to the Netherlands. Accountability for each depended on the different ways UNPKO maintained *possession* over individuals in Srebrenica. Determining *possession* depended on how individuals related to peacekeepers while being within UNPKO jurisdiction. Both the *Mothers* rulings establish a relation of slain Srebrenicans to *international society* represented by the UN and to the Dutch acting on its behalf. Respective UN and state immunities in their own way *objectified* Srebrenicans,

making them *disposable* and *exchangeable* for the sake of *international order*. Srebrenica in relation to the organization of the UN was utterly *disposable* for its ends. By upholding UN immunity, the ECtHR in 2013 established that the UN could *dispose* of *objectified* individuals. On the other hand, the HDC ruling in 2014 reiterates the *possessive* characteristics of state jurisdiction by ascribing tort liability to the Netherlands for those sacrificed in Srebrenica.

A population's *disposability* is a necessary condition for their sacrifices.

*Attribution* criteria determine which legal body committed an act and should be held liable for its violent consequences i.e. *disposal* or *use* (Ryngaert, 2015, 368). *Attribution* becomes a means to discern *accountability* for state and international organization's use of sovereignty, sovereign power understood as an embedded possessiveness. *Attributing* responsibility for an offence to personnel and their state triggers their human rights obligations and jurisdiction (Burke, 2014, p.135). Because states always maintain command, control, and criminal jurisdiction over their troops/officials; a state's liability for troops abroad depends on which immunity they hold during missions and this determines which court holds jurisdiction to consider the matter (Voetelink, 2015, p.165) Control equates to jurisdiction that represents a state's possession of said individual and their actions. In *Mothers*, possession becomes determinable with the duty of care that accompanies either UN or peacekeeper immunity that corresponds to either UN or the peacekeeping state's jurisdiction. Attributing harms to either UN and peacekeeper immunities reveals to whom the *value* of human life was rendered a *means* to be used; whether of *international order* or the peacekeeper states misuse.

## Effective Control

In a sense, *control tests* outlined below are key to reading how the history of peacekeeper violence revolves around *possession*. The use of *control tests* is limited to deciding the circumstances under which a peacekeeper's contributing state is responsible for the *disposal* of the host state's civilian. *Control tests* originate from legal decisions regarding atrocities occurring in an *international* context by attributing wrongful acts to two states or more in conflict for the purposes of applying international law. *Control tests* create and measure that link to the international realm. In other words, they provide different criteria for locating responsibility for violent actions in the legal relations between states and individuals. Their difference is in degrees, whether the stricter criterion of *effective control* set in the International Court of Justice (ICJ) ruling of *Nicaragua* or a more flexible approach as established in the ruling of International Criminal Tribunal on Yugoslavia (ICTY) in *Tadić*. *Control tests* identify how different parties were empowered and/or immunized to use force. At its core, this legal development reveals the *objectification* of individuals by way of how the courts can now differentiate liability for abuses. Those tests are:

**Effective Control:** In the 1986 ICJ case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (henceforth *Nicaragua*) the) ruled that the United States was legally responsible for violating the norm of non-interference in another state's national affairs for arming and supplying right-wing paramilitary groups (Contras) during the Nicaraguan Civil War. However, the ruling established that the US *was not* responsible for Contras' atrocities because it did not give direct orders or maintain operational command, which would constitute the necessary threshold of control, for those violations of international

humanitarian law. This test assesses chain of commands and recorded authorizations as the sole criteria that prove control. Effective control is based on *legal facts* on who ordered, authorized, and which state or entity is *directly* linked to the *ab-use of force*.

**Overall Control:** In 1999 during *The Prosecutor v. Duško Tadić* at International Criminal Tribunal for the former Yugoslavia (ICTY), Appeals Chamber directly contradicted *Nicaragua* which the justices saw as establishing a test too narrow to encapsulate responsibility for atrocity. Dusko Tadić was the president of a local political party who helped coordinate VRS paramilitaries who massacred civilians and operated concentration camps during the Bosnian War. The ICTY Appeals Chambers ruled in favour of the prosecution's cross-appeal to attribute international crimes of war and international crimes against humanity to Tadić's conduct because he was acting in a state capacity by providing planning and general support to VRS atrocities (linked to the Serbia)<sup>60</sup>. Overall control takes into account other links between those agents who use force on the behalf of states. Thus institutional ties (e.g. organizational affiliations and/or state funding) and/or lines of communication (as opposed to explicit orders) could constitute control because they indicate state involvement in a situation and from which they may withdraw.

Observe how the state cannot be implicated for wrongdoing and only individuals are criminalized, much as in the Nuremburg Tribunals and the ICT). Individuals are to be *acted upon*. The *Nicaragua* ruling only establishes a duty for the US to treat Nicaragua as a sovereign equal, which is to be given its inter-subjective due, which means not interfering with its internal affairs.

Strictly speaking, the UN is always *effectively controlling* peacekeepers in the formal sense since peacekeepers are within the UN command structure and derive their

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<sup>60</sup> At the time, Serbia was part of the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY).

authority from the organization (Findlay, 2002). Such control is also the UN's position and is able to assume responsibility for all actions committed under its banner (*Mothers*, 2013, paragraph 141, p.37). To attribute abuses to Dutchbat, the 2014 HDC decision court strictly referred to the events that indicated the Netherlands retained some *effective control* over Dutchbat (paragraph 4.40) and because UN authority *technically* cannot authorize illegal acts (paragraph 4.59). Despite the Netherlands handing over troops to UN control: (1) the Dutch state continued to command troop conduct (2) troops went beyond the authority UN mandated (3) and in conjunction with the UN, thus in joint control, decided to withdraw from Srebrenica (Palchetti, 2015, p.284)

### **Rulings**

The *Mothers* cases, both 2013 ECtHR and 2014 Hague District ruling, settles the matter by affirming that the *effective control* test is the legal mechanism and precedent through which to determine attribution for state acts. During the proceedings, the debate hinged on whether the UN or the Netherlands was responsible for the actions of Dutchbat peacekeepers. Plaintiffs challenged the immunities of the UN and on the extent to which UN immunities exculpated the Dutch state from responsibility for the conduct of its peacekeeping troops.

In the first ruling, in 2013, the ECtHR upheld the UN's *absolute immunity* from legal proceedings initiated by the Movement of Mothers who sought damages from the Netherlands and from the UN on behalf of families of those slain during the massacre on the grounds that UN peacekeepers did not intervene and partly aided in the preparation of genocidal atrocities. The Movement of Mothers accused the UN of failing to send properly armed troops to protect the city and not providing air support to Dutch

peacekeepers (paragraph 55, p.13). In the proceedings leading up to the ECtHR ruling, the Movement of Mothers claimed that when the Netherlands invoked UN immunities (on its behalf), this violated their human rights to due process as guaranteed by Article 6 of the European Convention of Human Rights. The Court rejected such claims relying on the *primacy of international order* that establishes the UN beyond reproach:

The Court takes note of the various understandings of the immunity of the United Nations in State practice and international legal doctrine. [...] Scholarly opinion is that international organisations continue to enjoy immunity from domestic jurisdiction.” (paragraph 141-2, pp.36-7).

The Court then considered whether the accusations held against the UN were sound *attributions*. To which they cited interpretations of control tests set out in their previous ECtHR 2007 ruling *Behrami and Saramati* from 2012.<sup>61</sup> At the time, both overall and effective *control tests* established in the *Bosnian Genocide* (mirroring *Nicaragua*) and the *Tadic* were considered international legal precedent (Buchan, 2012, p.290). In *Mothers* the ECtHR in 2013 revisited the issue and granted UN immunity and its CH.VII authorization as the indicators of representing *international societal control* of peacekeepers. UN immunity was *exceptional* akin to how a sovereign state operates; as the ECtHR wrote “sovereign immunity of foreign States ... also holds true as regards the immunity enjoyed by the United Nations.” (paragraph 158, pp.41).

The court’s reasoning was on justifying such reach due to the link to CH.VII of the UN Charter and its goal to “secure international peace and security” (paragraph, 152,

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<sup>61</sup> These other cases also involved peacekeeping harms, one involving an undetonated bomb harming a plaintiff’s child, and the other from a plaintiff’s unlawful detention. The legal question was whether they were attributable to the UN, which authorized the mission, or instead to the participating states that implemented it (Schmalenbach, 2015, p.291). The ruling was one of the first to affirm UN immunity however were considering confusing on the control tests (Krieger, 2015, p.268). (Agim Behrami and Bekir Behrami v France, App. No. 71412/01 and Ruzhdi Saramati v France, Germany, and Norway, App. No. 78166/01, European Court of Human Right, 2 May 2007).

p.40). In response to the Movement of Mothers *jus cogens* challenge, supposed to supersede all immunities, the Court iterated that regardless of the accusation of UN complicity in genocide — which “*may* [emphasis added] have to be judged” — UN actions were *by definition* legal since they stem from a CH.VII mandate (paragraph 159, p.41). UNPKO actions in Srebrenica, *attributable* to the UN, derived an immunity with exceptional status associated to the *maintenance of international order*. And so, the UN had to be exempt since it represented the will of *international society*. ECtHR (2013) in effect declared that the fact of the matter of UN immunity is not purely legal but *functional*, “To bring [peacekeeping] operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the *effective conduct* [emphasis added] of its operations (p.40).” Thus, the UN immunity operates in the manner state sovereignty does by placing itself beyond the international legal reach of both states and all individuals. The UN being outside the international law is the condition by which Srebrenicians were considered *disposable* objects but in relation to *international society*. Upholding UN immunity regards the *value* of Srebrenicians as second and *disposable* to the ends *international society* pursues via CH.VII.

The second case by the Movement of Mothers, began anew in 2013, but solely targeting the Dutch State for liability. Here, the Movement of Mothers successful ruling reveals the full extent of the *objectification* laden in international law. The *value* of the compensation gained was made possible since those slain resided in Dutch jurisdiction. When the ECtHR upheld UN immunity, the Court did not pronounce or judge the validity of the potential ongoing *Mothers* domestic civil litigation against the Netherlands

(paragraph 167, p.43). This refrain allowed for the favourable 2014 HDC ruling. That tacit acknowledgment by the court suggested that civil action may be in fact the appropriate avenue to seek accountability for Dutch peacekeeping actions during the Bosnian conflict.

The HDC ruling that came in 2014 awarded damages to the families of slain Srebrenicians which the Movement of Mothers represented by suing the Netherlands for their role during Dutchbat conduct. The Court found the Netherlands, deemed in *effective control* of Dutch peacekeepers (paragraph 4.47) who abandoned their fighting positions, provided improper care of refugees on their compound, turned over arms to VRS troops, and helped load buses of those later massacred (paragraph 4.335), all of which contravenes the *Convention for the Prevention of Genocide* (paragraph 4.329). Here, the HDC ruled that UN immunity does not apply for Dutch troop actions because the UN did not maintain control of them nor could have authorized illegal actions. The Movement of Mothers' kin were *disposable* when the District Court attributed the peacekeepers' *ultra vires*<sup>62</sup> actions to their sending state (and its laws), thus making UN authority irrelevant with respect to the abuses. In effect, *dual attribution* circumvents the constrictive threshold of the *effective control test* (Palchetti, 2015, 283) by ascribing certain peacekeeper conduct (for instance, of *ultra vires* character) to the sending state that retained command over its troops. A divisible responsibility emerges with *dual attribution*. As Spijkers (2014) puts it: “peacekeepers are nobody’s organ; and whoever happens to be in control of them at the relevant time is responsible for their actions”

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<sup>62</sup> Whose abuses were *ultra vires* meaning that the acts were used for purposes contrary for the basis of their authority (Palchetti, 2015, p.288).

(p.348). For precisely that reason, the 2014 HDC ruling is significant because it imputes some state liability despite the high threshold set in the *effective control test*.

In a sense, the UN acts as a corporate veil<sup>63</sup> behind which multiple states hide to evade liability (Brölmann, 2015). The ECtHR reasoning uses *dual attribution* for troop conduct, allowing the division of responsibility for multiple acts among the state and an international organization. In all of the preceding case law concerning peacekeeping wrongdoing, *attribution* was evaluated in a blanket fashion that the UN claimed full control of, and thus bore sole liability. This in effect precluded state responsibility (Spijkers, 2016, pp.346-7) as the Movement of Mothers had argued against the UN immunity (*Mothers*, 2013, paragraph, 166, p.43). The 2014 HDC ruling imputes liability for peacekeeper conduct onto the Netherlands, or to the UN, depending on whichever was in *effective control* during a specific allegation. The HDC's reasoning draws on the Dutch Supreme Court's ruling in the *Mustafic and Nuhanovic* cases, which found peacekeepers to be state organs and determined that *effective control* is contextual. It depends on whether the UN or the state controls the unit (Ryngaert, 2015, p.348).

Before lauding the case, considering how *control tests* as expressions of state jurisdictional *possession* does little to question the relationship it measures. The HDC, using such metrics, ruled that solely those 300 people inside the compound were within Dutch jurisdiction and thus entitled to protections of the European Convention on Human Rights (*Mothers*, 2014, 4.161). This underscores that Dutchbat's actions are premised on a certain type of *objectifying* violence. Those individuals to which the Netherlands was

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<sup>63</sup> Brölmann (2015) the term is for legal entities established to shield another entity from incurring responsibility. She draws the idea from the terms 'corporate veil' that companies use to dodge liabilities and taxes.

liable demarcates Dutch possession and sacrifice of those individuals. Though the UN also had in effect *disposed* of individuals in Srebrenica, the Netherlands represented *international society* in its role as a peacekeeping state. So the *value* of *civis sacer* depends on for whose state (*civitas*) one perished. In Srebrenica, individuals fell among the control of a myriad of actors which courts sought to disentangle and determine control. Srebrenicians were *objects* to whoever's sovereign power could dispose or exchange them. For those beyond any UN or peacekeeper's grasp or reach, Agamben's indicator of *homo sacer* captures the predicament of the exclusionary power of sovereignty that manifested in *the appearance of bare life during* the siege and massacre in Srebrenica. Whereas, those whose death was within the control of the UN perished as a sacrifice to *international societal* efforts during the Bosnian War. Lastly, those fallen whose families gained compensation, their deaths also indicate *civis sacer* in so much that their *disposal* could be registered as the Dutch misuse of *an objectified being* in its possession on behalf of *international society*.

### **Conclusion - *Contra* Instrumentalization**

One objective here is to reject the manner *legalism*, in court and discourse, is quiet to its role in structuring violence in the world — here regarding peacekeeper abuses. As Balibar (2015) notes, interpreting legal processes (including major scholarship) captures how functional violence associated with the state ramifies into the authoritative account of history (in Gramscian terms: *hegemonic discourse*) (p.35). To do so requites preserving the admirable struggle of the Movement of Mothers' actions who

insomuch revealed the worth of individuals in the *international order* of things.<sup>64</sup> Downplaying their efforts quiets how they troubled the international law of UN immunity. With that said, despite the promise of the *Mothers* cases, its reception demonstrates significant limitations and the resistance to challenging UN and peacekeeper immunities. Its various rulings have halted, for the time being, the previously developing field of civil litigation against peacekeeper abuses that challenged the CH.VII immunity (Momirov, 2016, p.439). In its stead, a silence sets wherein peacekeeper abuses become settled legal questions. A hegemonic silence is emerging in the interpretations of *Mothers* deeming *activist litigation* initiatives against UN immunities all but dead.<sup>65</sup> These accounts, however, can be re-interpreted to reveal and illustrate the violent subject-object relations found in peacekeeping operations.

Legal scholarship reads the *Mothers* cases with an instrumental perspective, analyzing it for legal doctrines and/or insights, so as to apply the analyses generated to other ongoing debates in international law.<sup>66</sup> In this manner, the abuses committed in

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<sup>64</sup> Civil litigation by rights groups representing those harmed by international actors like the UN or a multinational corporation is an emerging field that falls under the aforementioned *activist* approach to seeking *accountability*. Other notable cases include other private claims against the UN, Royal Dutch Petroleum (Shell) in the *Kiobel* and *El Wiwa* cases in the United States, the Canadian mining industry in the *Talisman* cases (Simons and Macklin, 2014, pp.246-254), and against multinational corporations such as Pfizer, Talisman, Exxon, and Nestle (Green, 2014). Tortious international law claims, though problematic in some respects for they re-inscribing violent subject-object relations between states and IOs toward individuals, nevertheless trouble the relation and insert more individual agency into international law.

<sup>65</sup> I consider certain interpretations to be hegemonic because of their epistemic reach and reputation. These interpretations come from prominent publishers such as Oxford University Press (see Morimov, 2016) and Brill-Nijhoff, (see Burke, 2014 and Howe et. Al, 2015) speaking to *institutional* actors within the field of *peacekeeping unaccountability*. As mentioned in the introduction, the reason for reading/mentioning major publications serves to intervene on how accounts of violence become interpreted create meaning in the world.

<sup>66</sup> Take for instance how it is framed as Morimov (2016) sees, in a new Oxford publication, that the case addresses broad questions courts are grappling with concerning international criminal law and state responsibility (p.444). The cases are characterized to influence the following sections in international law: “individual criminal liability, international organizational responsibility, national civil litigation surrounding atrocity, and responses to massacre” (Ryngaert & Schrijver, 2015, pp.220-1)

Srebrenica and the related jurisprudence are utilized by academia to problem-solve issues stemming from broader international political ends that result in harms. Legal analyses have begun leveraging the *Mothers* case as a means to improve the international laws governing peacekeeping: “what is undeniable [...] is that the District Court has given further impetus to the development of *accountability principles* [emphasis added] where UN peace operations go wrong.” (Ryngaert, 2014, p.372). Such an approach registers peacekeeper's violence as *civic* because, as Robert Cox (1994) would note, the practice of peacekeeping is not in-and-of-itself questioned. At times, however, cognitive dissonance arises. Consider how Trapp (2015) interprets the *Bosnia Genocide* decision: “Indeed, it would be a curious state of affairs if individuals were State-like enough to be entitled to engage in hostilities (and granted the other privileges reserved for State actors), but were not so much part of the State as to engage its responsibility” (p.274). Curious indeed, unless one does not presume the individual's subjectivity in the international public realm.

On a more fundamental note, the multiple peacekeeping immunities demonstrate the primacy of *international order* and how international law is a means in upholding it. So despite that Dutch peacekeeper's wrongdoing, neglect, and complicity in genocide (albeit in unfavourable circumstances) implicate the Netherlands and the UN, who are both uncontested international political subjects, individuals solely bear the burden of atonement for atrocity. Such an asymmetrical approach appears starkly in the international legal separation of ‘state responsibility’ and ‘individual criminal liability’ for atrocities despite the fact that they address the same violence. Courts in the *Mothers* case drew a similar line by separating what violence is international from that which is

not. *Mothers* cases show how courts processed the violence of Dutchbat peacekeepers, acting with UN authority and taking (some) instructions from their home state (p.286). Together, the ECtHR and the HDC proclaim that the UN, through one of its member-states (the Netherlands) was liable for the UN's use of individuals that *international society possessed* for the sake of *international order*.

Mieville (2004), following Marx, defines international law as the realm of rights between equals (states) and remarks that all that can remain is force (p.292). The lynchpin of the *Mothers* case is the vindication of the *effective control* test from the *Nicaragua* ruling (Trapp, 2015, pp.255-6) that civilizes state-complicity for sponsoring paramilitary atrocities abroad. It is telling that the Netherlands and Serbia together enjoyed equal international legal rights, leaving only force between them, manifesting in the VRS and UN Dutchbat abuses. All that remains for state subjects is an outstanding cost to bear for the Srebrenica massacre — accepted payment includes the rendition of war criminals to an international tribunal (as in ICTY) or state monetary compensation (as in *Mothers*). *Civis sacer* can have its day in court but the law will pass over with silence over those whom its kin accuse of culpability, here the UN. The fact that domestic courts are taking up international human rights civil litigation is surely better than nothing because nothing is less than whatever the state will have to pay for the sacrifice of life.

## Conclusion - Sacred International Order

Contemporary uses of humanitarian rhetoric demonstrate a tension between pacifist ideals and fatalistic views of war, especially in the context of praise for peacekeeping. For example, consider Barack Obama's 2009 acceptance speech for his Nobel Peace Prize:

we honor [peacekeepers] not as makers of war, but of wagers – but as wagers of peace. Let me make one final point about the use of force. Even as we make difficult decisions about going to war, we must also think clearly about how we fight it. [...] Where force *is necessary* [emphasis added], we have a moral and strategic interest in binding ourselves to certain rules of conduct.

Other than being *quintessential* just war theory, an unimaginative observation on peacekeeping, there is something more significant: the silence of not labelling UNPKO *war*. Such silence is indeed the *common sense* — that which masks deeper realities (Rancière 2008) — of peacekeeping. Peacekeepers, now deployed more aggressively, have become a hallmark of wartimes practice; they enable morally permissible killing within certain parameters. In legally fought wars soldiers do not murder one another and warring parties do not 'grieve' slain enemies (Butler, 2009, p.31). Humanitarian *use of force* sounds civil, whether it includes bombing, invasion, or embargo, and peacekeepers' acts disqualify as human rights violations (Meister, 2001, p.6). Peacekeeping is now *forceful*. From its inception, contradictions within peacekeeping have been overlooked, such as in 1988 when the Nobel Peace Prize awarded UNPKO for becoming more interventionist. While presenting the award Egil Aarvik noted:

the Peace Prize is to be awarded today to an organisation which, at least in part, consists of military forces. It might be reasonable to ask whether this is, in fact, in direct contradiction to the whole idea of the Peace Prize. *The fact that this question has not been raised* [emphasis added] is an indication

that it is universally accepted that the United Nations Peacekeeping Forces are in the spirit of the Peace Prize.

Peacekeeper abuses echo the *silent violence* that follows war; they are complicit in divorcing war's harms from its structure, and mask the fact that they do as soldier do: they engage in war.

Peacekeeper abuses disturb the prevailing vision of humanitarian ideals. Violence is attributed to the 'bad apples' among the troops. But as with war, and in efforts to keep peace, *abuses* are perceived as aberrant evils and the conditions involved are described as incomprehensible. Peacekeeping immunities (that protect the UN and those states that contribute to peacekeeping) help legitimize the practice of humanitarian warfare. Behind the immunity lays the emergency powers of the UNSC set out in Chapter VII of the UN Charter. From this position, peacekeepers embody *international society* by possessing its exceptional power – a power that places the individuals they encounter outside of public international law. With such exceptional powers, peacekeepers are beyond reproach. And it should come to no surprise that peacekeeping abuses *encounter* muted responses. Flustered legal analysis (which is unable to properly address abuses at best and complicit in abuses at worst) without a guilty subject for the abuses, provides speechless reasons for the purposes or reasons that people were harmed. Without satisfactory answers, those harmed by peacekeepers are labelled "victims" and become *sacred*; sacrificed subjects killed, though not executed, as part of sustaining the given order. Thus, sacred victims reaffirm *order* by way of ascribing transcendental meaning to those harmed, such as framing the violent events in terms of good and evil, thereby transcending the conditions and causes of the violence itself (Wydra, 2015, pp.10-1). Such Manicheanism can be seen in the literature on *peacekeeper unaccountability* in which *international societal*

structural conditions that lead to peacekeeping abuses are subsumed into the narrative that such abuses are the unfortunate result of an imperfectly realized international humanitarian project.

Peacekeepers embody an international order that is *quiet* on the subject of the *silences* it requires to operate. Put another way, soldiers express the sovereign voice of states through violence. Their *use of force* is the exception that becomes law. Peacekeepers carry the *potentiality* of CH.VII exceptional measures (though historically deployed with restraint) for the purposes to *pacify* resistance and enforce *international peace and security* (order). Peacekeepers are exceptional. To attack them is international crime (Roberts in Rodin and Shue, 2008, p.247). To fight a peacekeeper is not war, rather, it is international criminality (Klappe, 2010, p.533). *Peace* is the order of the day and, whatever shape it takes, its “other” is unacceptable. Peacekeepers are “are soldiers without enemies [...] representing the will of the international community” (UNSG, 1988). Consider how the UN mandate for the peacekeeping mission in the Democratic Republic of Congo (MONUSCO) was extended on an “exceptional basis” (UNSC/R/2098/para 9, in Ryngaert & Schrijver, 2015, p. 225) indicating the mandate’s deviation from international political norms. The peacekeepers’ mission was described as necessary in order to “neutralize [...] armed groups” (p.224), evoking the notion of reinstating order rather than confronting a combatant in war. So what does it mean when peacekeepers’ abuses are divorced from the peace they fail to keep? How is it that the leading uses and analyses of international law regarding peacekeeper abuses command perfecting UNPKO immunity for the sake of *international order*? *Objectified beings* are

*disposed of* in pursuit of a sacred humanitarianism that *orders* silence for the sake of the very subjects that uphold that order.

This thesis surveys a process of both an epistemic community and its paradigm, culminating in the field of *peacekeeper unaccountability*, to be a part of maintaining the subjects with powers capable to *objectify* individuals for *international order*. Their framing of abuses contributes to peacekeepers being seen as neutral arbiters and impartial in their applications of force (White in Dunoff, 2013, 578). Peacekeeper *violence* means something and the exceptional powers implicit in UNPKO immunities confirm the presence of subjectivity being defined. Taking from Agamben's (1998) central insight regarding sovereign subjectivity, that exceptionality — a legal relation that places individuals outside of the law — in the eyes of those who represent that law — constitute a sovereign.

But peacekeepers belong to no one sovereign. Instead, those harmed by UNPKO stand outside *international society* as if the structure were a sovereign. Unlike a sovereign, without a body, *international society* appears through Hannah Arendt's (1970) note on *structural violence* where "bureaucracy or the rule of intricate system of bureaus in which no men, neither one nor the best, neither the few nor the many, can be held responsible, and which could be properly called rule by Nobody" (p.38). So even though the UN has a legal personality, one that the Movement of Mothers tried to bring to court and that the Haitians are trying do the same, nobody appears because of the UN's absolute immunity. Literally, UN immunity appears in the organization's refusal to appear to summons. When so much of international life remains abstract, *legal personality*, is a rare instance where collectives, groups, communities, represented by a

delegate, *appears* as the sensible (Cassese, 1986, p.10). States are legal beings with jurisdiction, personified bodies, and endowed with subjectivity — a “*dramatis personae*” (Paulus, 2013, p.74) set on an international stage within its community of other state bodies (p.10). Both absences (of an individual’s and of *international society’s* international legal personality) are loud silences of an *international order* brought into being by the only subjects within this order, sovereign states. Such subjects have no space for instruments other than their use.

Perhaps one cannot, what is more one must not, understand what happened, because to understand is to justify...If understanding is impossible, knowing is imperative, because what happened could happen again

— Levi, (1963, pp.395-396)

Calls for punishing evildoers evade confronting the “sacredness position” that law uses to propel and sustain order. A rush to action presumes a righteous course and negates the pause for thought that violence forces upon us. As for peacekeeping, their adulation, and summons, speak to think through the order they represent. Lawrence Douglas observes (1995, pp. 449, 462) “The criminalization of aggressive warfare, unusual as this may be, represents no more than the extension of legal principles that control domestic conduct into the relations between nations” (p.110). And so, in the same breath, to punish a wrongdoing peacekeeper, but insists they fight, calls upon the same source of violence with which peacekeeping abuses and pacifies. The humanitarianism found in peacekeeping resembles a paradox of human rights “as a paradigm of injustice and as a reason to transcend justice itself with compassion (love) for the sacrificial victim. Claims of justice are thus neither originary nor self-sufficient – they always come after some form of human sacrifice (after evil)” (Meister, 2001, p.18). And calls for

*accountability* cover peacekeeping *sacrificial* abuses in running to international law.

International crime, after all, is a legacy from the Nuremberg Trials' answers the question of state perpetuated abuses with targeting individual evil (Ainley, 2008, pp.56-7; Sloane, 2007, p.89; Brownlie, 1998, 108).<sup>67</sup>

What becomes problematic is how peacekeeping abuses becomes something other than the *international order* from which it came. And *international law* that grants peacekeepers immunities is redeemed and with it the *will of the international community* the UN represents. For that reason, *humanitarian war* in peacekeeping ought not be silent spectacle. War comes through *spectacle* (Arendt, 1969, p.52) and equally representations of war can kill with notions of "sanctioned killing and patriotic dying" (Der Derian, 2009, p.38). This image of peacekeeping makes its abuses so deadly when considering that the same *paradigm of accountability* seeks reforming immunities but not the fighting it serves. *Peacekeeper unaccountability* literature sings Egil Aarvil (1988) songs of praise for humanitarian rally:

Well may you ask, in despondent alarm:  
What is my weapon? What is my arm?  
— Nordahl Grieg

Instead we must shudder as the historian who writes of the Holocaust and recognizes themselves and their subjectivity in the subject matter (Haidu, 1983). Indeed, what is disturbing is how the such subjectivity, that this thesis implicates of peacekeeping, is constructed on "sacred orders" that requires *silence* on the

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<sup>67</sup> It is crucial to stress that punishment is not sacrifice since it is within the confines of the law. Such a distinction can be noted in preparatoire works on genocide convention: "the treatment of certain criminal acts falling within the same category as distinct offences is not innovation. Examples exist in state penal systems. Thus homicide which is the denial of an individual human being's right to live is divided into several different categories: manslaughter, homicide, murder, and even parricide or reigicide" (ad nod committee E/AC.25/3, 1948, in Akhavan, 2012, p.82).

*objectification* of individuals. It is too facile to listen to silence. and demand misreading Adorno's oft quoted line that "after Auschwitz, there is no word... not even a theological one, that has any right unless it underwent a transformation" (in Akhavan, 2012, p.104) or "to write poetry after the Holocaust is barbaric." (in Meister, 2015, p.v).

Attempts were to present this picture took on the form of bringing Agamben's theory to lament *silences* brought upon by *international society*. *Homo sacer* voices sovereign power by being regulating whatever stands outside of internal state space, such as borderzones, seas/international waters, and where sovereigns clash during war. *Civis sacer* are *objectified violently* deemed necessary to sustain *international order*. International law represents one international societal institution that *objectify* people. In this case, *sovereign violence* creates the *bare life* of *homo sacer*, such as refugees and undocumented migrants; when done in the capacity of *international society* such *violence* creates *civis sacer*. International society constitutes itself, and its subjects, through violence, manifesting in the division between those with *subjectivity* and those *objectified* for the former's *use* and *abuse*. To sustain the potentiality outlined here, of such *exceptionality* to sustain state subjectivity, *international order* has brought sacred humanitarian values. And as Frost (1994) shows, *all roads of international orders lead back to sustaining the inter-state system* (p.79).

[Humanitarianism] after the cold war [allows] the "international community to intervene in former colonies for the purpose of rescuing human bodies without purporting to recolonize such "failed states." The global "Responsibility to Protect" doctrine rests on a new paradigm, the *refugee* camp, which exists to save lives rather than to use of waste them and is therefore ethically distinguishable from both a labor camp and a colonial reservation. [...] If the Holocaust now reveals genocide to be an absolute, and infinite evil, then the only universal ethics after evil would be to put human rights as a "Responsibility to Protect," ahead of *any* claim to justice

(which will always be less absolute than the Holocaust) [sic] (Meister, 2011, p.16)

*Homo sacer* is whoever faces an outside relation to sovereignty in the form of, for example, a concentration camp guard or customs officer within a specific locale such as a camp or border crossing. States, in different degrees, bear down onto individuals with exceptional violence which appears when they are able to treat them as if they were objects. Leaving out this sovereignty's *possessive* characteristics Koskenniemi (2005), even notes that,

The international doctrine of State sovereignty bears an obvious resemblance to the domestic-liberal doctrine of individual liberty. Both characterize the social world in descriptive and normative terms. They describe social life in terms of the activities of individual agents (legal subjects, citizens, States) and set down the basic conditions within which the relations between these agents should be conducted. (p.224)

International law serves to register state subjects who mutually recognize these subject-object relations as necessary in order to *constitute* state subjectivity in international politics. The exclusive prerogative a state holds towards other states in regards to matters within its borders marks *possession* not only of territory but of populations within it. In other words, the *constitution* of state subjectivity depends on establishing the status of individuals as objects. Both *homo sacer* or *civis sacer* appear in international legal measures denoting an individual's relationship to a state and/or international organization; this is how *effective control* and *dual attribution* disclose *possession*. Thus, those harmed by peacekeepers are objectified by *international society* to become *civis sacer*, but can only have compensation towards its representative state. Peacekeeping abuses and wrongdoings during the Srebrenica massacre typified *objectified violence* of *international society* for the sake of *international order*. When courts developed two

international legal doctrines — *dual attribution* and *effective control* — which served to delimit the UN's exceptional and absolute sovereign immunity and Dutch civil liability for costs and damages. Individuals are put at the *disposal* and *exchange* of peacekeeper immunities which recasts their abuses to be an integral part of the meaning of the current *international order*.

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