
UN Immunity or Impunity? A Human Rights Based Challenge

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Abstract

National courts have long understood the UN to have absolute immunity from their jurisdiction, based upon provisions in the UN Charter and the Convention on Privileges and Immunities of the UN. While state immunity has evolved over recent decades, allowing restrictive immunity that distinguishes between acts jure imperii and those jure gestionis, questions have arisen as to whether that doctrine applies to international organizations and, specifically, the UN. The counterbalance to the UN's absolute immunity is the requirement that it provide alternative mechanisms for resolving disputes. This raises concerns about accountability and internal review. Case law from various courts demonstrates an increasing willingness to attempt to challenge absolute immunity on the basis that the bar to jurisdiction violates claimants' rights to access a court and to a remedy. In all of those cases, individuals' ability to access alternative mechanisms for dispute resolution has been used to show that their rights have been realized. Recent events concerning the 2010 cholera outbreak in Haiti may lead to a challenge to the UN's absolute immunity. The UN has deemed those claims to be 'not receivable', which denies the claimants their rights to access a court and to a remedy. In October 2013, lawyers for the Haiti cholera victims filed a class action in the Southern District of New York, seeking to challenge the UN's immunity by bringing the Organization before a national court. This article explores whether the events in Haiti may provide the first successful, human rights-based challenge to the UN's absolute immunity.

1 Introduction

On 21 October 2010, cholera broke out in the Artibonite region of Haiti. Within the first 30 days, Haitian authorities recorded almost 2,000 deaths from the disease. Dr

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Renaud Piarroux, a French epidemiologist who has spent his career studying cholera, observed that the epidemic spread faster in Haiti than anywhere he had seen.¹ The cholera outbreak is directly attributable to UN peacekeeping troops from Nepal,² a country that is the third largest contributor of forces to the UN Stabilization Mission in Haiti (MINUSTAH).³ A new group of Nepalese troops arrived in Haiti in October 2010 and were deployed to the Mirebalais camp. UN protocol requires that troops pass a basic health screening. Symptomatic individuals undergo laboratory tests for infectious diseases, but the UN does not test individuals who do not exhibit active symptoms. Approximately 75 per cent of cholera carriers do not exhibit active symptoms. The Nepalese Army's Chief Medical Officer stated that no Nepalese soldiers deployed as a part of the MINUSTAH mission in Haiti were tested for cholera prior to entering Haiti.⁴

The UN's independent panel of four experts found that cholera strains from Nepal and from Haiti were a 'perfect match'.⁵ The panel's findings set out how the cholera spread and infected at the rate that it did, owing to poor waste management from the MINUSTAH camp that spread into a tributary of the Artibonite River, Haiti's longest and most important river.⁶

Claims have been filed on behalf of 5,000 individuals affected by the outbreak of cholera in Haiti. Those claims allege negligence, gross negligence, and/or recklessness by the UN and MINUSTAH. In February 2013, the UN responded to the Haitian claims by detailing the financial aid and other resources it has provided to prevent and reduce the spread of cholera. The UN insists that the claims submitted are 'not receivable' owing to those claims involving review of political and policy matters.⁷ This, essentially, bars the claims being heard by the UN's dispute resolution mechanisms. In July

¹ See, generally, Piarroux *et al.*, 'Understanding the Cholera Epidemic, Haiti', 17 *Emerging Infectious Diseases* (2011) 1161.

² See, e.g., Frerichs *et al.*, 'Nepalese Origin of Cholera Epidemic in Haiti', 18 *Clinical Microbiology and Infection* (2012) 158.

³ MINUSTAH was originally authorized by SC Res. 1542 of 30 Apr. 2004 to support the Transitional Government in ensuring a secure and stable environment; assist in monitoring, restructuring, and reforming the Haitian National Police; help with comprehensive and sustainable Disarmament, Demobilization, and Reintegration (DDR) programmes; assist with the restoration and maintenance of the rule of law, public safety, and public order in Haiti; protect UN personnel, facilities, installations, and equipment and protect civilians under imminent threat of physical violence; support the constitutional and political processes; assist in organizing, monitoring, and carrying out free and fair municipal, parliamentary and presidential elections; support the Transitional Government as well as Haitian human rights institutions and groups in their efforts to promote and protect human rights; and monitor and report on the human rights situation in the country.

⁴ Cravioto *et al.*, 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (2011), available at: www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf, at 12.

⁵ *Ibid.*

⁶ *Ibid.*, at 19–23.

⁷ UN Department of Public Information (New York), 'Haiti Cholera Victims' Compensation Claims "Not Receivable" under Immunities and Privileges Convention, United Nations Tells Their Representatives', 21 Feb. 2013, UN Doc. SG/SM/14828.

2013, the UN refused a request for compensation filed on behalf of the cholera victims, again citing its immunity from jurisdiction.⁸

It has long been understood that the UN has absolute immunity from the jurisdiction of national courts. Recent cases and academic commentary demonstrate a 'nibbling away' at the edges of UN immunity, but the circumstances for a successful challenge have not yet extended to claims arising from UN peacekeeping operations. There exists a counterbalance to the UN's absolute immunity: section 29 of the Convention on Privileges and Immunities of the UN requires the Organization to resolve any private law claims through alternative dispute resolution mechanisms.⁹ However, those frequently are not established,¹⁰ which undermines certainty for claimants.

Under international human rights law, individuals hold rights to access a court and to a remedy. The inability to bring the cholera claims before a national court or to the UN's dispute resolution mechanisms arguably results in the Organization being able to avoid accountability. This article explores whether, and on what grounds, those individuals are pursuing a legitimate human rights claim that might challenge the UN's immunity.

Scholarship that addresses the UN's immunity includes articles about accountability of international organizations¹¹ and reform proposals aimed at more effective accountability mechanisms.¹² Whilst broadly relevant, they do not address the human rights violations that can result from the UN's absolute immunity. Literature on UN accountability for human rights violations and peacekeeping operations largely focuses on criminal offences and laws of war,¹³ which are informative but not directly applicable to the Haitian claims. Jurisprudence from national and regional courts focuses either on broader issues of immunity or on private law claims arising from criminal acts committed by peacekeepers. An evolving line of case law has discussed issues of immunity and human rights but, so far, courts have been reluctant to uphold those challenges because the individuals in those cases were able to access other modes of dispute settlement.

The cholera claims might be distinguished from previous cases because they do not relate to criminal offences committed by peacekeepers and because their classification

⁸ UN Secretary-General, 'Letter to Congresswoman Maxine Waters', 5 July 2013, available at: www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf.

⁹ This requirement is also set out in *Model Status of Forces Agreement for Peace-keeping Operations*, UN Doc. A/45/594 (1990), Art. 51.

¹⁰ UN Department of Public Information, *The Blue Helmets: A Review of United Nations Peace-keeping* (3rd edn, 1996), at 42.

¹¹ See, e.g., Parish, 'An Essay on the Accountability of International Organizations', 7 *Int'l Orgs L Rev* (2010) 277.

¹² See, e.g., Wouters and Schmitt, 'Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials', *Leuven Centre for Global Governance Studies*, Working Paper No. 49, Apr. 2010.

¹³ See, e.g., Clark, 'Peacekeeping Forces, Jurisdiction and Immunity: A Tribute To George Barton', 43 *Victoria U Wellington L Rev* (2012) 77; Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability', 51 *Harvard Int'l LJ* (2010) 323; Paust, 'The UN Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity', 51 *Harvard Int'l LJ* (2010) 1.

as ‘not receivable’ leaves the claimants without access to a court or to a remedy. This article brings together different strands of jurisprudence in order to explore whether a human rights-based challenge to immunity might be successful. I shall first set out the concept of absolute immunity held by international organizations and particularly the UN, explaining how and why it differs from foreign sovereign immunity. I shall then focus on the alternative dispute settlement mechanisms that provide a counter-balance to such immunity. Lastly, I shall explore the growing recognition of a human rights-based challenge to international organizations’ immunity.

2 Absolute or Restrictive Immunity

The concept of state immunity is not static. Over the past 50 years, there has been a movement away from states having absolute immunity and towards applying the doctrine of restrictive immunity. Restrictive immunity distinguishes between acts performed *jure imperii* (acts of a sovereign nature) and those performed *jure gestionis* (acts of a private nature). The need to distinguish between those types of acts developed as states increasingly became involved with matters outside their official capacity as states or international organizations. Absolute foreign sovereign immunity created unfairness, for example commercial dealings between a company and a state were non-justiciable, but would have been justiciable if they had involved non-state entities. In the US, for example, the Foreign Sovereign Immunities Act (1976) limits immunity to *jure imperii*¹⁴ and allows claims in respect of private law acts.

International organizations are seen as quasi-states in terms of their functions and internal legal systems,¹⁵ yet are granted absolute immunity rather than the current restrictive understanding afforded to states. International organizations’ immunity can be distinguished from that of states in terms of sources and rationale. State immunity is an evolving concept, while international organizations’ immunity is usually enshrined within treaties. This restricts the extent to which such immunity can be interpreted or evolve. Absolute immunity was the prevailing theory until the second half of the 20th century. International organizations created prior to that time will therefore have absolute immunity enshrined within their constituent instruments or relevant treaties. International organizations need to hold immunity from national courts’ jurisdiction in order to prevent inconsistencies that would occur across different national courts.¹⁶ Some scholars even have insisted that national courts or tribunals are ‘totally unsuited’ for disputes involving international organizations.¹⁷

Over recent years, some small movements have been made towards treating international organizations like quasi-states by applying restrictive foreign sovereign

¹⁴ See, generally, Nash, ‘Contemporary Practice of the United States Relating to International Law’, 74 *AJIL* (1980) 418.

¹⁵ Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’, 7 *Chinese J Int’l L* (2008) 285.

¹⁶ Cf. *Broadbent v. OAS*, 628 F.2d 27, at 35 (DC Cir. 1980).

¹⁷ M.B. Akehurst, *The Law Governing Employment in International Organizations* (1967), at 12.

immunity. It is important to note that not all national courts adopt that approach.¹⁸ Even within states that do apply restrictive immunity to international organizations, most insist that the UN is a special organization that retains absolute immunity. The UN's immunity is based on the Charter of the UN: Article 105(1) sets out that '[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'.¹⁹ That provision is not framed as absolute immunity,²⁰ and some commentators insist that the immunity was intended to be functional rather than absolute.²¹ A straightforward reading of the Charter indicates that the UN's immunity is restricted by its human rights obligations under Articles 1(3), 55, and 56. Any actions that violated human rights would contradict the UN's purposes and certainly would not be 'necessary' for their achievement; it appears contradictory, at best, that the UN would hold immunity with regard to such acts.²² However, when the Charter provisions were elaborated upon in the Convention on Privileges and Immunities of the UN (1946) (hereafter, the General Convention) the immunity was interpreted as being absolute.

Section 2 of the General Convention establishes that:

The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.²³

Courts, generally, have interpreted section 2 as granting absolute immunity to the UN.²⁴ This approach is based on the UN Charter and the General Convention pre-dating the move to restrictive immunity,²⁵ meaning that even if the UN's immunity was conceived of as functional, it was codified as absolute. That approach can be seen, for example, in the early case of *Manderlier v. Organisation des Nations Unies et l'Etat Belge*²⁶ and subsequently in a series of cases ranging from employment disputes²⁷ to damages

¹⁸ See, e.g., *Groupement d'Enterprises Fougerolle v. CERN*, Swiss Federal Court, 21 Dec. 1992, ATF 118 Ib 562; SJ 278 (1993); Bull. ASA (1993) 259; Pratique Suisse 1992; 4 SZIER (1993) 691; Arbitrage Internationale/Juris prudence, SZIER (1994) 143 ff; 102 ILR (1996) 209, at 211–212 where the court held that the distinction between acts performed *jure gestionis* and *jure imperii* did not apply to international organizations.

¹⁹ UN Charter, Art. 105(1).

²⁰ See, e.g., Paust, *supra* note 13, at 9.

²¹ Reinisch, 'Convention on the Privileges and Immunities of the United Nations 1946, Convention on the Privileges and Immunities of the Specialized Agencies 1947', in UN (ed), *Audiovisual Library of International Law*, available at: www.un.org/law/av1/.

²² See *infra* sect. 4.

²³ UN GA Res. 22(1), 'Convention on the Privileges and Immunities of the United Nations', 13 Feb. 1946, s. 2.

²⁴ A. Reinisch, *International Organizations Before National Courts* (2000), at 332.

²⁵ Rios and Flaherty, 'Legal Accountability of International Organization: Challenges and Reforms', 16 *ILSA J Int'l & Comp L* (2010) 433, at 437.

²⁶ *Manderlier v. Organisation des Nations Unies et l'Etat Belge (Ministre des Affaires Etrangères)*, Brussels Civil Court, 11 May 1966, [1966] JT 721; 45 ILR (1972) 446.

²⁷ E.g., *Radicopoulos v. UN Relief and Works Agency*, Egyptian Court, 1957, *Annual Report of the Director of UNWRA*, 13 UN GAOR, Supp. (No. 14) 41, UN Doc. A/391 (1958); *Boimah v. UN General Assembly*, 664 F Supp 69 (EDNY, 1987).

arising from peacekeeping operations.²⁸ Traditional justification for the UN's absolute immunity is that it would be undesirable for national courts to determine the legality of the UN's acts because (a) those courts would have very different interpretations from one another; and (b) allowing national courts to determine the legality of UN acts might leave the Organization open to prejudice or frivolous actions within some countries.²⁹

Embryonic signs that the UN may not hold absolute immunity are appearing within case law and scholarship that seek to apply restrictive immunity based on the distinction between acts *jure imperii* and those *jure gestionis*. That line of reasoning relies on specific national legislation of limited application. Despite the wording in section 2 being unambiguous, there is an argument that the trend developing within some countries of applying restrictive immunity to international organizations ought to be mapped onto the UN. That would allow national courts to hear cases that apply the same distinction between *jure gestionis* and *jure imperii* to the UN as they do to states and other international organizations.³⁰ Although judges generally consider that they are bound to grant immunity to the UN,³¹ judicial comments within some cases demonstrate that, within the right context and if certain facts were present, courts might be prepared to apply restrictive sovereign immunity.

In *Askir v. Boutros-Ghali & Others*³² a Somali citizen brought a claim against the UN, seeking damages for unlawful possession of property during UN operations in Somalia in April 1992. The complaint was dismissed on the basis of section 2 of the General Convention, which the court determined gives rise to absolute immunity other than when the UN expressly waives that immunity. The FSIA's exceptions did not apply because the acts arose within a military (peacekeeping) context rather than from a commercial matter and the Act's exceptions, therefore, did not apply. The court did not base its ruling on the FSIA not applying to the UN, but rather on the acts committed not falling under one of the listed exceptions. This raises the question whether the Act may restrict the UN's immunity if its actions do fall within the listed exceptions to immunity.

The court in *Brzak v. UN* did consider whether the FSIA 1976 applies to the UN. It held that, in principle, the Act might apply, but the court made it clear that the UN continues to enjoy absolute immunity unless its actions fall within the Act's narrow list of exceptions. Based on section 2 of the General Convention, the court reasoned that the UN is like a foreign government in terms of absolute immunity. The court concluded that the General Convention is self-executing and applies in US courts without

²⁸ E.g., *Abdi Hosh Askir v. Boutros Boutros-Ghali*, 933 F Supp 368 (SDNY, 1996).

²⁹ P. Sands and P. Klein (eds), *Bowett's Law of International Institutions* (5th edn, 2001), sect. 15–045, at 491.

³⁰ *Ibid.*, sect. 15–046, at 491.

³¹ Gaillard and Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass', 51 *ICLQ* (2002) 1, at 2.

³² *Askir v. Boutros Boutros-Ghali*, *supra* note 28.

implementing legislation.³³ The starting point, therefore, in all similar claims will be that the UN has absolute immunity unless an exception – such as the list within the FSIA 1976 – can be demonstrated.³⁴

Although *Brzak v. UN* demonstrates the possibility of US courts applying the restrictive doctrine to the UN, that may only occur in very limited circumstances. Those circumstances are governed by a US Act that has not widely been replicated, although similar provisions do exist within some jurisdictions.³⁵ For the cholera claims, the utility of these cases is that they demonstrate a ‘nibbling away’ at the edges of the UN’s absolute immunity. That such immunity may be challenged within national courts is an important part of the broader understanding of the evolving nature of the UN’s immunity. Application of restrictive immunity to the UN requires legislation to be enacted that sets out specific circumstances for the exceptions to exist. It seems highly unlikely that this will occur outside the commercial context or that it will become uniform practice across all countries.

If we accept that the UN’s immunity is different from the doctrine of foreign sovereign immunity, we must explore whether there are possible ways in which to challenge the Organization’s immunity. The first step is to explore the counterbalance to absolute immunity – the requirement to provide alternative modes of settlement for disputes.

3 Alternative Dispute Resolution Mechanisms

Appropriate modes of settling disputes³⁶ provide a counterbalance to immunity by enabling claimants to access a court or a remedy through alternative mechanisms. According to Reinisch, those mechanisms are ‘increasingly also seen as a legal requirement stemming from treaty obligations incumbent upon international organizations, as well as a result of human rights obligations involving access to justice’.³⁷ Although ‘radical’³⁸ because of the focus on ‘the human rights impact’³⁹ on

³³ ‘This is an important finding for the future implementation and application of the General Convention in United States courts’: Johnson, ‘Introductory Note to *Brzak v. United Nations* (2D CIR.) and *Mothers of Srebrenica v Netherlands & United Nations* (Neth. App. Ct.)’, 49 *ILM* (2010) 1011, at 1012.

³⁴ Exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity: s. 1605(a)(1), actions based upon the foreign sovereign’s commercial activities carried out, or causing a direct effect, in the US: s. 1605(a)(2), and actions that affect property rights.

³⁵ See, e.g., UK State Immunity Act 1978, reprinted in 17 *ILM* (1978) 1123, s. 3; Canada, State Immunity Act 1982, reprinted in 21 *ILM* (1982) 798, ss. 5 and 6; Australian Foreign State Immunities Act 1985, reprinted in 25 *ILM* (1986) 715; European Convention on State Immunity (CoE) of 16 May 1972, ETS 3, 28 ff, Art. 7.

³⁶ See, e.g., *Groupement d’Enterprises Fougerolle v. CERN*, *supra* note 18: the court (at 211–212) looked at alternative methods for resolving disputes owing to the distinction between *jure gestionis* and *jure imperii* not applying to international organizations and noted (at 212) that such mechanisms provide the counterpart to international organizations’ immunity.

³⁷ Reinisch, *supra* note 15, at 286.

³⁸ *Ibid.*, at 298.

³⁹ *Ibid.*, at 295.

a claimant, emerging jurisprudence demonstrates that international organizations' immunity *might* be conditional upon the provision of adequate alternative mechanisms for resolving disputes.

Section 29 of the General Convention provides a counterbalance to the UN's absolute immunity under section 2 by mandating the Organization to provide alternative mechanisms for resolving disputes: '[t]he 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;'

Traditionally, it was insisted that any UN failure to comply with its section 29 obligations does not affect its immunity.⁴⁰ Yet, there is increasing recognition that where alternative dispute resolution mechanisms are not available a claimant's fundamental rights may be violated. It is on that basis that a challenge arguably could be brought against the UN's absolute immunity. Before turning to the human rights implications of failing to provide appropriate modes of settlement,⁴¹ we must first explore what the UN is required to provide under section 29 within the context of the Haitian claims.

The UN's alternative modes of dispute resolution include local claims commissions for peacekeeping operations, administrative tribunals, and *ad hoc* negotiation, conciliation, mediation, or arbitration. Reforms have been proposed in order to improve these mechanisms and their availability⁴² to claimants, for example by extending the jurisdiction of the Organization's administrative tribunals to include private law claims other than employment disputes.⁴³ However, any such courts or tribunals would require the UN to hold itself accountable, which raises its own set of issues. Not only are internal review processes problematic owing to potential bias or misuse,⁴⁴ but it is also imperative that justice is seen to be done – something most likely to occur through access to national, regional, or hybrid courts.⁴⁵ Irrespective of reform proposals for the future, it is crucial to understand the current position in relation to the Haitian claims.

The cholera epidemic occurred as a result of a UN peacekeeping operation. Therefore, it is necessary to explore the UN's section 29 obligations in relation to peacekeeping operations. It is clear that UN peacekeepers require immunity in order to fulfil their functions and because countries might otherwise be reluctant to commit their troops as peacekeepers.⁴⁶ The functioning of judicial systems in conflict or fragile

⁴⁰ Miller, 'The Privileges and Immunities of the United Nations', 6 *Int'l Orgs L Rev* (2009) 7, at 98–100; *Bisson v. The United Nations, the World Food Programme & ABC Organization*, 2007 WL2154181 at II, Slip Op. (SDNY, 2007).

⁴¹ See *infra* sect. 4.

⁴² Gaillard and Pingel-Lenuzza, *supra* note 31, at 5.

⁴³ 'Report of the Special Committee on Peacekeeping Operations and its Working Group', Mar. 2005, UN Doc. A/59/19/Rev1.

⁴⁴ On issues of internal review and accountability see, generally, Parish, *supra* note 11, at 7–16.

⁴⁵ As discussed, e.g., in 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' (the Zeid Report), annexed to 'Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly', 24 Mar. 2005, UN Doc. A/59/710.

⁴⁶ Cf. Clark, *supra* note 13.

states might lead to peacekeepers' own rights, such as to a fair trial, being violated should such immunity not exist. The counterbalance to that immunity, then, is that appropriate means of dispute resolution must be provided for instances where peacekeepers' actions are criminal offences or give rise to private law claims.

A Section 29: Peacekeeping Operations

Undertaking peacekeeping operations 'should not and has not minimized international organizations' responsibility for unjustifiable injury to states and individuals'.⁴⁷ The question arises whether the UN has fulfilled these obligations in respect of the cholera outbreak that occurred in Haiti. Two main questions must be addressed in relation to the individuals affected by the cholera outbreak in Haiti: (1) which appropriate dispute settlement mechanisms is the UN obligated to provide within the context of peacekeeping operations, and (2) does failure to fulfil those section 29 obligations impact upon the UN's immunity from jurisdiction under section 2?

Provision of appropriate dispute settlement is set out in the UN's 'Model Status of Forces Agreement for Peace-Keeping Operations' (Model SOFA).⁴⁸ The Model SOFA states that UN peacekeeping operations and their members 'shall refrain from any action or activity incompatible with the impartial and international nature of their duties',⁴⁹ and that the Special Representative and Commander are to 'take all appropriate measures to ensure the observance of these obligations'.⁵⁰ The UN and its members are granted immunities,⁵¹ with the exception of civil law cases relating to activities outside official duties (*jure gestionis*).⁵² Where the peacekeeping operation or its members have immunity from jurisdiction of local courts in respect of a private law claim, the Model SOFA provides for alternative dispute settlement mechanisms,⁵³ namely, claims commissions.

Despite Article 51 of the Model SOFA, no standing claims commissions have ever been established.⁵⁴ This is clearly a breach of the UN's legal obligations, although third-party claims have been settled instead by local claims review boards made up of UN officials⁵⁵ and established for each peacekeeping mission.⁵⁶

⁴⁷ Arsanjani, 'Claims against International Organizations: Quis Custodiet Ipsos Custodes', 7 *Yale J World Public Order* (1980–1981) 131, at 141.

⁴⁸ *Model Status of Forces Agreement for Peace-keeping Operations*, UN Doc. A/45/594 (1990), Art. 51.

⁴⁹ *Ibid.*, Art. 6.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, Arts 46–49.

⁵² *Ibid.*, Art. 49.

⁵³ *Ibid.*, Arts 51–54.

⁵⁴ 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations', Report of the Secretary-General, UN Doc. A/51/903 (1997), at para. 8; Cf. M.C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (2004).

⁵⁵ Although these boards may work well in practice (Report of the Secretary-General, *supra* note 54, at para. 8), Wouters and Schmitt (*supra* note 12, at 31) note that, being comprised of UN officials, the boards' 'independence and objectivity have been questioned'. See also K. Wellens, *Remedies Against International Organisations* (2002), at 162.

⁵⁶ 'Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces

Another method for resolving disputes is the ‘lump-sum’ payment. This was deployed with regard to the Operations des Nations Unies au Congo (ONUC) which, despite having provision for a claims commission, failed to set up either a claims commission or review board. The UN instead allocated a lump sum payment from which compensation was awarded.⁵⁷ Indeed, the aforementioned case of *Manderlier v. Organisation des Nations Unies et l’Etat Belge*⁵⁸ concerned the UN’s lump sum of money in an outright settlement of ‘all claims’⁵⁹ filed against the UN by Belgians for damage to persons and property caused by the UN Force in the Congo. Acceptance of this sum would waive any further rights of action against the UN.

Salmon⁶⁰ insists that the UN used the lump-sum payment because it wanted to avoid the public procedure and public scrutiny that would come with having claims from that peacekeeping operation brought before the claims commission.⁶¹ This is interesting for the individuals affected by the cholera outbreak in Haiti because the UN has refused to deploy this method in relation to their claims.⁶²

The UN claims that section 29 eliminates the possibility of impunity. In a memorandum of law in support of its motion to dismiss and to intervene in the *Brzak* case, the UN stated:

In civil cases, the uniform practice is to maintain immunity, while offering, in accord with section 29 of the General Convention, alternative means of dispute settlement [including negotiation, conciliation, mediation and/or arbitration] . . . This practice achieves two fundamental goals: it ensures the independence of the United Nations and its officials from national court systems, but at the same time it eliminates the prospect of impunity.⁶³

Yet, if no alternative dispute settlement mechanisms are created the UN immunity is neither diluted nor repealed.⁶⁴ It appears that one has no direct bearing on the other.⁶⁵ Although political pressure may be put on the UN to set up alternative modes of settlement, the likelihood of that occurring depends on various factors. Therefore, this

headquarters Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations’, Report of the Secretary-General, UN Doc. A.51.389 (1996) at paras 20–33; ‘Administrative and budgetary aspect of the financing of the United Nations peacekeeping operations’, Report of the Secretary-General, *supra* note 54, at paras 7–11.

⁵⁷ Wellens, *supra* note 55, at 99.

⁵⁸ *Manderlier*, *supra* note 26.

⁵⁹ Exchange of letters constituting an Agreement between the UN and Belgium relating to the settlement of claims filed against the UN in the Congo by Belgian nationals. New York, 20 Feb. 1965, *UN Juridical Yrbk* (1965) 39.

⁶⁰ ‘Les Accords Spaak-U Thandt du 20 fevrier 1965’, 11 *AFDI* (1965) 469.

⁶¹ See, generally, Wouters and Schmitt, *supra* note 12, at 32.

⁶² *Supra* note 8.

⁶³ ‘Memorandum of Law in Support of the Motion of the United Nations to Dismiss and to Intervene’, 2 Oct. 2007, available at: <http://iilj.org/courses/documents/BrzakBrzakv.UnitedNations-MemorandumofLawoftheUnitedNations.pdf>.

⁶⁴ Miller, *supra* note 40, at 98–100; see also Bisson, *supra* note 40.

⁶⁵ In *Manderlier v. Belgium State and UN* (Brussels Appeal Court), 15 Sept. 1969, 69 *ILR* 139, *UN Juridical Yearbook* (1969), at 236–237 the Appeal Court held that failure under s. 29 had no bearing on the absolute immunity under s. 2. Therefore the plea of ‘no jurisdiction’ was upheld.

route does not provide certainty that individuals such as the Haitian victims will be able to realize their rights to access a court or to seek a remedy.

B Section 29: Private Law Claims

A second barrier to the Haitian claims is the UN's response that they fall outside the scope of section 29 because they do not '[arise] out of contracts or other disputes of a private law character'.⁶⁶ The UN has made it clear that special rules govern its obligations for disputes arising within the context of peacekeeping operations.⁶⁷ Those rules result in a more limited interpretation of 'private law claims' than those found, for example, under Headquarters or other agreements.

The UN insists that the Haitian individuals do not hold 'private law' claims and therefore, according to the Organization, dispute settlement mechanisms are not available. Crucially, private law claims in the context of peacekeeping operations require criminal, illegal, or unlawful actions or activities of the mission or its members.⁶⁸ UN responsibility for such acts stands in contrast with the matters set out in the claims submitted regarding the cholera outbreak. Although the claims are torts based on negligence, gross negligence, and/or recklessness, the UN insists that they relate to policies⁶⁹ rather than the ways in which MINUSTAH members implemented those policies. The claims, then, fall outside the special rules for private law disputes arising from peacekeeping operations.

One judgment that appears relevant to the UN's response is that of the Dutch Court of Appeal in *Mothers of Srebrenica v. State of the Netherlands and UN*.⁷⁰ In that case it was claimed that UN failure to prevent genocide in Srebrenica 'was negligent'. Although this demonstrates that private law claims may arise from UN policy, the Court's reasoning is not always clear, which limits the case's usefulness. Johnson notes that '[t]he court assumed that the claim was one of a private law character and did not seem to have been informed (nor did it apparently inquire) how the UN applied and interpreted that provision since 1946'.⁷¹ The case, then, does not provide any persuasive reasoning or analysis of what constitutes a private law claim, and is of little use for any attempts to demonstrate that the Haitian claims fall under section 29.

⁶⁶ UN GA Res. 22(1), *supra* note 23, s. 2.

⁶⁷ 'Review of the Efficiency of the Administrative and Financial Functioning of the United Nations: Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the GA on 13 Feb. 1946', Report of the Secretary-General, UN Doc. A/C.5/49/65, 24 Apr. 1995, at paras 16–22.

⁶⁸ See, e.g., Report of the Secretary-General, *supra* note 67, at para. 16; 'Comprehensive review of the whole question of peacekeeping operations in all their aspects', 24 Mar. 2005, UN Doc. A/59/710.

⁶⁹ 'Report of the Secretary-General, *supra* note 67, at para. 23 clearly states that it will not address 'claims based on political or policy-related grievances'.

⁷⁰ *Mothers of Srebrenica v. Netherlands and UN*, Case No. 200.20.151/01, Judgment (Appeal Ct., The Hague, 30 Mar. 2010), available at: www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf.

⁷¹ Johnson, *supra* note 33, at 1014.

Wouters and Schmitt note that individuals seeking to challenge UN acts might focus on the UN's failure to fulfil its section 29 obligation.⁷² They assert that 'a reckless national court could refuse to grant immunity' on that basis.⁷³ The UN has not made available any of its alternative dispute resolution mechanisms in respect of the cholera claims. Therefore, the Haitian claimants have no access to a court or to a remedy. The remaining possibility appears to be for the claimants to use international human rights law to challenge the UN's absolute immunity.

4 Human Rights and Absolute Immunity

It is now necessary to examine whether the claimants' human rights have any bearing on the Organization's immunity. Individuals hold fundamental rights to access a court and to seek a remedy. Those rights are found within the UDHR, the ICCPR, the ECHR, and customary human rights law. Where an individual's rights are violated, the human rights implications may provide grounds to challenge absolute immunity. In order to determine whether this is the case, we must explore the position regarding human rights and absolute immunity of international organizations and, specifically, the UN.

Over recent years, there has been a growing acceptance that international organizations are bound by international law.⁷⁴ This includes customary international human rights law. Reinisch insists that international organizations 'may be under a duty to provide' access to courts or to seek a remedy for potential claimants, without which 'they may encounter difficulties in insisting on their immunity from suit in national courts'.⁷⁵

The European Court of Human Rights has made clear that it regards the EU as bound by international human rights law. In *Waite and Kennedy v. Germany* and *Beer and Reagan v. Germany*⁷⁶ the Court considered that while immunities of international organizations might pursue a legitimate aim that would result in access to a court being restrained, this should not be absolute. It is worth noting that the Court did not indicate that providing such mechanisms is a 'strict prerequisite' for immunity.⁷⁷ The Court did consider that such alternative modes of resolving disputes are 'a material factor'⁷⁸ when determining an organization's immunity⁷⁹ and that there ought to be 'reasonable alternative means' available to claimants.⁸⁰ The need for alternative

⁷² Wouters and Schmitt, *supra* note 12.

⁷³ *Ibid.*

⁷⁴ Cf. H. Schermers and N. Blokker, *International Institutional Law* (2003), at 1002; Reinisch, *supra* note 15, at 290.

⁷⁵ *Ibid.*, at 291.

⁷⁶ App. No. 28934/95, *Beer and Reagan v. Germany*, 33 EHRR (2001) 54, at para. 58; App. No. 26083/94, *Waite and Kennedy v. Germany*, 30 EHRR (1999) 261, at para. 73.

⁷⁷ Reinisch, *supra* note 15, at 292.

⁷⁸ *Waite and Kennedy*, *supra* note 76, at para. 68.

⁷⁹ Reinisch, *supra* note 15, at 292.

⁸⁰ *Waite and Kennedy*, *supra* note 76, at para. 73.

mechanisms was developed further in *Siegler v. Western European Union*.⁸¹ The Court not only held that immunity is conditional on the existence of alternative dispute settlement mechanisms, but also that the mechanism had to meet certain standards of due process to ensure that Article 6(1) ECHR was not violated.

Other international organizations have adopted similar positions to the ECtHR. The International Labour Organization Administrative Tribunal (ILOAT) in *Chadsey v. Universal Postal Union* emphasized 'the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure'.⁸² In a later case, the same tribunal extended that principle to 'the safeguard of an impartial ruling by an international tribunal'.⁸³ The UN Administrative Tribunal (UNAT) has relied upon the *Chadsey* ruling,⁸⁴ both explicitly⁸⁵ and implicitly by broadly interpreting its jurisdiction.⁸⁶

This line of cases shows a movement towards international organizations' immunity being dependent on claimants having alternative methods for resolving disputes. Courts seemingly take the approach that international organizations are obligated to provide a reasonable legal remedy if there is no alternative and effective dispute settlement mechanism. Praust insists that this approach 'must be approved' because 'it is justified by the human rights principle of access to courts'.⁸⁷

Dannenbaum insists that the UN is also legally bound by international human rights law.⁸⁸ The UN's legal personality means that it is bound by customary international law, and this includes certain human rights.⁸⁹ UN Charter provisions, including Articles 1(3), 55, and 56, also require the UN to respect human rights.⁹⁰ UN members arguably have a positive duty to enforce the Charter's human rights obligations 'over and above any other international law granting immunity'.⁹¹ The position that the UN has immunity even where that would violate human rights has been deemed 'counterintuitive'.⁹²

Where there is a failure to provide reasonable access to alternative mechanisms for resolving disputes, it seems clear that UN absolute immunity will violate its obligations under international human rights law and those set out in Article 55(c) of the

⁸¹ *Siegler v. Western European Union*, Brussels Labour Court of Appeal, [2004] JT, 617, ILDC (2003) 53.

⁸² *Chadsey v. Universal Postal Union*, ILO Administrative Tribunal, 15 Oct. 1969, Judgment No. 122, *UN Juridical Yrbk* (1968), at 176.

⁸³ *Rubio v. Universal Postal Union*, ILO Administrative Tribunal, 10 July 1997, Judgment No. 1644, at para. 12.

⁸⁴ Cf. Reinisch, *supra* note 15, at 292–293 for discussion of these cases.

⁸⁵ *Teixera v. Secretary-General of the UN*, UN Administrative Tribunal, 14 Oct. 1977, Judgment No. 230.

⁸⁶ *Irani v. Secretary-General of the UN*, UN Administrative Tribunal, 6 Oct. 1971, Judgment No. 150; *Zafari v. UNWRA*, UN Administrative Tribunal, 10 Nov. 1990, Judgment No. 461; *Salaymeh v. UNWRA*, UN Administrative Tribunal, 17 Nov. 1990, Judgment No. 469.

⁸⁷ *Wouters and Schmitt supra* note 12, at 26.

⁸⁸ See, generally, Dannenbaum, *supra* note 13, at 323–327.

⁸⁹ *Ibid.*, at 323.

⁹⁰ *Ibid.*

⁹¹ See, generally, Rios and Flaherty *supra* note 25.

⁹² Paust, *supra* note 13, at 9.

Charter. These appear to be solid foundations for Haitian claimants to build a human rights-based challenge to the UN's immunity.

National courts have recently started to consider the incompatibility between international human rights law and the doctrine of absolute immunity in terms of international organizations,⁹³ and specifically the UN. It is to these cases that we now turn in order to explore whether they provide useful jurisprudence for the cholera claims.

The Appeals Court in *Manderlier v. Organisation des Nations Unies et l'Etat Belge*⁹⁴ sowed the seeds of a potential human rights-based challenge to UN immunity. The Appeals Court criticized 'the present state of international institutions [being that] there is no court to which the appellant can submit his dispute with the United Nations' as being a situation that 'does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights'.⁹⁵ Whilst the court upheld the UN's absolute immunity despite the UDHR human rights obligations, the case highlights the tension between absolute immunity and human rights. It is important to note that this case was brought at a time when international human rights law was being codified.⁹⁶ Over 40 years later, there is greater potential for challenging absolute immunity on the basis of the developed and crystallized rights to access a court and to a remedy.

In *Urban v. UN* the judgment stressed that a 'court must take great care not to unduly impair [a litigant's] constitutional right of access to courts'. Although the court emphasized a constitutional right, this might as easily have been a human right. Whilst the tension was not fully explored owing to the facts, it does highlight that there is a leaning towards rights of access to a court. Given the developments in international human rights law, this tension may now resolve in human rights taking precedence.⁹⁷ At the very least, Haitian claimants might use this case to demonstrate the central importance of the right to access a court when determining whether or not the UN has immunity.

The plaintiffs in *Mothers of Srebrenica v. State of the Netherlands and the UN* claimed that the right to access a court provides an exception to the immunity principle.⁹⁸ The District Court ruled that the ECHR ought not to be an impediment to UN missions effectively undertaking their duties and that Article 6 could not be used as a ground for exception to the UN's absolute immunity.⁹⁹ The District Court's reasoning was not followed by the Court of Appeal in *Mothers of Srebrenica v. State of the Netherlands and UN*.¹⁰⁰ The Court of Appeal instead ruled that the UN could be joined to the case, thus

⁹³ For discussion of relevant case law cf. Reinisch, *supra* note 15.

⁹⁴ *Manderlier*, *supra* note 65.

⁹⁵ *Ibid.*

⁹⁶ It should be noted that the two Covenants codifying the UDHR were enacted between the facts of the claim and the appeal being heard.

⁹⁷ *Urban v. UN*, US CA, 768 F 2d 1497, 248 US App. DC 64 (DC Cir. 1985). The court considered the litigant to be 'frivolous' and seeking to 'flood' the court with 'meritless, fanciful claims'.

⁹⁸ *Mothers of Srebrenica et al. v. State of the Netherlands and the UN*, District Court, The Hague, 10 July 2008, 295247/HA ZA 07-2973.

⁹⁹ See, generally, den Dekker, 'Immunity of the United Nations before the Dutch Courts', 3 *The Hague Justice JI* (2008) 16.

¹⁰⁰ *Mothers of Srebrenica*, *supra* note 70.

setting aside its immunity under section 2 of the General Convention. The basis for setting aside the immunity was the right of an individual to access a court. The Court of Appeal held that the UN Charter and the General Convention could not be used by states to avoid their ECHR obligations, and it insisted that it was not precluded from *testing* the UN's immunity against these provisions.

After testing the UN's immunity, and on the findings within that case, the Court of Appeal concluded that there would be no violation of the ECHR or ICCPR if a Dutch court upheld UN immunity within that particular case. While this case does not provide an example of when UN immunity may violate an individual's right to access a court, based on its specific facts it does demonstrate that courts have the jurisdiction to determine whether such a violation has occurred within the context of a specific case.

These cases demonstrate that the door is now ajar for a human rights-based challenge to the UN's immunity. Each of these cases was decided on its own facts, with the courts finding that there were alternative modes of settlement available to the claimants. The courts, however, did all set out the principle that a human rights-based challenge might be successful if the Organization's immunity violated an individual's human rights. In the right circumstances and with the right set of facts, immunity may be limited if it contravenes an individual's right of access to a court, both *de jure* and *de facto*.¹⁰¹

Individuals affected by the cholera outbreak in Haiti have been prevented from accessing the local claims board or other alternative modes of settlement. If the UN is granted absolute immunity from jurisdiction, then the Haitian individuals will not be able to realize their rights to access a court and to a remedy. That distinguishes their claims from the line of cases previously brought before national courts. The UN's absolute immunity arguably violates ICCPR rights to access courts and to an effective remedy.¹⁰² Finally, absolute immunity threatens individuals' 'dignity and worth' as set out in the UN Charter's preamble, the preamble to and Article 1 of the UDHR, and the preamble to the ICCPR.¹⁰³

Wouters and Schmitt assert that the question that arises 'is not so much a conflict between internal and international rules, but rather between international rules *inter se*'.¹⁰⁴ If a national court were to allow the claims to be brought against the UN, it would breach its obligations towards the Organization. However, it may be 'permissible justification' if the court were 'to argue that the right to a judge may be considered as *jus cogens*'.¹⁰⁵ Exploring the possibility that the right to access a court¹⁰⁶ or to

¹⁰¹ It must be noted, as Johnson points out, that the Court of Appeal's finding that it is legally permissible for a party to the General Convention to deny 'absolute' immunity to the UN may result in a potential dispute arising between the UN and that state: Johnson, *supra* note 33, at 1015.

¹⁰² Rios and Flaherty, *supra* note 25, at 445–446.

¹⁰³ *Ibid.*

¹⁰⁴ Wouters and Schmitt, *supra* note 12, at 25.

¹⁰⁵ *Ibid.*, at 26.

¹⁰⁶ See, e.g., General Comment No. 29 of the UN Human Rights Committee, 24 July 2001, UN Doc. A/56/40, 2001, at para. 91; the International Criminal Tribunal for the former Yugoslavia held that 'Article 14 of the International Covenant reflects an imperative norm of international law to which the Tribunal must adhere': *Vujin v. Tadic*, ICTY, Appeal Judgment in Allegations of Contempt against Prior Counsel, Milan Vujin, Counsel for the Appellant: Mr. Vladimir Domazet for Milan Vujin', *Prosecutor v. Tadic* (IT-94-1-A-AR77), Appeals Chamber, 27 Feb. 2001, at 3.

a remedy is *jus cogens* would enable a national court to uphold a challenge to the UN's immunity without breaching its own obligations.

5 Concluding Remarks

Events in Haiti provide a strong case for the need to re-evaluate the UN's immunity and its section 29 obligations. The cholera outbreak is directly attributable to the UN and MINUSTAH, with clear evidence of the cholera strain having been brought into the country by Nepalese peacekeepers and of the disease's spread occurring due to poor waste management at the MINUSTAH camp. Yet, the UN has relied on its immunity from jurisdiction in respect of claims arising from the cholera outbreak and has failed to provide appropriate mechanisms for resolving those disputes. The individuals affected are unable to access a court or to seek a remedy.

The UN recognizes the need for appropriate dispute settlement mechanisms for a range of private law claims. However, its approach to disputes arising from peacekeeping operations can and does lead to violations of individuals' rights to access a court and to a remedy. Instead of focusing on reforming the section 29 mechanisms and their availability to a claimant, it might be possible to bring a case for non-immunity on the basis of the UN Charter, international human rights law, and evolving understanding and application of immunity doctrines. The UN's insistence that the Haitian claims are 'not receivable' has created the perfect test case for whether human rights obligations take precedence over the Organization's immunity from jurisdiction. On 9 October 2013, lawyers for the Haiti cholera victims filed a class action in the Southern District of New York. That action challenges the UN's absolute immunity. It remains to be seen whether that challenge will be successful.