PROTECTION IN THE NAME OF EFFICIENCY: CAN THE UN'S IMMUNITIES CONTINUE TO BE JUSTIFIED BY FUNCTIONAL NECESSITY?

By

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Abstract

In 2010, following a devastating earthquake, the United Nations (UN) was accused of bringing and spreading cholera in Haiti via a contingent of peacekeepers. Following a long process that involved the UN factually denying that it was responsible for the introduction of the disease, the claimants, a group of Haitians who had been directly or indirectly affected by the disease, went to court in the US. In 2016, the court of appeals ruled that the UN could not be compelled to deliver reparations, as it benefited from absolute immunity. In making this decision, the court followed both the Convention on Privileges and Immunities of the United Nations (also called the General Convention) and the recommendations of the US government, buttressed by previous cases such as the lead poisoning scandal in Kosovo that emerged in the late 1990s, also caused by the UN and for which they also escaped demands for reparations.

This decision as well as the reaction of the UN was harshly criticised by NGOs, the media, and the academic literature. Yet despite the nature of the claims, the number of victims, and the increasing involvement of peacekeepers in the daily lives of vulnerable populations leading to more opportunities to cause harm, there is a general unease in questioning the necessity of absolute immunity for the UN. The doctrine, courts, and the UN itself all participate in maintaining the idea that the UN requires the broadest scope of immunity in order to function, as if the UN was still an emerging organisation in need of protection. This narrative of functional necessity has permeated the discussions on UN reform, and influenced most reform proposals to focus on a better implementation of the existing rules.

Despite this lack of change, there is a real risk that a situation like Haiti and Kosovo could happen again. This thesis therefore critically assesses the narrative of functional necessity, and argues that as the organisation and its range of action have evolved, it is now obsolete. Taking inspirations from other organisations but to a greater extent from States – entities which have seen their once absolute immunity reduce over time – this thesis will propose a reform based on restricting the immunity of the UN and advocating for an independent judicial body to be established in order to examine the claims that inevitably follow. The objective is to take into account both the UN's unique nature and its main goals, with the overarching argument being that if no move towards reparations is taken, the crippling effect on the UN would end up far more dangerous and costly for the organisation and its goals.

Table of Contents

Acknowledgment

I started this thesis in 2019, after being introduced to the Haiti cholera scandal in 2017 and writing my Master's dissertation on the *Georges* case. This inspiration and passion sustained me throughout the long process of writing.

I will not say this was easy. On top of the common constraints of doing a PhD – deadlines, hours spent editing, articles downloaded six times and forgotten about six times – the world shut down in 2020. While some might think that it would have been a great opportunity to bunk down and write, the general uncertainty and worry made these two years incredibly difficult. Nonetheless, I prevailed, but not without the constant love, help, and support of the following people.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Bibliography

Primary sources

Cases

International Court of Justice cases and decisions

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) [1999] ICJ Rep 62

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 8th July 1996 [1996] ICJ Rep 226

Oil Platforms (Islamic Republic of Iran v. United States of America) (Judgement) [2003] ICJ Rep 161

Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion) 11th April 1949 [1949] ICJ Rep 174

Inter-American Court of Human Rights

Case of Goiburú et al v. Paraguay, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 153 (22 September 2006)

Case of La Cantuta v. Peru, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 162 (29 November 2006)

European Court of Human Rights

Ashingdane v United Kingdom (1985) 7 EHRR 528

Beer and Reagan v Germany (1999) 33 EHRR 19

Stichting Mothers of Srebrenica and Others v Netherlands (2013) 57 EHRR SE10

Waite and Kennedy v Germany (1999) 30 EHRR 261

Human Rights Advisory Panel

N. M. and Others v. UNMIK (Opinion) (26 February 2016), Human Rights Advisory Panel, Case No. 26/08

France

Soc. 1er juill. 2020, n°18-24.643

Civ, 1ère, 28 mars 2013, n°11-10.450

Soc. 1er juill. 2020, n°18-24.643

United Kingdom

Compania Naviera Vascongado v. Steamship "Cristina" And Persons Claiming An Interest Therein, [1938] AC 485.

The Parlement Belge, Court of Appeal 5 P.D. [1880]

Italy

Borri v. Repubblica Argentina, Corte di Cassazione, 27 May 2005, (2005) Case No. 11225

Branno v. Ministry of War, Corte di Cassazione, Riv. dir. int. (1955)

FAO v. INPDAI, Corte di Cassazione, 18 October 1982, [1982] UNJYB 234

Porru v. FAO, 25 June 1969, Rome Court of First Instance (Labor Section), [1969] UNJYB 238

Simoncioni and others v. Germany and President of the Council of Ministers, Corte *Costituzionale*, 22 October 2014, No. 238

United States

Atkinson v Inter-American Development Bank, US Court of Appeals (DC Cir) (9 October 1998) 156 F.3d 1335

Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Capital, Inc. 821 F.3d 297, 305 (2d Cir. 2016)

Berizzi Brothers Co. v. SS Pesaro, 271 U.S. 562 (US Supreme Court 1926)

Broadbent v. Organization of Am. States, 628 F.2d 27 (D.C. Cir. 1980)

Brzak v United Nations, 597 F.3d 107 (2d Cir. 2010)

Delama Georges v United Nations 84 F Supp 3d 246 (SDNY 2015)

Delama Georges v. United Nations 834 F 3d 88 (2nd Cir. 2016)

Jam v. International Finance Corp., 172 F.Supp.3d 104 (2016)

Jam v. International Finance Corp., 586 U.S. ___ (2019)

Jam v. International Finance Corp., 860 F.3d 703 (2017)

Laventure v. United Nations 17 2908 cv (2nd Cir. 2018)

Laventure v. United Nations 279 F Supp 3d 394 (EDNY 2017)

MATOS RODRIGUEZ et al v. PAN AMERICAN HEALTH ORGANIZATION, 502 F. Supp. 3d 200 (D.D.C. 2020)

Matter of Timely Secretarial Service, Inc. 987 F.2d 1167 (5th Cir. 1993)

Mendaro v World Bank, US Court of Appeals (DC Cir) (27 September 1983) 717 F.2d 610

Schooner Exchange v. McFaddon, 11 U.S. 116 (1812)

Victory Transport Inc. v. Comisaria General 336 F.2d 354 (2d Cir. 1964)

Constitutions

Constitution of the Italian Republic

State legislation

United States

The Foreign Sovereign Immunities Act, 28 USC §§ 1602 et seq.

The International Organizations Immunities Act, 22 USC §288 et seq.

Canada

European Communities Privileges and Immunities Order (C.R.C., c. 1308)

Executive orders

Executive Order 11689 (5 December 1972)

Conventions

League of Nations Treaty Series

Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 108 LNTS 188

Brussels Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels (signed 10 April 1926) and its additional protocol (signed 24 May 1934) 4062 LNTS 199

United Nations Treaty Series

Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (UN Charter)

Articles of Agreement of the International Bank for Reconstruction and Development (concluded on 27 December 1945, entered into force 27 December 1945) 2 UNTS 134

Convention on the Privileges and Immunities of the United Nations (adopted on 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention)

Agreement Regarding the Headquarters of the United Nations (signed 26 June 1947, entered into force 21 November 1947) 11 UNTS 11

Convention on the Privileges and Immunities of the Specialized Agencies (opened for signature 21 November 1947, entered into force 2 December 1948) 33 UNTS 261

Agreement on the Status of the North Atlantic Treaty Organisation, national representatives and international staff (adopted 20 September 1951, entered into force 18 May 1954) 200 UNTS 3

Articles of Agreement of the International Financial Corporation (signed on 25 May 1955, entered into force 20 July 1956) 264 UNTS 117

Agreement establishing the Inter-American Development Bank (signed on 8 April 1959, entered into force 30 December 1959) 389 UNTS 69

Convention on the Organisation for Economic Cooperation and Development (with Supplementary Protocols Nos. 1 and 2) (signed on 14 December 1960, entered into force on 30 September 1961) 888 UNTS 179

Agreement establishing the African Development Bank (signed on 4 August 1963, entered into force 10 September 1964) 510 UNTS 3

Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals (20 February 1965) 535 U.N.T.S. 198

General Convention on the privileges and immunities of the Organization of African Unity (concluded 25 October 1965) 1000 UNTS 393

Agreement establishing the Asian Development Bank (signed on 4 December 1965, entered into force 22 August 1966) 571 UNTS 123

International Covenant for Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171

American Convention on Human Rights "Pact of San José, Costa Rica" (adopted on 22 November 1969, entered into force on 18 July 1978) 1144 UNTS 123

European Convention on State Immunity (adopted on 16 May 1972) 1495 UNTS 171

Agreement establishing the European Bank for Reconstruction and Development) (signed on 29 May 1990, entered into force 28 March 1991) 1646 UNTS 97

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

Agreement on the Privileges and Immunities of the International Criminal Court (adopted 9 September 2002, entered into force 22 July 2004) 2271 UNTS 3

Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations Operation in Haiti (adopted 9 July 2004, entered into force 9 July 2004) 2271 UNTS 235

Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223

Regional Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

Treaty on the Functioning of the European Union (Treaty of Rome, as amended)

Conference on Security and Cooperation in Europe, Final Act (adopted in Helsinki, 1975), available at <https://www.osce.org/files/f/documents/5/c/39501.pdf> accessed 9 August 2023

Other treaties

Agreement between the Government of the Republic of Chile and the Organisation for Economic Co-operation and Development on the Privileges, Immunities and Facilities granted to the Organisation, <https://www.oecd.org/legal/Chile_PandI_Agreement.pdf> accessed 14 August 2023

Agreement between the Government of Ukraine and the Organisation for Economic Co-operation and Development on the Privileges, Immunities and Facilities granted to the Organisation, <https://www.oecd.org/legal/41384557.pdf> accessed 14 August 2023

Agreement on the Privileges And Immunities of the Association of Southeast Asian Nations, <https://asean.org/wp-content/uploads/2021/09/Agreement-on-Privileges-and-Immunities.pdf > accessed 7 August 2023

Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, entered into by the League of Nations and the Swiss Government on 18 September 1926, (1926) 7 League of Nations Official Journal 1142 annex 911a

IRENA Doc. A/3/13 < https://www.irena.org/-/media/Files/IRENA/Agency/About-IRENA/Assembly/Third-Assembly/A_3_13_Privileges-and-Immunities.pdf> accessed 7 August 2023

Treaties that have not entered into force

United Nations Convention on Jurisdictional Immunities of States and Their Property, UNGA Res 59/38 (LXV) (2 Dec 2004) (adopted without a vote, on the recommendation of the Committee)

Secondary Sources

Journal Articles

“The United Nations under American Municipal Law: a Preliminary Assessment” (1946) 55 Yale Law Journal 778

Anthony D, ‘Resolving UN torts in US courts: Georges v United Nations’ (2018) 19 Melbourne Journal of International Law 1

Myriam Benlolo-Carabot, ‘Les immunités de l’Union européenne dans les États tiers’ (2009) 55 Annuaire Français de Droit International 783

Benvenisti E, ‘Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?’ (2018) 29 European Journal of International Law 9

Bissell R E and Nanwani S, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges' (2009) 6 Manchester Journal of International Economic Law 2

Bleicher S A, ‘UN v. IRDB : A Dilemma of Functionalism’ (1970) 24 International Organizations 31

Blokker N, ‘International Organizations: the Untouchables?’ (2013) 10 International Organizations Law Review 259

Bode T G, ‘Cholera in Haiti: United Nations Immunity and Accountability’ (2016) 47 Georgetown Journal of International Law 759

Boon K E and Mégret F, ‘New Approaches to the Accountability of International Organizations’ (2019) 16 International Organizations Law Review 1

Boon K, ‘The United Nations as Good Samaritan: Immunity and Responsibility’ (2016) 16 Chicago Journal of International Law 341

Bordin F L, ‘To what immunities are international organizations entitled under general international law? Thoughts on Jam v IFC and the ‘default rules’ of IO immunity’ (2020) 72 Questions of Law Zoom-in 5

Bouchez L J, ‘The Nature and Scope of State Immunity from Jurisdiction and Execution’ (1979) 10 Netherlands Yearbook of International Law 3

Bradlow D D, ‘Using a Shield as a Sword : Are International Organizations Abusing Their Immunity’ (2017) 31 Temple International & Comparative Law Journal 45

Brockman-Howe B E, ‘Questioning the UN’s Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation’ (2011) 10 Washington University Global Studies Law Review 727

Brower C H, 'International Immunities: Some Dissident Views on the Role of Municipal Courts' (2001) 41 Virginia Journal of International Law 1

Buscemi M, ‘The non-justiciability of third-party claims before UN internal dispute settlement mechanisms: the ‘politicization’ of (financially) burdensome questions’ (2020) 68 Questions of Law Zoom-in 23

Caplan, L M, ‘State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory’ (2003) 97 American Journal of International Law 741

Chopra J, ‘The UN’s Kingdom of East Timor’ (2000) 42 Survival 27

Choudhury F, ‘'The United Nations Immunity Regime: Seeking a Balance between Unfettered Protection and Accountability' (2016) 104 Georgetown Law Journal 725

Chukwuemeke Okeke E, ‘Unpacking the ”Jam v. IFC” Decision’ (2019) 13 Diritti umani e diritto internazionale 297

Collins R and White N D, ‘Moving Beyond the *Autonomy-Accountability* Dichotomy: Reflections on Institutional Independence in the International Legal Order’ (2010) 7 International Organizations Law Review 1

Culhane J G, ‘Tort, Compensation, and Two Kinds of Justice’ (2003) 55 Rutgers Law Review 1027

Dannenbaum T, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’ (2010) 51 Harvard International Law Journal 113

Daugirdas K, 'Reputation and Accountability: Another Look at the United Nations' Response to the Cholera Epidemic in Haiti' (2019) 16 International Organizations Law Review 11

Daugirdas K, ‘Reputation and the Responsibility of International Organizations’ (2014) 25 European Journal of International Law 991

De Brabandere E, ‘Immunity of International Organizations in Post-conflict International Administrations’ (2010) 7 International Organizations Law Review 79

Ehrenfeld A, ‘Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969): United Nations Immunity Distinguished From Sovereign Immunity’ (1958) 52 International Law and the Political Process 88

Fatouros A, ‘On the Hegemonic Role of International Functional Organizations’ (1980) 23 German Yearbook of International Law 9

Ferstman C, ‘Reparations for Mass Torts Involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations’ (2019) 16 International Organizations Law Review 42

Fiti Sinclair G, ‘The Original Sin (and Salvation) of Functionalism’ (2016) 26 The European Journal of International Law 965

Fiti Sinclair G, ‘Towards a Postcolonial Genealogy of International Organizations Law’ (2018) 31 Leiden Journal of International Law 841

Fox H, ‘In defence of State immunity : why the UN Convention on State immunity is important’ (2006) 55 International and Comparative Law Quarterly 399

Fraulin G, Lee S and Bartels S A, ‘“They came with cholera when they were tired of killing us with bullets”: Community perceptions of the 2010 origin of Haiti’s cholera epidemic’ (2022) 17 Global Public Health 738

Freedman R, ‘UN Immunity or Impunity? A Human Rights Based Challenge’ (2014) 25 European Journal of International Law 239

Glenn G H, Kearney M M and Padilla D J, ‘Immunities of International Organizations’ (1982) 22 Virginia Journal of International Law 247

Gordon G M and Young L E, ‘Cooperation, information, and keeping the peace: Civilian engagement with peacekeepers in Haiti’ (2017) 54 Journal of Peace Research 64

Guzman A, International Organisations and the Frankenstein Problem’ (2013) 24 European Journal of International Law 999

Hafner G and Lange L, ‘La Convention des Nations Unies sur les Immunités Juridictionnelles des États et de leurs Biens’ (2004) 50 Annuaire Français de Droit International 45

Herz S, ‘International Organizations in U.S. Courts : Reconsidering the Anachronism of Absolute Immunity’ (2008) 31 Suffolk Transnational Law Review 471

Holohan A, ‘Peacebuilding and SSR in Kosovo: an Interactionist perspective’ (2016) 17 Global Crime 331

Hovell D, ‘Due Process in the United Nations’ (2016) 110 American Journal of International Law 1

Jenks W, ‘Some Problems of the International Civil Service’ (1943) 3 Public Administrative Review 104

Khalil A, ‘Immunity is not Impunity: The Legal Framework Applicable to UN Accountability for the Haiti Cholera Crisis’ (2020) 24 Journal of International Peacekeeping 143

Klabbers J, ‘Controlling International Organizations: A Virtue Ethics Approach’ (2011) 8 International Organizations Law Review 285

Klabbers J, ‘Notes on the ideology of international organizations law: The International Organization for Migration, state-making, and the market for migration’ (2019) 32 Leiden Journal of International Law 383

Klabbers J, ‘The EJIL Foreword: The Transformation of International Organizations Law’ (2015) 26 The European Journal of International Law 9

Krajewski M and Singer C, ‘Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights’ (2012) 16 Max Planck Yearbook of United Nations Law 1

Krieger H, ‘Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts As a Way to Avoid UN Reform?’ (2015) 62 Netherlands International Law Review 259

Kuhn A K, ‘Status of International Organizations’ (1944) 38 American Journal of International Law 658

Kunz J L, 'Privileges and Immunities of International Organizations' (1947) 41 American Journal of International Law 828

Lewis P J, ‘Who Pays for the United Nations' Torts: Immunity, Attribution, and Appropriate Modes of Settlement' (2014) 39 North Carolina Journal of International Law and Commercial Regulation 259

Lindstrom B, ‘When Immunity Becomes Impunity’ (2020) 24 Journal of International Peacekeeping 164

Maluwa T, ‘Ratification of African Union treaties by member states: law, policy and practice’ (2012) 13 Melbourne Journal of International Law 636

Mégret F, ‘La responsabilité des Nations Unies aux temps du choléra’ (2013) 46 Revue belge de droit international 161

Miller A J, ‘The Privileges and Immunities of the United Nations’ (2009) 6 International Organizations Law Review 7

Mitrany D, ‘The Functional Approach to World Organization’ (1948) 24 International Affairs (Royal Institute of International Affairs 1944) 350

Murray J-P, ‘The UNODC and the Human Rights Approach to Human Trafficking : Explaining the Organizational (Mis)Fit’ (2019) 10 Journal of International Organizations Studies 107

Ness G D and Brechin S R, ‘Bridging the Gap: International Organizations as Organizations’ (1988) 42 International Organization 245

O’Toole T, ‘Sovereign Immunity Redivivus : Suits against International Organisations’ 4 Suffolk Transnational Law Journal 1

Okada Y, ‘Interpretation of Article VIII, Section 29 of the *Convention on the Privileges and Immunities of the UN*: Legal Basis and Limits of the Human Rights-Based Approach to the Haiti Cholera Case’ 15 International Organizations Law Review 39

Okada Y, ‘The immunity of international organizations before and after Jam v IFC: Is the functional necessity rationale still relevant?’ (2020) 72 Questions of Law Zoom-in 29

Orakhelashvili A, 'The Legal Basis of the United Nations Peace-Keeping Operations' (2003) 43 Virginia Journal of International Law 485

Papa M I, ‘The *Mothers of Srebrenica* Case before the European Court of Human Rights: United Nations Immunity versus Rights of Access to a Court’ (2016) 14 Journal of International Criminal Justice 893

Pillinger M, Hurd I and Barnett M N, ‘How to Get Away with Cholera: The UN, Haiti, and International Law’ (2016) 14 Perspectives on Politics 70

Rashkow B C, ‘Above The Law? Innovating Legal Responses To Build A More Accountable UN: Where Is The UN Now?’ (2017) 23 ILSA Journal of International & Comparative Law 345

Rashkow B C, ‘Immunity of the United Nations: Practices and Challenges’ (2013) 10 International Organizations Law Review 332

Rawski F, ‘To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations’ (2002) 18 Connecticut Journal of International Law 103

Reinisch A and Weber U A, ‘In the shadow of Waite and Kennedy’ (2004) 1 International Organisations Law Review 59

Reinisch A, ‘The accountability of International Organizations’ (2001) 7 Global Governance 131

Reinisch A, ‘To What Extent Can and Should National Courts “Fill the Accountability Gap”?’ (2013) 10 International Organizations Law Review 572

Rossi P, ‘The International Law Significance of “Jam v. IFC”: Some Implications for the Immunity of International Organisations’ 13 Diritti umani e diritto internazionale 305

Sapiro M, ‘Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation’ (1995) 88 American Journal of International Law 631

Singer M, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53

Steffek J, ‘The cosmopolitanism of David Mitrany: Equality, devolution and functional democracy beyond the state’ (2015) 29 International Relations 23

Stewart D P, ‘The UN Convention on Jurisdictional Immunities of States and Their Property’ (2005) 99 American Journal of International Law 194

Talentino A K, ‘Perceptions of Peacebuilding: The Dynamic of Imposer and Imposed Upon’ (2007) 8 International Studies Perspectives 152

Tomuschat C, ‘International Law: Ensuring the survival of mankind on the eve of a new century: General course on public international law’ (1999) 281 Recueil des course de l’Académie de droit international de la Haye 9

Tomuschat C, ‘The International Law of State Immunity and Its Development by National Institutions’ (2011) Vanderbilt Journal of Transnational Law 1105

Treichl C and Reinisch A, ‘Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation’ (2019) 16 International Organizations Law Review 105

Türkelli G E, ‘The Best of Both Worlds or the Worst of Both Worlds? Multilateral Development Banks, Immunities and Accountability to Rights-Holders’ (2020) 12 Hague Journal on the Rule of Law 251

Webb P, ‘Should the 2004 un State Immunity Convention Serve as a Model/Starting point for a Future UN Convention on the Immunity of International Organizations?’ (2013) 10 International Organizations Law Review 319

Wedgwood R, ‘The Evolution of United Nations Peacekeeping’ (1995) 28 Cornell International Law Journal 631

Werzer J, ‘The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor’ (2008) 77 Nordic Journal of International Law 105

Wessel R A, ‘Immunities of the European Union’ (2014) 10 International Organisations Law Review 395

Yannis A, ‘The UN as Government in Kosovo’ (2004) 10 Global Governance 67

Young, C, 'The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity under the IOIA' (2017) 95 Texas Law Review 889

Zunshine P, 'Improving International Organization Accountability: A Proposal Based on the Tobacco Master Settlement Agreement' (2020) 50 California Western International Law Journal 459

Zwanenburg M, 'UN Peace Operations Between Independence and Accountability' (2008) 5 International Organizations Law Review 23

Books

Allen E W, *The Position Of Foreign States Before National Courts, Chiefly In Continental Europe* (Macmillan 1933)

Bankas E K, *The State Immunity Controversy in International Law* (2nd edn, 2022 Springer)

Bederman D J, *International Law in Antiquity* (Cambridge University Press 2001)

Bekker P H F, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers 1994)

Dixon M, *Textbook on International Law* (7th edn, Oxford University Press 2013)

Dupuy P-M and Kerbrat Y, *Droit International Public* (14th edn, Dalloz 2018)

Grant J P, *International Law* (Dundee University Press 2010)

Higgins R and others, *Oppenheim's International Law: United Nations* (1st edition Oxford University Press, Oxford 2017)

Klabbers J, *An introduction to International Organizations Law* (4th edn, Cambridge University Press 2022)

Klabbers J, *International Law* (3rd edn, Cambridge University Press 2020)

Klabbers J, *International Law* (4th edn, Cambridge University Press 2023)

Mitrany D, *A Working Peace System: An Argument for the Functional Development of International Organization* (The Royal Institute of International Affairs 1944)

Mitrany D, *The Progress of International Government* (Allen & Unwin 1933)

Naert F, *International law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010)

Reinisch A, *International Organisations before National Courts* (Cambridge University Press 2000)

Schmitt P, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Edward Elgar 2017)

Schreuer C H, *State Immunity: Some Recent Developments* (Grotius Publication Limited 1988)

Virally M, *Le droit international en devenir: Essais écrits au fil des ans* (Presses Universitaires de France 1990)

Yang X, *State Immunity in International Law* (Cambridge University Press 2012)

Book Chapters

Banifatemi Y, 'Jurisdictional Immunity of States – Commercial Transactions' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019)

Blokker N, 'Proliferation of International Organizations: An Exploratory Introduction' in Niels M Blokker and Henry G Schermers (eds), *Proliferation Of International Organizations* Kluwer Law International, 2001)

Dunoff J L, 'The Law and Politics of International Organizations' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of international Organizations* (1st edition Oxford University Press, Oxford 2016)

Peters A, 'International Organizations and International Law' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of international Organizations* (1st edition Oxford University Press, Oxford 2016)

Pingel I, 'Les immunités de l'Union Européenne' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2014)

Taylor K N, 'Shifting Demands in International Institutional Law: Securing the United Nations' Accountability for the Haitian Cholera Outbreak' in Mónika Ambrus and Ramses A. Wessel (eds), *Netherlands Yearbook of International Law 2014* (1st edn, T.M.C. Asser Press The Hague 2015)

Virally M, 'De la classification des organisations internationales' in Ganshof van der Meersch (ed), *Miscellanea W.J. Ganshof van der Meersch : studia ab discipulis amicisque in honorem egregii professoris edita* (Emile Bruylant 1972)

Webb P, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in Malcolm D. Evans (ed), *International Law* (5th edn, Oxford University Press 2018)

UN Documents

United Nations Security Council

UNSC Res 2350 (13 April 2017) UN Doc S/RES/2350

UNSC Res 2692 (14 July 2023) UN Doc S/RES/2692

UNSC Res 2699 (2 October 2023) UN Doc S/RES/2699

UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244

UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542

UNSC Res 1927 (4 June 2010) UN Doc S/RES/1927

UNSC Res 1159 (27 March 1998) UN Doc S/RES/1159

UNSC Res 1159 (27 March 1998) UN Doc S/RES/1159

UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100

UNSC Res 1473 (4 April 2003) UN Doc S/RES/1473

UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100

UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272

UNSC Res 1159 (27 March 1998) UN Doc S/RES/1159

UNSC Res 2350 (13 April 2017) UN Doc S/RES/2350

United Nations General Assembly

UNGA Res 52/247 (17 July 1998) UN Doc A/RES/52/247

UNGA 161 (13 January 2017) UN Doc A/Res/ 71/161

UNGA 161B (13 July 2017) UN Doc A/Res/ 71/161B

UNGA, 'Financial situation of the United Nations: Report of the Secretary-General' (9 May 2022) UN Doc A/76/435/add.1, Summary

UNGA 'Comprehensive Review of the Whole Question of Peace-Keeping Operations in all their Aspects: Model status-of-forces agreement for peace-keeping operations' (9 October 1990) UN Doc A/45/594

UNGA 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations' (21 May 1997) UN Doc A/51/903

UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (1996) UN Doc A/71/367

UNGA, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' (24 March 2005) 59th Session (2005) UN Doc A/59/710

UNGA, 'Final Report of Sub-Committee I of the Sixth Committee, Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies', UN Doc A/C.6/191 (15 November 1947)

United Nations Secretary-General

U.N. Secretary-General '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 Headquarters: Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation—Financing of the United Nations Peacekeeping Operations: Rep. of the Secretary- General' (20 September 1996) UN Doc A/51/389

U.N. Secretary-General 'Procedures in place for implementation of article 8, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, on 13 February 1946: report of the Secretary-General' (24 April 1995) UN Doc A/C.5/49/65

United Nations Office of Legal Affairs

UN Office of Legal Affairs, Memorandum to the Legal Adviser, UNRWA, UNJYB (1984)

United Nations Human Rights Council

United Nations Human Rights Council, 'The human right to an effective remedy: the case of lead-contaminated housing in Kosovo: Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Baskut Tuncak' (4 September 2020) UN Doc A/HRC/45/CRP.10

Preparatory Commission of the United Nations

Preparatory Commission of the United Nations on Privileges and Immunities, Committee 5: Privileges and Immunities, U.N. DOC. PC/LEG/22 (Dec. 2, 1945)

United Nations Regulations

Regulation NO. 1999/1 (25 July 1999) UNMIK/REG/1999/1

Communications

Letter from Jack B. Tate (US State Department Acting Legal Adviser) to the Acting Attorney General (19 May 1952)

Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Dianne Post (25 July 2011)

Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Brian Concannon (21 February 2013)

Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Brian Concannon (5 July 2013)

Letter from Pedro Medrano (Assistant Secretary-General and Senior Coordinator for Cholera Response to Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque (24 November 2014)

Letter from Ban Ki-moon (United Nations Secretary-General) to Members of United States Congress (19 February 2015)

Letter from Jean-Pierre Lacroix (Under-Secretary-General for Peacekeeping Operations) to Baskut Tuncak (Special Rapporteur on the implications for human rights of the

environmentally sound management and disposal of hazardous substances and wastes) (5 October 2018)

Letter from Jean-Pierre Lacroix (Under-Secretary-General for Peacekeeping Operations) to Baskut Tuncak (Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes) (24 December 2018)

Letter from António Guterres (UN Secretary-General) to Baskut Tuncak (Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes) (4 October 2019)

Letter from Philip Alston (Special Rapporteur on extreme poverty and human rights) and others to Antonio Guterres (28 April 2020) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25228 accessed 25 October 2023

Newspaper Articles

'Haiti cholera protest turns violent' *Al Jazeera* (Doha, 16 Nov 2010) <https://www.aljazeera.com/news/2010/11/16/haiti-cholera-protest-turns-violent> accessed 19 February 2024

'Haitians protest government's cry for international troops to quell gang chaos as cholera outbreak grows' *CBS News* (New York, 11 Oct 2022) <https://www.cbsnews.com/news/haiti-news-protests-cholera-ariel-henry-international-military-intervention/> accessed 19 February 2024

Bradlow B, 'Multilaterals must earn the right to limited immunity' Financial Times (London, 28 March 2019) <https://www.ft.com/content/2512aa84-515d-11e9-9c76-bf4a0ce37d49> accessed 30 August 2023

Carroll R, 'Protesters in Haiti attack UN peacekeepers in cholera backlash' *The Guardian* (London, 16 Nov 2010) <https://www.theguardian.com/world/2010/nov/16/protestors-haiti-un-peacekeepers-cholera> accessed 21 December 2022

Mérancourt W and Coletta A, 'The U.N. is mulling another mission in Haiti. Hatians are skeptical' The Washington Post (Washington D.C., 12 November 2022) <https://www.washingtonpost.com/world/2022/11/12/haiti-cholera-united-nations/> accessed 24 March 2024

Pilkington E and Quinn B, 'UN admits for first time that peacekeepers brought cholera to Haiti' The Guardian (London, 1 December 2016) <https://www.theguardian.com/global-development/2016/dec/01/haiti-cholera-outbreak-stain-on-reputation-un-says> accessed 31 August 2023

Watson I, 'Protests over Haiti's cholera outbreak turn violent' *CNN* (Atlanta, 15 Nov 2010) <http://edition.cnn.com/2010/WORLD/americas/11/15/haiti.cholera/index.html> accessed 19 February 2024

Web pages

Hurd I, 'End the UN's legal immunity' (*The Hill*, 22 July 2016) <https://thehill.com/blogs/congress-blog/judicial/288739-end-the-uns-legal-immunity/> accessed 19 February 2024

United Nations press Releases, official statements and documents

United Nations Secretary-General, 'Secretary General Apologizes for United Nations Role in Haiti Cholera Epidemic, Urges International Funding of New Response to Disease' (Press Release, 1 December 2016) <https://press.un.org/en/2016/sgsm18323.doc.htm> accessed 24 March 2024

United Nations Secretary-General, 'Secretary-General to Establish Trust Fund for Displaced Roma, Askhali, Egpytian Communities in Northern Kosovo Following Human Rights Panel's Findings' (Press Release, 26 May 2017) <https://press.un.org/en/2017/sgsm18538.doc.htm> accessed 24 March 2024

United Nations Secretary-General, 'Statement attributable to the Spokesman for the Secretary-General on Haiti' (19 August 2016) <https://www.un.org/sg/en/content/sg/statement/2016-08-19/statement-attributable-the-spokesman-for-the-secretary-general-haiti> accessed on 10 January 2024

United Nations, 'UN marks anniversary of devastating 2010 Haiti earthquake' (UN News, 12 January 2022) <https://news.un.org/en/story/2022/01/1109632> accessed 25 October 2023

United Nations Secretary-General, 'Statement attributable to the Spokesman for the Secretary-General on the Human Rights Advisory Panel's recommendations on Kosovo' (2017) <https://www.un.org/sg/en/content/sg/statement/2017-05-26/statement-attributable-spokesman-secretary-general-human-rights> accessed 16 October 2023

Online articles and blog posts

Alvarez J, 'The United Nations in the Time of Cholera', (*American Journal of International Law Unbound*, 4 April 2014) <http://www.asil.org/blogs/united-nations-time-cholera> accessed 6 February 2024

Arato J, 'Equivalence and Translation: Further Thoughts on IO immunities in Jam v. IFC' (EJIL:Talk!, 11 March 2019) <https://www.ejiltalk.org/equivalence-and-translation-further-thoughts-on-io-immunities-in-jam-v-ifc/> accessed 24 March 2024

Burci G L, 'Jam v IFC's complications: the Pan-American Health Organization' (*EJIL:Talk!*, 4 January 2021) <https://www.ejiltalk.org/jam-v-ifcs-complications-the-pan-american-health-organization/> accessed 19 February 2024

Desierto D, 'SCOTUS Decision in Jam et al v. International Finance Corporation (IFC) Denies Absolute Immunity to IFC… With Caveats' (*EJIL:Talk!*, 28 February 2019) <https://www.ejiltalk.org/scotus-decision-in-jam-et-al-v-international-finance-corporation-ifc-denies-absolute-immunity-to-ifc-with-caveats/> accessed 19 February 2024

Dias S, 'Jam v IFC before the D.C. District Court: Forget the Floodgates, there won't even be a Trickle' (*EJIL:Talk!*, 1 April 2020) <https://www.ejiltalk.org/jam-v-ifc-before-the-d-c-

district-court-forget-the-floodgates-there-wont-even-be-a-trickle/> accessed 19 February 2024

Hammarberg T, 'International Organisations acting as quasi-governments should be held accountable' (Council of Europe 8 June 2009) <https://www.coe.int/nl/web/commissioner/-/international-organisations-acting-as-quasi-governments-should-be-held-accountable> accessed 25 March 2024

Lewnard J et al, 'Strategies to Prevent Cholera Introduction During International Personnel Deployments: A Computational Modelling Analysis Based on the 2010 Haiti Outbreak', *PLOS Medicine*, 26 January 2016, DOl: 10.1371/journal.pmed.1001947, <https://pubmed.ncbi.nlm.nih.gov/26812236/> accessed 24 March 2024

Lindstrom B, Jonsson S and Stoddard Leatherberry G, 'Access to Justice for Victims of Cholera in Haiti: Accountability for U.N. Torts in U.S. Court' (Boston University School of Law International Law Journal, 3 November 2014) <https://www.bu.edu/ilj/2014/11/03/access-to-justice-for-victims-of-cholera-in-haiti-accountability-for-u-n-torts-in-u-s-court/> accessed 24 March 2024

Reinisch A, 'Convention on the Privileges and Immunities of the United Nations: Convention On The Privileges And Immunities Of The Specialized Agencies 1' (2009) <http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf> accessed 10 January 2024

Webb P, 'The United Nations Convention on Jurisdictional Immunities of States and Their Property' (*United Nations Audiovisual Library of International Law*) <https://legal.un.org/avl/ha/cjistp/cjistp.html> accessed 23 March 2024.

Videos

Kristen Boon, UN Accountability and International Law Experts Workshop, https://www.youtube.com/watch?v=pDNxTBKM0bw

Reports

CDC, 'Recommendations for Preventing Lead Poisoning among the Internally Displaced Roma Population in Kosovo from the Centers for Disease Control and Prevention' (27 October 2007)

Centers for Disease Control and Prevention, 'Cholera in Haiti' (*Centers for Disease Control and Prevention*) <https://www.cdc.gov/cholera/haiti/index.html#ref-2> accessed 6 January 2024.

Cravioto A and others, 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (May 2011)

Lantagne D S and others, 'The Cholera Outbreak in Haiti: Where and how did it begin?' (2013)

Ombudsperson in Kosovo, 'Special Report no. 1 on the compatibility with recognized international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo' (*The Republic of Kosovo*

Ombudsperson Institution 18 August 2000) <https://oik-rks.org/en/2001/04/26/special-report-no-1/> accessed 25 March 2024

OSCE 'Background Report: Lead contamination in Mitrovicë/Mitrovica affecting the Roma community' (February 2009)

OSCE 'Report to the Ministerial Council on strengthening the legal framework of the OSCE in 2012' (7 December 2012) MC.GAL/15/12

Vega Ocasio D and others, 'Cholera Outbreak – Haiti, September 2022-January 2023' (2023) 72 Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report 21

Research Papers

Pingel I, 'Privileges and Immunities of the Organisation for Security and Cooperation in Europe (OSCE)' (2018) Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper 2018-37

Official governmental statements

Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson's Remarks on Rolling out the Law on Foreign State Immunity' (*Ministry of Foreign Affairs of the People's Republic of China* 5 September 2023) <https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/202309/t20230905_11138090.html> accessed 24 March 2024

Petitions

Institute for Justice & Democracy in Haiti, 'Petition for Relief' (submitted November 3 2011) <https://ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> accessed 6 January 2024

Mario Joseph, Brian Concannon and Ira Kurzban, 'Petition for Relief addressed to the Office of the United nations Secretary-General' (submitted 3 November 2011)

Institute for Justice & Democracy in Haiti and others, 'ICCPR Violations in the Context of the Cholera Epidemic in Haiti' (Submission for the 112th Session of the United Nations Human Rights Committee, October 8 & 9 2014)

Amicus Curiae Briefs

Brief of Amicus Curiae of Dr. Erica R. Gould in Support of Plaintiffs- Appellants and Reversal, Jam v. Int'l Fin. Corp., 860 F.3d 703 (D.C. Cir. 2017)

Preet Bharara et al., 'Brief for the United States of America as amicus curiae in support of affirmance' (26 August 2015)

Briefings

Amy Liebermann, 'Haiti Cholera Case Raises Questions About U.N. Accountability' *World Politics Review* (1 December 2011)

Introduction

In 2010, following a devastating earthquake that killed thousands and displaced millions, the people of Haiti had not had the time to recover before a new affliction fell upon them: cholera. However, unlike the earthquake, this catastrophe was human-made. United Nations ("UN") peacekeepers brought it from where they were based in Nepal[1] and, in the span of a few years, over 10,000 people died.[2]

In 2016, following the second court case for a class action suit by Haitians who had been directly affected by or lost family members due to the cholera introduced in their State by UN peacekeepers, Secretary General Ban Ki-Moon apologised[3] for the role of the United Nations in the spread of the disease and described the situation as a 'blemish' on the reputation of the Organisation globally. This apology came after the UN fought tooth and nail to not be considered judicially responsible for the crisis. The reparations for the Haitians were meant to come directly from the UN; instead, the Secretary-General announced an aid program financed by voluntary contributions from States, fuelled by what he called a 'collective responsibility to deliver'.[4] A similar statement was released regarding the lead poisoning situation in Kosovo, where 138 individuals from the Roma, Ashkali, and Egyptian communities alleged that they had been poisoned by unsafe amount of lead in the water and soil at a UN internally-displaced persons camp.[5] The Secretary-General expressed 'profound regret' and called on the 'shared duty' of both the UN and its Members to support these communities by participating in a Trust Fund.[6]

Identifying the problem

The reason behind the lack of reparations granted to the victims by the UN is founded in the absolute immunity granted to the UN by its Convention on the Privileges and Immunities of

[1] United Nations General Assembly (thereafter UNGA) 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) UN Doc A/71/367, para 14.
[2] Denisse Vega Ocasio and others, 'Cholera Outbreak – Haiti, September 2022-January 2023' (2023) 72 Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report 21, 23.
[3] United Nations Secretary-General, 'Secretary General Apologizes for United Nations Role in Haiti Cholera Epidemic, Urges International Funding of New Response to Disease' (Press Release, 1 December 2016) <https://press.un.org/en/2016/sgsm18323.doc.htm> accessed 24 March 2024.
[4] ibid.
[5] *N. M. and Others v. UNMIK* (Opinion) (26 February 2016), Human Rights Advisory Panel, Case No. 26/08, paras 118-123.
[6] United Nations Secretary-General, 'Secretary-General to Establish Trust Fund for Displaced Roma, Askhali, Egpytian Communities in Northern Kosovo Following Human Rights Panel's Findings' (Press Release, 26 May 2017) <https://press.un.org/en/2017/sgsm18538.doc.htm> accessed 24 March 2024.

the United Nations.[7] There are caveats to this absoluteness, such as the possibility to waive its immunity and the obligation to provide alternative modes of dispute settlement for disputes involving contracts or for disputes 'of a private law character'.[8] However, in both Haiti and Kosovo, this last qualification was rejected as the UN explained that the claims concerned policy and public matters of the organisation.[9]

This justification was criticised,[10] as evidence shows that the UN has reduced the scope of the definition of a dispute of private character over time, essentially shutting down any attempt from claims such as the ones in Haiti or Kosovo to have any chance to succeed.[11] The courts followed suit, sounding the death knell for any reparations for the aggrieved persons.[12]

The realisation that any claims similar to the Haitian or Kosovar claims – third party claims – are essentially doomed to fail is what inspired the topic of this thesis. While these cases were significant both in terms of the number of people affected and the attention it got in the media – particularly Haiti – there is no guarantee that it will not happen again, even in a reduced scope. Indeed, peacekeeping missions have only become increasingly integrated, and for longer durations of time. In Haiti, the mission involved in the cholera crisis, the MINUSTAH, was in place from 2004 to 2017,[13] when it was replaced with another mission (MINUJUSTH), lasting until 2019.[14] In Kosovo, the UN undertook many duties usually

[7] Convention on the Privileges and Immunities of the United Nations (adopted on 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention) art II, section 2
[8] ibid art VIII, section 29.
[9] See Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs to Dianne Post (25 July 2011) for Kosovo, and Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Brian Concannon (21 February 2013).
[10] See for instance UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (1996) UN Doc A/71/367 on the UN response to the Haiti cholera crisis.
[11] Martina Buscemi, 'The non-justiciability of third-party claims before UN internal dispute settlement mechanisms: the 'politicization' of (financially) burdensome questions' (2020) 68 Questions of Law Zoom-in 23, 28: 'In doing so [reducing the scope of what a dispute of private law character is], the UN tightened even further the already narrow access to justice for aggrieved individuals, thus setting a dangerous precedent that needs to be carefully scrutinized'.
[12] See 1.2.2.2.
[13] United Nations Security Council (thereafter UNSC) Res 1542 (30 April 2004) UN Doc S/RES/1542.
[14] UNSC Res 2350 (13 April 2017) UN Doc S/RES/2350.

handled by a State,[15] but still with the absolute privileges and immunities of an international organisation,[16] which led to accusations that the UN was acting 'more like [an] authoritarian government[s]'[17] than a peacekeeping mission. Furthermore, the involvement of the UN in Haiti has not stopped with the conclusion of MINUJUSTH. A United Nations Integrated Office in Haiti (BINUH) was created and has most recently been renewed for one year until 15 July 2024,[18] and the recent developments in Haiti have also prompted the Security Council to adopt a resolution authorising a Multinational Security Support (MSS) mission.[19] While these are not peacekeeping missions per se, they show the continued presence of the UN in Haiti, even two decades after the establishment of MINUSTAH.

Peacekeeping operations are no longer ceasefire observance missions but decades-long missions with vulnerable populations that are impacted in many different aspects of their daily lives. Instances of territorial administrations such as Kosovo are even broader, taking on some of the duties of a State. The MINUSTAH had as part of its mandate missions as broad as 'assist[ing] with the restoration and maintenance of the rule of law, public safety and public order in Haiti', 'support[ing] the constitutional and political process under way in Haiti, including through good offices, and foster principles and democratic governance and institutional development'[20] and, as reiterated in the aftermath of the 2010 earthquake, 'assist[ing] the Government of Haiti in providing adequate protection of the population, with particular attention to the needs of internally displaced persons and other vulnerable groups, especially women and children'.[21] A peacekeeping mission has therefore a much easier access to vulnerable populations than it used to, causing more opportunities for harm.[22]

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[15] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244, para 10: '…Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration which establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo'. See also Regulation NO. 1999/1 (25 July 1999) UNMIK/REG/1999/1, section 1, 1.1: 'All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General'. This extensive mandate was described as 'almost unprecedented' and a 'move into uncharted territory' for the UN. Alexandros Yannis, 'The UN as Government in Kosovo' (2004) 10 Global Governance 67, 67.

[16] The involvement of the UN in Kosovo as a quasi-State, and the subsequent lack of alternative entity for the Kosovar led to the questions posed by Reinisch: 'quis custodiet ipsos custodes (who guards the guardians'? August Reinisch, 'The accountability of International Organizations' (2001) 7 Global Governance 131, 132.

[17] Frederick Rawski, 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations' (2002) 18 Connecticut Journal of International Law 103, 123.

[18] UNSC Res 2692 (14 July 2023) UN Doc S/RES/2692.

[19] UNSC Res 2699 (2 October 2023) UN Doc S/RES/2699.

[20] UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542, p 2-3.

[21] UNSC Res 1927 (4 June 2010) UN Doc S/RES/1927, p 2.

[22] Marten Zwanenburg, 'UN Peace Operations Between Independence and Accountability' (2008) 5 International Organizations Law Review 23, 24: '[t]he increased interaction with the local population means increased chances that individuals in the host state will suffer damage or injury from the operation's conduct'.

The growing impact of the presence of the UN in vulnerable people's daily lives is not limited to mass claims of negligence, as the ongoing accusations of rapes and sexual assaults against peacekeepers show.[23] Yet, despite the blows to its reputation, the UN continues to stick to the same method, clinging to its absolute immunity.

The rationale behind immunity for the UN and its staff is often described in the literature as functional necessity, the belief that the organisation needs immunities in order to fulfil its functions.[24] The scope of the immunity therefore depends on the functions a given organisation has been granted. Subsequently, it is protected if it can prove that an act (or lack thereof) can be related to one of its functions. This is where the qualification of a claim as addressing matters of policy of the organisation comes, a qualification established by the UN itself with no oversight.

The recent claims of Haiti and Kosovo show the culmination of these two strands: the proximity to populations in a very vulnerable situation which undoubtedly made the health crisis worse as it could not be contained quickly, and the functional necessity rationale. Any built-in caveat of the absolute immunity of the UN such as the private law character of a dispute triggering the requirement of alternative means of dispute settlement is therefore useless.[25]

The literature on third party claims and the absolute immunity of the UN saw a resurgence following the Haiti crisis. However, despite the clear acknowledgement that something needed to change, and that the system was anachronistic, any reform proposal tended to consider the argument of functional necessity as a given. In other words, few proposals focused on changing the scope of immunity and if they did, ample consideration was still given to the need of the UN to benefit from as broad of a scope of immunities as possible. The courts act similarly, treating the UN as a special entity due to its nature as an

[23] While this thesis will focus on the immunity of the United Organisations as an organisation rather than on the immunity granted to individual peacekeepers, it is worth mentioning that the issues faced by the UN when it comes to its overall credibility amongst the populations it intends to help was also deeply affected by these allegations.

[24] See for instance Niels Blokker, 'International Organizations: the Untouchables?' (2013) 10 International Organizations Law Review 259, 260.

[25] Martina Buscemi, 'The non-justiciability of third-party claims before UN internal dispute settlement mechanisms: the 'politicization' of (financially) burdensome questions' (2020) 68 Questions of Law Zoom-in 23, 30: 'The result being that the UN enjoys a *double* immunity, before national courts and before its internal dispute settlement mechanisms – or even a *triple* one, given the lack of jurisdiction of international courts to rule on conduct attributable to the UN.'

international organisation and due to its important goals, to the detriment of third party claims. This absolute immunity, both internal (in that the UN procedures do not guarantee reparations even in arguably unambiguous cases like Haiti) and external (as seen through the reaction of the courts) show the existence of a narrative involving the UN and its functions, one that shields the organisation against potential "enemies" that intend to hamper its functioning via the means of immunity. In this narrative, States are perceived as the main enemies, and the protections given by (preferably) absolute immunity are the only way the UN can survive and thrive. In short, the goals of the UN and the activities undertaken to further these goals are seen as a net positive, and any lawsuits, even by third parties with no apparent link to a hostile State nor obvious intention to destroy the organisation, are seen as a net negative. This is a blanket protection, disregarding the identity of the parties in questions – individuals, not hostile States. It is this narrative that the thesis intends to challenge.

The research question and method

When apologising for the involvement of the UN in the cholera epidemic, the Secretary-General spoke of a "blemish" on the reputation of the organisation. That is an understatement. The question of immunities is sensitive in international law, particularly as while States have seen an evolution towards restrictive immunity,[26] international organisations, in general, have not. This situation, combined with the crises in Haiti and Kosovo, the continued involvement of the UN in people's daily lives, and the general sentiment of impunity despite wrongdoings, justifies a deeper look at the rationale behind the UN's immunity and the reason for its continued relevance. The research question is therefore twofold: why is functional necessity the continued justification behind the UN's immunity, as it is the cause for its absolute scope, and what would an immunity system not based on it look like? This thesis uses the doctrinal method. It aims to explain the choices made by the drafters of the Charter and the General Convention (and by the UN, courts, and literature ever since) on the basis of a functional necessity narrative with the United Nations as a protagonist, States as enemies, and immunities as the ultimate helpers, with the courts as advocates and secondary helpers.[27] It re-tells the story of the adoption of functional necessity as a rationale underpinning absolute immunity, and shows that this narrative is so persuasive that it perseveres to this day, when most of the "enemies" are no longer a pressing

[26] See Chapter 4.
[27] This narrative will be developed further in Chapter 2.

concern, and when the protagonist has more influence and more reach than ever before. It reframes the story on individuals instead, third parties that cannot yield the power the UN has and find themselves with no recourse, amplifying the sentiment that the UN is untouchable and unpunishable. The thesis also uses compares the UN and States in order to show the differences but also the hidden similarities between them.

As such, this thesis looks at decisions from domestic and regional courts, UN statements, and the literature on UN immunity (particularly written post-Haiti) to first tease out the functional necessity narrative. The aim of this argument is to show that not only does this narrative exist, but that it actually has a negative impact on the UN and its functions. While the need for absolute immunity could be understandable when the UN was first established and in a fragile position, it is now a major organisation with a huge reach and a large potential to cause harm. Its staunch position on maintaining its protection has also lost its strength: while States were once considered the "enemy", this argument is fragilized by the recent Haiti and Kosovo cases, as these were complaints coming from third parties with either no apparent government support (Haiti) or no government at all to turn to (Kosovo).

On the argument that absolute immunity will help the UN accomplish its goals, another glaring flaw is apparent. The UN sees itself as a key player in global governance. In the background of its territorial administration mission in Kosovo is the overarching aim of State-building based on considerations of democracy, transparency, and respect for the fundamental rights of the people, particularly minority communities.[28] Even more "traditional" peacekeeping missions such as MINUSTAH in Haiti had an extensive mandate, assisting for instance in the political process and supporting and monitoring the application of human rights.[29] Furthermore, the UN also expects its member States to adhere to principles of transparency, responsibility, and accountability. By refusing to grant reparations to third party claimants, or more broadly by refusing to change it position on its own absolute immunity, the UN behaves hypocritically.[30] Overtime, the backlash over this

[28] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244, para 11.
[29] UNSC Res 1542 (30 April 2004) UN Doc S/RES/1542, para 7. A more extreme point of view is to consider these (relatively speaking) new peacekeeping missions as having an overarching "State-building" goal, in accordance with UN standards of what a State should look like. Ruth Wedgwood, 'The Evolution of United Nations Peacekeeping' (1995) 28 Cornell International Law Journal 631, 635: 'Peacekeeping now looks like a summary of all the hopes of the 1960's and 1970's for development aid and political transition – to somehow remake emerging countries as prosperous, democratic, and stable societies. The old classical mission of peacekeeping – interposing lightly armed troops to monitor a truce, to observe, perhaps to rebuff some small trans-border terrorist incidents – has been transformed'.
[30] See Mona Ali Khalil, 'Immunity is not Impunity: The Legal Framework Applicable to UN Accountability for the Haiti Cholera Crisis' (2020) 24 Journal of International Peacekeeping 143, 156: 'In an ideal world, the UN would be able and should be the first to hod itself accountable – not only to live up to its legal obligations

hypocrisy will grow, and the impact on the UN's mission will be far greater than any lawsuit could ever cause. There is already a pushback in Haiti regarding interventions from the UN;[31] there is no guarantee that this pushback will stop there.

As fragile as the functional necessity narrative is as a justification for absolute immunity, particularly in recent times, its influence is felt not only in the UN but in other international organisations as well. Multiple international organisations based their immunity on the UN's, going as far as to copy the relevant dispositions wholesale. This functionalist foundation stretches even to the organisations that have made the specific choice not to go for textual absolute immunity. Financial international organisations such as multi-development banks (MDBs) have indeed a more limited version of immunity, with opportunities for parties to raise an action in court. Following along the functionalist rationale, this opening is presented as positive for the organisations' goals: if they are to have credibility in the financial market, they cannot completely close themselves off to litigation. And yet, when faced with the possibility of losing domestically guaranteed absolute immunity,[32] they will argue that nothing less than absolute immunity is necessary for them to accomplish their goals. International organisations are therefore entirely seeped into the narrative of functional necessity, even when their own constitutive instruments set out an opening for legal action.

By contrast, States have gone through an evolution in their immunity, going from absolute to restrictive. This restriction is based on the evolution of the State's role on the economic plane.[33] While the trend towards restriction started during the inter-war period between the First and the Second World War, it came to dominate the debates on State immunity in the second half of the 20th century. Just recently, China finally decided to align itself with the majority and enact restrictive State immunity.[34]

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and to its own principles, policies and practices but also to be a more credible advocate when it calls upon Member States to do so'.

[31] Widlore Mérancourt and Amanda Coletta, 'The U.N. is mulling another mission in Haiti. Hatians are skeptical' The Washington Post (Washington D.C., 12 November 2022) <https://www.washingtonpost.com/world/2022/11/12/haiti-cholera-united-nations/> accessed 24 March 2024.

[32] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019), where the US Supreme Court dynamically interpreted the US legislation on international organisations immunities to align with State immunity, by now considered restrictive.

[33] Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (14th edn, Dalloz 2018) 147.

[34] Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson's Remarks on Rolling out the Law on Foreign State Immunity' (*Ministry of Foreign Affairs of the People's Republic of China* 5 September 2023) <https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/202309/t20230905_11138090.html> accessed 24 March 2024.

With this evolution in mind, the last part of the thesis attempts to answer the second part of the research question: if functional necessity can no longer justify the UN's immunities and is indeed obsolete, what could be put in place as its replacement? The thesis makes the argument that while a system such as State immunity cannot be applied wholesale to the UN, taking into account their fundamental differences, it is obvious that a reform proposal should first argue for restrictive immunity, based on the nature of the act undertaken. The differentiation between acts covered and not covered by immunity should also not be set by the UN as it was before, with the UN deciding on its own and opaquely what a dispute of private law character meant. As much as possible, the UN should be removed from this process, for considerations of real and perceived impartiality. The role of jurisdiction is highlighted as a potential referee in claims akin to Haiti and Kosovo. The main goal should be to both preserve the UN's specificity as an international organisation – and therefore leave some acts protected by immunity – while also taking into account the impossibility of the UN's continued refusal to entertain third party claims for reparations if it wants to accomplish its goals unhindered. Much like with State immunity, growing pains are expected. There may well be a flood of claims once it is made possible to sue the UN and possibly win, and the financial worries of the UN would also have to be addressed, particularly in how they interrogate the continued existence of international organisations. Ultimately, the hope is for adaptability: if the UN is aware that it can be sued, it will no longer be able to cut corners with medical tests or placement of refugee camps. With a robust judicial framework in place to weed out the frivolous lawsuits, the UN could focus on the claims that are considered legitimate. Addressing the thorny issue of reparations can be financially perilous in the short term, but advantageous in the long term, securing the UN's reputation as a model of good governance. In that regard, the thesis argues that an independent international court is the best option possible, ensuring impartiality and efficiency. A number of key conditions, such as easier accessibility for the alleged victims, would also have to be met.

This thesis intends to address a gap in the literature on reform of the UN, and question whether the narrative of functional necessity is still tenable today. In order to address this question, it will use the case of Haiti as a perfect recent example of the UN and the courts using this narrative. It will then show the existence of the narrative, its origins in functionalism and its consequences on UN practice, and its continued influence on other international organisations. It will then interrogate how State immunity went from absolute to restrictive and if anything can be taken from this evolution with regards to the UN. Finally, it will present a proposal for reform based on the deconstruction and abandonment of the

narrative for a true restrictive immunity of the UN, arguing that only the establishment of a fully independent and directly accessible international court can guarantee impartiality and a transparent assessment of third party claims.

Delimitation of the subject matter

Lastly, a few definitions and delimitations of the subject are needed. In this thesis, the term "immunity system" means the framework supporting absolute immunity. It encompasses not only Section 2 of the General Convention that establishes absolute immunity, but also the caveats in Section 29, as well as the contributions from the Secretary-General on what a dispute of private law character includes. Restrictive immunity is to be understood as an opposite to absolute immunity generally, though it can take different forms.

Following the parties in the Haiti cholera case, the topic is on the immunity of the UN as an organisation, not on the officials or experts on missions of the UN. Likewise, the allegations of sexual abuse and rape by individual peacekeepers will not be addressed in this thesis unless as a supporting argument for the lack of credibility of the UN as a model of good governance. Finally, the reform proposal that this thesis intends to develop is specific to the United Nations, though the narrative discourse can – and will – be applied to other international organisations.

Chapter 1: The immunity of the United Nations in practice: demonstrating the issues raised by the UN's extensive immunities

Introduction

The issues surrounding the UN's absolute immunity tend to come to a head following a scandal. The cholera crisis in Haiti, ultimately determined to have been caused by the introduction of the disease by a contingent of Nepalese peacekeepers and the Kosovo lead poisoning allegations, where a refugee camp administered by the UN was placed in close contact with toxic amounts of lead, represent two clear examples of such scandals. Despite both involving people who have no link with the UN – no contractual relationships – and despite both instances causing deaths and injuries in large number, the alleged victims were unable to get reparations from the UN. The UN fought for – and was granted, or granted itself – protection every step of the way.

The two cases show the formation of a pattern in how the UN handles these types of crises. Denial, a lack of alternative dispute settlement, an opaque qualification of the dispute, and, when a claim reaches a court, external immunity all participate in making the – in theory – "functional" immunity of the UN into a de facto absolute immunity. This immunity stands even when the argument of the human right of access to justice is brought forward, cementing the strength of the UN's absolute immunity.

1.1. Cholera in Haiti, lead in Kosovo: the emergence of a pattern

While it has gotten a lot of attention due to its scale, the Haiti situation is not the only one to involve the UN's immunity, nor is it the only one to lead to injury and death. In Kosovo, the instance of lead poisoning is also representative of the UN's method of handling cases involving its immunity. As such, the two scandals are often linked in the literature. They both involve third party claimants assessing that they have a private dispute with the UN. Both constitute instances of negligence on the part of the UN leading to injuries and deaths. In that sense, they are distinct from other scandals involving the UN such as the Srebrenica massacre, which was much more easily linked to the UN's operational activities. In both Haiti and Kosovo, the argument that the disputes concern public matters was used. While the Haiti scandal represents the most complete example of the pattern of defending the absolute immunities of the UN, as it made it before a domestic court where Kosovo could not, the combination of these two cases indicate the formation of a pattern of how the UN handles recent mass third party claims arising out of the activities of peacekeeping missions. The pattern is as follows: denial of factual responsibility, opaque defence of its decision to not grant reparations, court case (if applicable) where both the State and the court of the

forum recognise that it needs absolute immunity, and finally an acceptance of moral responsibility and a call for voluntary donation to a trust fund.

1.1.1. Lead poisoning in Kosovo: a failure to get in front of courts

The Kosovo lead poisoning situation finds its roots in the war and unrest in the Balkan region in the 1990s. While it also involves an alleged case of negligence on the part of the UN, it did not make as much "noise" as the Haiti case: the scale of the crisis was much lesser – though still devastating for the communities involved – and the alleged victims were unable to have their "day in court".

Following mass displacements of minority communities, the United Nations Mission Interim Administration Mission in Kosovo (UNMIK) housed 600 Roma, Ashkali, and Egyptian families in Internally Displaced Person (IDP) camps. However, the water, soil, and air of and around the camp were contaminated by lead due to the activities of an industrial complex nearby.[35] The level of danger was considered grave enough for NATO, which also had contingents in place under the KFOR mission, to remove its personnel from the area.[36] Despite warnings from the World Health Organization (WHO) as to the risks incurred by pregnant women and children from the lead exposure in 2004, no action was taken by UNMIK to remove the families from the camps.[37] This exposure to lead can lead to harmful effects, particularly for pregnant women and children aged 0-6 years old. Despite numerous reports[38] recommending immediate action such as the removal of the most vulnerable members of the population from the camps, little action was taken, and much of it too late.

In February 2006, the claimants filed for compensation using UN Third Party Claim Process framework.[39] In a letter from July 2011, the Under-Secretary-General for Legal Affairs at the time, Patricia O'Brien, stated that the claims 'do not constitute claims of a private law character and, in essence, amount to a review of the performance of UNMIK's mandate' and that 'therefore, the claims are not receivable.'[40]

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[35] *N. M. and Others v. UNMIK* (Opinion) (26 February 2016), Human Rights Advisory Panel, Case No. 26/08, para 37.
[36] ibid para 47.
[37] ibid paras 50, 53.
[38] See for instance CDC, 'Recommendations for Preventing Lead Poisoning among the Internally Displaced Roma Population in Kosovo from the Centers for Disease Control and Prevention' (27 October 2007) & OSCE 'Background Report: Lead contamination in Mitrovicë/Mitrovica affecting the Roma community' (February 2009), inter alia.
[39] United Nations General Assembly (UNGA) Res 52/247 (17 July 1998) UN Doc A/RES/52/247.
[40] Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Dianne Post (25 July 2011).

Dissatisfied with the conclusion of the case, the claimants requested the Human Rights Advisory Panel (HRAP) to reopen proceedings regarding the lead poisoning case. The Panel had originally heard a complaint lodged in 2008, though it had decided at the time that it was inadmissible as it fell into the remit of the United Nations Third Party Claims Process.[41] Following the reopening of the case, the Panel heard the case of N.M. and Others v. UNMIK[42] in 2016, which alleged that the living conditions in the camp (and the lead exposure in particular) caused the deaths of at least one child and two adults.[43] The Panel found that numerous rights of the families affected were violated, including the right to life and the right not to be subjected to torture or inhuman treatment, both contained in the European Convention on Human Rights (ECHR).[44] Despite the Panel's recommendations to compensate the victims, the UN has consistently refused to do so. Instead, following the release of the HRAP's decision, the Secretary-General announced the creation in 2017 of a Trust Fund to 'implement community-based assistance projects' in order to benefit the affected communities.[45] Its contributions are voluntary, and it was 'not intended to offer any individual compensation to the victims, contrary to HRAP recommendation.'[46] Despite efforts by the United Nations Secretariat to encourage contributions, the Trust Fund is essentially non-operational, as it has not received enough resources to function.[47] Following repeated demands from the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Baskut Tuncak, the Secretariat's only answer was a repeated commiseration for the ongoing situation of the affected communities and a renewed engagement to encourage potential sponsors to voluntarily donate to the Fund.[48]

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[41] *N. M. and Others v. UNMIK* (Opinion) (26 February 2016), Human Rights Advisory Panel, Case No. 26/08, para 14.
[42] *N. M. and Others v. UNMIK* (Opinion) (26 February 2016), Human Rights Advisory Panel, Case No. 26/08.
[43] ibid paras 118-123.
[44] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 2 and art 3.
[45] United Nations Secretary-General, 'Statement attributable to the Spokesman for the Secretary-General on the Human Rights Advisory Panel's recommendations on Kosovo' (2017) <https://www.un.org/sg/en/content/sg/statement/2017-05-26/statement-attributable-spokesman-secretary-general-human-rights> accessed 16 October 2023.
[46] United Nations Human Rights Council, 'The human right to an effective remedy: the case of lead-contaminated housing in Kosovo: Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Baskut Tuncak' (4 September 2020) UN Doc A/HRC/45/CRP.10., para 50.
[47] ibid para 51.
[48] See for instance Letter from Jean-Pierre Lacroix (Under-Secretary-General for Peacekeeping Operations) to Baskut Tuncak (Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes) (5 October 2018); Letter from Jean-Pierre Lacroix (Under-Secretary-General for Peacekeeping Operations) to Baskut Tuncak (Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes) (24 December 2018); Letter from António Guterres (UN Secretary-General) to Baskut Tuncak (Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes) (4 October 2019).

Despite the lack of success in court, the Kosovo situation is representative of the difficulties for alleged third party victims[49] to get any reparations, particularly as the UN continues to deny its judicial responsibility, using absolute immunity as a shield. A more recent situation does represent a full timeline of the process of attempting to get reparations from the UN, from the initial denial of any responsibility to a case in front of a domestic court.

1.1.2. Haiti: the solidification of a pattern through a "perfect" case

The case of Haiti represents a "perfect" case in two major aspects compared to the Kosovo scandal, both cementing the pattern already observed in Kosovo and adding a component: the intervention of a domestic court.

Indeed, contrary to the Kosovo situation, the Haitian claimants were able to go as far as possible within the domestic court system. While the victims in the lead poisoning case went before the HRAP regarding UNMIK's actions (or lack thereof), there were no recorded domestic case attempts against UNMIK specifically. On the other hand, the Haiti case went before two US courts,[50] and while the results were not in the favour of the claimants, the existence of these cases and the additional submissions that come with them (*amicus curiae*, intervention from the Attorney General, etc) provide a much greater source of materials to trace the UN's arguments and general response to the crisis.

Secondly, the case provoked a greater reaction in the doctrine, with a clear uptick in articles published on the topic of the UN's immunities following the crisis making it to the news in 2016. This interest is partly explained by the scale of the crisis – over 10,000 people died according to official sources[51] – but also by the completeness of the case, from the Haitians attempting to resolve the matter internally to a court case. Additionally, the Special Rapporteur on extreme poverty and human rights at the time, Philip Alston, wrote a damning report on the UN's response to the Haiti cholera crisis, criticising both the original denial that anything had happened that the UN was responsible for, and the lack of admission of legal responsibility.[52] The report was leaked before its official publication and featured in

[49] Persons who do not have a contract with the UN or are otherwise involved with the UN (such as employees or ex-employees).
[50] One in first instance and one on appeal: *Delama Georges v United Nations* 84 F Supp 3d 246 (SDNY 2015) and *Delama Georges v. United Nations* 834 F 3d 88 (2nd Cir. 2016).
[51] Centers for Disease Control and Prevention, 'Cholera in Haiti' (*Centers for Disease Control and Prevention*) <https://www.cdc.gov/cholera/haiti/index.html#ref-2> accessed 6 January 2024.
[52] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (1996) UN Doc A/71/367, para. 35.

the New York Times, showing that the interest for the case had transcended academic interest.

In short, the pattern of the UN's refusal to compensate victims following a crisis it has been recognised responsible for, while already seen in the Kosovo crisis, gets an additional element in Haiti. The sheer scale of the Haiti crisis, the court cases that followed, and the interest in both academia and the media have made it a central focus point of any study on UN immunity. Regardless, the two crises usually end up being addressed together in academic publications[53] – though with a noticeable slant towards the Haiti case[54] – and as such will be addressed together in this thesis. However, due to the cholera case showing the full pattern of the UN's strategy in defending its immunity, it will be detailed extensively.

1.2. Introduction to the Haiti case

The Haiti cholera case represents the most complete recent account of the UN's handling of its own immunity, from the attempted use of the treaty-established standing claims commissions to a domestic court case. For the sake of clarity, (1.2.1) a brief explanation of the UN's immunity will be given, (1.2.2) followed by a focus on the Haiti case itself.

1.2.1. The United Nations absolute immunity system: a blunt, but efficient instrument

The immunity the UN benefits from finds its roots in the United Nations Charter[55] adopted in 1945. More specifically, the general dispositions dealing with the UN's immunity are contained in article 104 and 105. Article 104 establishes the legal capacity of the organisation:

> The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.[56]

[53] See for instance Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341. She addresses one after the other as examples of cases deemed not receivable under the UN Convention on Privileges and Immunities.
[54] Ibid. The Kosovo case gets about a page in the article while the Haiti case gets about four. The reason for this is of course linked to the reason why the Haiti case is more interesting from an analytical point of view: there are more details, and a longer timeline.
[55] Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (UN Charter).
[56] ibid art 104.

Article 105, as a complementary provision, describes the immunity the UN benefits from:

> 1. 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.
> 2. 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 connection with the Organization.
> 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.[57]

Notably, the immunity of the UN as envisaged in the Charter is functional, that is, based on the functions the UN has to exercise. This is an issue which we will return to and explore in greater detail in the following section. Immunity should only be granted if deemed necessary for the UN to achieve its goals and fulfil its functions. In other words, **it is not absolute** in the most basic meaning of the word, unless the functions are considered so broad as to necessitate absolute immunity. This was exactly the path chosen by the General Assembly as it followed paragraph 3 of Article 105 in proposing a convention to specifically deal with the details of the UN's immunity.

In February 1946, about four months after the Charter came into force, the General Assembly adopted the Convention on the Privileges and Immunities of the United Nations (thereafter CPIUN or the General Convention). At the time, the issue of the privileges and immunities of an organisation such as the United Nations were largely 'uncharted territory',[58] particularly as the League of Nations itself only provided very little in terms of model to follow. The League's Covenant[59] only provided for the diplomatic immunities of its employees as well as the inviolability of its premises. It is only with the *modus vivendi*[60] (an agreement between the League and its host State Switzerland) that the first traces of an

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[57] ibid art 105.

[58] August Reinisch, 'Convention on the Privileges and Immunities of the United Nations: Convention On The Privileges And Immunities Of The Specialized Agencies 1' (2009) <http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf> accessed 10 January 2024: "At the time of the adoption of the Charter of the United Nations there were not many legal instruments that could have served as examples for what was intended to be achieved . . . Thus, the privileges and immunities of international organizations was largely uncharted territory."

[59] Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 108 LNTS 188.

[60] Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, entered into by the League of Nations and the Swiss Government on 18 September 1926, (1926) 7 League of Nations Official Journal 1142 annex 911a.

assessment of privileges and immunities for the organisation itself appeared. Even then, it merely stated that the League could not 'in principle, according to the rules of international law, be sued before the Swiss courts without its consent'.[61]

It is in this context that the Convention on the Privileges and Immunities of the United Nations was drafted and adopted. In its Article II Section 2, it establishes a de facto absolute immunity for the UN:

> 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. It is, however, understood that no waiver of immunity shall extend to any measure of execution.[62]

The presence of the term "every" is already clear as to the purpose of the article. It is only reinforced by the very few exceptions (or rather caveats, though Reinisch mentions their goal as 'mitigat[ing]'[63] the absolute immunity in Section 2) that the Convention contains. One is included in the same article: the organisation's immunity can be waived. The other two are in Article VIII Section 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.[64]

In other words, the goal of Section 29 is to provide 'another route for remedies'.[65] Section 29 does not further specify what exactly these "appropriate modes of settlement" may be. However, the practice of the UN since the adoption of the General Convention can give some indication as to what is generally considered to be appropriate modes of settlements, as well as justify the use of the word "caveat" rather than "exception" for the dispositions of

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[61] ibid art I.
[62] Convention on the Privileges and Immunities of the United Nations (adopted on 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention) art II, section 2 (emphasis added).
[63] August Reinisch, 'Convention on the Privileges and Immunities of the United Nations: Convention On The Privileges And Immunities Of The Specialized Agencies 1' (2009) <http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf> accessed 10 January 2024.
[64] Convention on the Privileges and Immunities of the United Nations (adopted on 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention) art VIII section 29.
[65] Yohei Okada, 'Interpretation of Article VIII, Section 29 of the *Convention on the Privileges and Immunities of the UN*: Legal Basis and Limits of the Human Rights-Based Approach to the Haiti Cholera Case' 15 International Organizations Law Review 39, 41.

Section 29. In the text of the disposition, there is no indication in the text that said mode of settlement is to be an independent[66] court, leading to the early conclusion that it might not be the preferred mode of dispute settlement, and said mode might in fact specifically *not* be a court. The practice only buttresses this interpretation. Firstly, as specified by the International Court of Justice in its *Cumaraswamy Advisory Opinion* (1999),[67] these routes of settlement do not include national tribunals.[68] Secondly, the UN usually resorts to arbitration when it comes to issues arising out of contracts.[69] Thirdly, internal disputes such as employment disputes are usually handled by the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), which can both 'be considered to be modes of implementing Section 29'.[70]

In theory, means do therefore exist for third-party claims. In practice however, claimants are faced with numerous difficulties that close each avenue theoretically open to them by the CPIUN. The waiver is applied at the discretion of the organisation itself, an obvious obstacle to justice: if the organisation is aware that it would be costly (financially, but also reputationally) to become a party to a case, it can simply refuse to waive this immunity. The first avenue would then be closed. As for the second avenue of Section 29, a case would have to fit within one of the two defined categories: a) contracts or other dispute of a private law character or b) disputes involving an official benefiting from functional immunity. Crucially, the term "dispute of a private law character" is not given a definition in the text of the General Convention, nor have any definitive definition emerged since then. The UN is therefore able to redefine and reshape the term to fit its position on a specific case, leading to another avenue closed to third party claimants. Finally, domestic courts tend to uphold the UN's immunity, and have done so consistently across multiple jurisdictions. No other case shows this as clearly as the Haiti cholera case, which ultimately led to two US court decisions in 2015 and 2016 – both upholding the UN's immunity.

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[66] Read "independent" here as "external to the UN system".
[67] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62.
[68] ibid para 66.
[69] U.N. Secretary-General 'Procedures in place for implementation of article 8, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, on 13 February 1946: report of the Secretary-General' (24 April 1995) UN Doc A/C.5/49/65, para 3: '… it has been the practice of the United Nations to make provision in its commercial agreements (contracts and lease agreements) for recourse to arbitration in the event of disputes that cannot be settled by direct negociations'.
[70] Yohei Okada, 'Interpretation of Article VIII, Section 29 of the *Convention of the Privileges and Immunities of the UN*: Legal Basis and Limits of the Human Rights-Based Approach to the Haiti Cholera Case' 15 International Organizations Law Review 39, 48.

1.2.2. The Haiti cholera crisis: a brief overview

This section will aim to present the facts of the Haiti cholera crisis, the various procedural and judicial difficulties encountered by the claimants, and the consequences of the scandal as it cemented a general impression of impunity and injustice.

1.2.2.1. The facts

On 7 January 2010, a devastating earthquake hit Haiti, a Caribbean State amongst the poorest in the world. The earthquake resulted in the death of over 200,000 people, including 102 United Nations staff members.[71] Subsequently, the presence of peacekeepers for the United Nations Mission for Stabilization in Haiti – thereafter MINUSTAH – present in the country since 2004, was reinforced.[72] One of these reinforcements came in the form of a contingent of a few hundred Nepalese peacekeepers. They arrived in Haiti in October 2010 after a training period in Kathmandu, where a cholera epidemic was ongoing at the time.[73] Soon after their settlement in the Mirebalais MINUSTAH base, the first cases of cholera in Haiti were reported, emerging firstly along a tributary of the Artibonite River near the base, then following the stream of the Artibonite itself, which had at the time become a vital source of water for the inhabitants following the destruction of most of the water infrastructures in Haiti.[74] The circumstances surrounding the origin of the outbreak have now been established: a waste handling company that the UN had a contract with dumped faecal waste into the river once the sceptic tank of the base was full.[75]

As for the peacekeepers themselves, the Petition for Relief by the Institute for Justice & Democracy in Haiti (the driving force behind the Haiti judicial cases) stated that the '[t]he Nepalese Army's Chief Medical Officer, Brig. Gen. Dr. Kishore Rana, stated that no Nepalese soldiers deployed as a part of the MINUSTAH mission in Haiti were tested for cholera prior to entering Haiti'[76] and that after a health screening, the members of the contingent were allowed to spend a few days with their families, with no additional screening after this period before sending them to Haiti.[77] The combination of these factors led to a

[71] United Nations, 'UN marks anniversary of devastating 2010 Haiti earthquake' (UN News, 12 January 2022) <https://news.un.org/en/story/2022/01/1109632> accessed 25 October 2023.
[72] UNGA 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para 14.
[73] ibid.
[74] ibid.
[75] ibid.
[76] Institute for Justice & Democracy in Haiti, 'Petition for Relief' (submitted November 3 2011) <https://ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> accessed 6 January 2024, para 19.
[77] ibid para 20.

devastating epidemic in a very vulnerable State following a catastrophic natural disaster. As of 2020, the epidemic is said to have killed over 10,000 people and affected a million more.[78] It was only on February 4th 2022, 12 years after the outbreak, that Haiti was declared cholera-free.[79] Recent developments however have shown that Haiti is not yet rid of the disease: on October 2nd 2022, two cases of patients with acute diarrhoea were confirmed to be cholera cases.[80] As of January 2023, more than 20,000 suspected cases have been reported.[81]

The backlash against the UN was swift and at times violent, with thousands of Haitians taking to the street to demonstrate against the UN and its peacekeepers for bringing cholera to the country.[82] The Secretary-General quickly established an Independent Panel of Experts to assert the evidence of the UN being responsible for the introduction of cholera in Haiti.[83] The panel produced two reports in 2011 and 2013.[84] The first one was met with disbelief from the scientific and legal community, as it concluded that, despite the evidence pointing to the MINUSTAH camp as being the origin of the cholera epidemic in Haiti, the outbreak 'was not the fault of, or deliberate action of, a group or an individual'.[85] The report pointed out the 'simultaneous water and sanitation and health care systems deficiencies'[86] as factors that made the epidemic possible. In other words, the dumping of faecal matter in the river alone was not enough to cause the outbreak. The 2013 report, on the other hand, took into account the backlash the first report got and stated that 'the preponderance of the evidence and the weight of the circumstantial evidence does lead to the conclusion that personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti'.[87] However, they still considered that no one could be said to be at fault, and that it was 'an accidental and unfortunate conflict of events'.[88]

[78] Denisse Vega Ocasio and others, 'Cholera Outbreak – Haiti, September 2022-January 2023' (2023) 72 Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report 21, 23.
[79] ibid.
[80] ibid 22.
[81] ibid 21.
[82] See for instance Rory Carroll, 'Protesters in Haiti attack UN peacekeepers in cholera backlash' *The Guardian* (London, 16 Nov 2010) <https://www.theguardian.com/world/2010/nov/16/protestors-haiti-un-peacekeepers-cholera> accessed 21 December 2022.
[83] UNGA 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para 16.
[84] ibid paras 16 and 17.
[85] Alejando Cravioto and others, 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (May 2011), 29.
[86] ibid 4.
[87] Daniele S. Lantagne and others, 'The Cholera Outbreak in Haiti: Where and how did it begin?' (2013), section 5.
[88] ibid.

1.2.2.2. Procedural and judicial difficulties

The affected people first tried to use the proper channels supposedly set up by the UN when dealing with third-party claims for personal injury: a standing claims commission.[89] However, none was ever established in Haiti.[90] The claimants then filed a legal petition for the establishment of such a commission.[91] Failing that, the only other path forward was litigation in front of a court.

In 2011, a US-based NGO called the Institute for Justice & Democracy in Haiti lodged a petition with MINUSTAH on behalf of 5000 cholera victims.[92] Their demands were the following: a) a fair and impartial hearing, b) monetary compensation, c) preventive action by the United Nations, and d) a public acknowledgement by the United Nations of its responsibility, as well as a public apology. Sixteen months later, the Under Secretary-General for Legal Affairs replied, stressing the Independent Panel's no-fault findings, and asserted that the claims were 'not receivable pursuant to Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations'.[93] Indeed, while Section 29 sets out a requirement for the UN to provide for appropriate modes of settlement for disputes deemed of a private law character, the Under Secretary-General stated that the claims would instead 'necessarily include a review of political and policy matters'.[94] Thus, the claims were rejected as they were not considered to fall under the remit of Section 29. This reasoning was challenged by the claimants, who requested a meeting to discuss the matter; this was quickly shut down by the Under Secretary-General, who insisted that 'as these claims are not receivable, I do not consider it necessary to meet and further discuss this matter'.[95]

The claimants then filed a class action suit in October 2013 with the United States District Court for the Southern District of New York in *Delama Georges v United Nations*. The court ruled that the defendants were immune from suit in January 2015.[96] On 19 August 2016, the

[89] Mario Joseph, Brian Concannon and Ira Kurzban, 'Petition for Relief addressed to the Office of the United nations Secretary-General' (submitted 3 November 2011), para 66.
[90] ibid para 6.
[91] Amy Liebermann, 'Haiti Cholera Case Raises Questions About U.N. Accountability' *World Politics Review* (1 December 2011).
[92] UNGA 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para 28.
[93] Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Brian Concannon (21 February 2013).
[94] ibid.
[95] Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Brian Concannon (5 July 2013).
[96] *Delama Georges v United Nations* 84 F Supp 3d 246 (SDNY 2015).

Court of Appeals for the Second Circuit came to the same decision.[97] An attempt to bring the case to the Supreme Court was unsuccessful.[98]

1.2.2.3. Criticism and further impact on UN peacekeeping missions

The manner in which the UN handled the Haiti cholera scandal was heavily criticized in the press and by scholars. A scathing report by the then United Nations Special Rapporteur on extreme poverty and human rights (mentioned above) detailed the multiple failures of the UN.[99] It included sections on the legal as well as scientific matter, painting a picture of, at best, gross negligence on the part of the UN.

Ahead of the official publication of the Alston report in 2016, the then Secretary-General Ban Ki-Moon announced the development of a new approach addressing the issues raised in the report as well as the acceptance of moral responsibility (but – crucially – not *legal* responsibility) and the promise of 'material assistance and support'.[100] The UN then announced an aid package of $400 million to address the cholera epidemic in Haiti. However, by 2020, the amount actually collected was barely 5% of the overall goal ($20,5 million), of which only a fraction has been spent.[101] The leading cause behind such a low amount is that the gathering of funds was made through voluntary donations from States (as opposed to assessed, mandatory payments). The result is that Haiti received only a fraction of what they were promised after the court case failed. Not only were they not able to get their right to a remedy recognised in court, but the voluntary donations were not enough to cover the damage inflicted, similar to Kosovo.

This double loss has had, and continue to have, a negative effect on Haiti and a negative perception of the UN. Studies have shown that perceptions of peacekeepers is important for the success of peacekeeping missions,[102] and that 'exposure to peacekeeping abuse

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[97] *Delama Georges v. United Nations* 834 F 3d 88 (2nd Cir. 2016).
[98] See status of the docket at <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16a466.htm> accessed 10 January 2024.
[99] UNGA 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367.
[100] United Nations Secretary-General, 'Secretary General Apologizes for United Nations Role in Haiti Cholera Epidemic, Urges International Funding of New Response to Disease' (Press Release, 1 December 2016) <https://press.un.org/en/2016/sgsm18323.doc.htm> accessed 24 March 2024.
[101] Letter from Philip Alston (Special Rapporteur on extreme poverty and human rights) and others to Antonio Guterres (28 April 2020) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25228 accessed 25 October 2023.
[102] See Andrea Kathryn Talentino, 'Perceptions of Peacebuilding: The Dynamic of Imposer and Imposed Upon' (2007) 8 International Studies Perspectives 152.

consistently and dramatically undermines civilian perceptions of peacekeepers.'[103] More importantly, it is established that 'exposure to abuse not only shapes expectations of peacekeepers' abusiveness, but also affects views of their effectiveness and benevolence.'[104] While the Gordon and Young study was not specifically on cholera and focused instead on more direct and individual instances of abuse such as sexual abuse, use of force, or thieving, the conclusions on the consequences of a negative perception can be extrapolated to the cholera crisis. As the demonstrations that erupted very soon after the epidemic started show, the perception of MINUSTAH was almost certainly already negative, and would not have improved following the denial of judicial responsibility and of financial reparations by the UN. This is backed up by Fraulin, Lee, and Bartels, who speculate that 'the cholera epidemic in Haiti likely had a further detrimental impact on the ability of MINUSTAH, and then MINUJUSTH, to successfully fulfil their mandates in the later years of their existence.'[105] The epidemic, and the rapid identification of those responsible despite the initial denial by the UN – which was also a factor in the backlash – constitute therefore not only a perceived injustice for the Haitians but also the making of a ticking time bomb for the UN with regards to the efficiency of its peacekeeping missions.

As the perception of what peacekeepers do and do not do, such as abuse, is important for the success of a mission, causing an epidemic and subsequently denying any reparations for its victims can only lead to more distrust amongst the very people the peacekeepers were sent to help. To add to it, the cholera epidemic saw large media coverage: the blight in the UN's reputation is not just seen in Haiti. In terms of global perception, if such crises as happened in Haiti and Kosovo do not stop and if no action is taken by the UN to prevent them ever occurring again, the reputation of peacekeepers and of the UN in general may very well shift. Compounded with the current trend of longer peacekeeping missions with a deeper integration of the peacekeepers due to broad mandates, the reputation of the UN and of its peacekeeping missions rests on a fragile equilibrium. This shift in perception has in fact already been noticed: in her 2007 study, Andrea Talentino points out that while the UN is 'usually considered both credible and capable by citizens', she does mention that this initial

[103] Grant M Gordon and Lauren E Young, 'Cooperation, information, and keeping the peace: Civilian engagement with peacekeepers in Haiti' (2017) 54 Journal of Peace Research 64, 76.
[104] ibid 74.
[105] Georgia Fraulin, Sabine Lee and Susan A Bartels, '"They came with cholera when they were tired of killing us with bullets": Community perceptions of the 2010 origin of Haiti's cholera epidemic' (2022) 17 Global Public Health 738, 747.

perception is not universal, pointing out the example of Iraq, where 'the oil-for-food scandal has colored perceptions of the UN's competence and integrity'.[106]

1.3. Internal immunity: the refusal from the UN to consider a dispute of private law character

The decision of the UN to refuse to consider the claims as being of a private law character in Haiti can – and has been – criticised on both form and substance. The UN refused to establish a standing claims commission, supposed to deal with third party claims resulting from a peacekeeping mission in the State the mission is intervening in. The lack of this means of complaint constitutes the first major obstacle faced by the victims, despite it being planned for in treaties signed by the parties. The justification for the refusal of the consideration of their claim was also at first difficult to obtain. The UN reportedly 'refused the victims' request for further clarification of the dismissal', as well as 'mediation or a meeting to discuss out-of-court resolution of the claims'.[107] It was only after insistence from the United States Congress that the claimants were able to know the full reason for the refusal, including details on what the Secretary-General does and does not consider to be of a "private law character".

The rest of the criticism centres on the content of the justification itself. More precisely, scholars that have analysed the claims have stated that, while it is unwise to expect a complete equivalency, the claims were extremely close to what a tort claim[108] would be in a domestic setting. The lack of precision of what Section 29 considers a dispute "of a private law character" certainly adds a dose of uncertainty, but there is evidence throughout official UN documents – some authored by Secretary-Generals – that what the UN would internally consider "of a private law character" used to include injuries and deaths in situations that could fit the Haiti cholera case. In other words, there used to be at least some consistency of what was considered in that category, only for this consistency to disappear in the Haiti case.

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[106] Andrea Kathryn Talentino, 'Perceptions of Peacebuilding: The Dynamic of Imposer and Imposed Upon' (2007) 8 International Studies Perspectives 152, 160.

[107] Institute for Justice & Democracy in Haiti and others, 'ICCPR Violations in the Context of the Cholera Epidemic in Haiti' (Submission for the 112th Session of the United Nations Human Rights Committee, October 8 & 9 2014), para. 18.

[108] See for instance Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du choléra' (2013) 46 Revue belge de droit international 161, 161. See also José Alvarez, 'The United Nations in the Time of Cholera', (*American Journal of International Law Unbound*, 4 April 2014) <http://www.asil.org/blogs/united-nations-time-cholera> accessed 6 February 2024, 26: 'A response that tort complaints are 'policy' claims because the policies of the tortfeasor may be questioned is a defense that only someone who has never had to face a tort suit could possibly make.'

This is an example of the internal immunity the UN benefits from – its immunity is guaranteed by internal processes (or lack thereof), of which the UN is entirely in control.

1.3.1. The non-application of article 51 of the Status of Forces Agreement: an obstacle to impartiality

The Status of Forces Agreement (SOFA) is an agreement signed between the UN and the host State of a peacekeeping mission. In 1990, the Secretary-General, at the request of the General Assembly, established a model SOFA to serve as a basis for future agreements.[109] Notably, all SOFA agreements– including the one for MINUSTAH – contain a provision on claims of a private law character:

> Except as provided in paragraph 53,[110] any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claim commission to be established for that purpose. One member of the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government.[111]

On top of this, any decision must have the approval of at least two members of the commission, giving the appearance of a rather fair balance of influence between the host State and the UN. Moreover, the President of the International Court of Justice (ICJ) may appoint the chairman 'if no agreement as to the chairman is reached within thirty days of the appointment of the first member of the commission'.[112] The (potential) involvement of the President of the ICJ serves to internationalise the process even further, as well as reinforce the impression of a neutral creation.

On the application of this disposition, then Secretary-General Kofi Annan stated in a report that 'the standing claims commission as envisaged under the model agreement has never

[109] UNGA 'Comprehensive Review of the Whole Question of Peace-Keeping Operations in all their Aspects: Model status-of-forces agreement for peace-keeping operations' (9 October 1990) UN Doc A/45/594.
[110] These exceptions are '[a]ny other dispute between the United Nations peace-keeping operation and the Government, and any appeal that both of them agree to allow from the award of the claims commission established pursuant to paragraph 51.' ibid para 53.
[111] ibid para 51.
[112] ibid para 51.

been established in the practice of United Nations peacekeeping operations',[113] adding that there can therefore be 'no acquired operational experience against which the effectiveness or ineffectiveness of such a procedure can be judged'.[114] This is supported by the Haitians' experience when they attempted to seize the commission, and subsequently call for its establishment.[115] To this day, no standing claims commission according to the SOFA model was ever established, in Haiti or anywhere else. In their stead were established local claim review boards, which were UN-led. This obviously raised questions of transparency and impartiality, which Kofi Annan acknowledged in his report, admitting that '[t]he local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case'.[116] And while he also called for the disposition on standing claims commissions to be maintained in the SOFA model, particularly as it would 'provide[s] for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par',[117] they remain entirely absent on the ground.

While one of the justifications for the lack of these standing claims commissions was put forward as the claimants having 'found the existing procedure of local claims review boards expeditious, impartial and generally satisfactory',[118] the experience of the Haiti cholera crisis does not point to such an optimistic suggestion. More importantly, the argument used by the victims was that the standing claims commissions *should have been put in place*, no matter how impartial the replacement may be, because the provision for their establishment was in the SOFA agreement signed with Haiti for MINUSTAH.

As such, while the SOFA seems to provide a semblance of a solution on paper, through the promise of a somewhat impartial examination of claims such as the ones regarding the cholera epidemic, it does not actually exist. This constitutes a missing link between the UN and the claimants, as well as a severe blow to any demands of accountability, since these

[113] UNGA 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations' (21 May 1997) UN Doc A/51/903, para 8.
[114] ibid para 8.
[115] See more generally Institute for Justice & Democracy in Haiti, 'Petition for Relief' (submitted November 3 2011) <https://ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> accessed 6 January 2024, specifically paras 4, 66, 67 (which confirms that 'no standing claims commission has been set up in Haiti') and 102.
[116] UNGA 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations' (21 May 1997) UN Doc A/51/903, para 10.
[117] ibid para 10.
[118] ibid para 8.

commissions were supposed to provide a way for claims of a private dispute character to be evaluated according to Section 29 of the CPIUN. Unsurprisingly, many of the authors writing on Haiti have pointed out the absence of these standing claims commissions as a failure on the part of the UN, and their establishment as a big step forward towards accountability and avoiding crises as devastating for the UN's reputation as the Haiti cholera case.[119]

While the lack of adequate testing of the peacekeepers represents the first instance of the UN's carelessness when it comes to the prevention of the spread of disease in disaster-struck Haiti, the absence of these standing claims commissions is one of the most glaring early issues in the UN's pattern of defending its immunity.[120] It is impossible to say for certain that these commissions, if they had been allowed to exist, would have ruled in favour of the Haitians,[121] or even if such a ruling would have helped smooth over the compensation disputes. However, their absence certainly did not help, as they would have most likely provided an answer regarding the character of the dispute, as their first step would have been to establish if they were competent in the matter – in other words, if they considered the dispute to be of a private law character.

In sum, the non-application of the SOFA disposition 51, created specifically in order to assist in the application of Section 29 of the CPIUN, is one of the first important failure on the part of the UN, as its use could have helped with clarifying Section 29 and providing an important precedent for its interpretation (as well as possibly resulting in a positive outcome for the claimants).

[119] See for instance Rosa Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge' (2014) 25 European Journal of International Law 239, 247 (stating that the lack of such commission being established 'is clearly a breach of the UN's legal obligations'), and Frédéric Mégret, 'La responsabilité des Nations Unies au temps du choléra' (2013) 46 Revue belge de droit international 161, 187.

[120] Without this crucial first step, few options exist for the claimants. See Kate Nancy Taylor, 'Shifting Demands in International Institutional Law: Securing the United Nations' Accountability for the Haitian Cholera Outbreak' in Mónika Ambrus and Ramses A. Wessel (eds), *Netherlands Yearbook of International Law 2014* (1st edn, T.M.C. Asser Press The Hague 2015) 170: 'The cholera case illustrates that the most glaring deficiency in the claims commission regime is that there is no legal recourse available to individuals in circumstances where the UN has unilaterally refused to establish the commission'.

[121] This will be detailed in Chapter 5 (5.2.3.1), but the host States of peacekeeping missions have a vested interest in the missions "working", as they rely on UN presence.

1.3.2. A dispute of policy versus a dispute of private law character: discordance between the UN and the doctrine

The justification that the UN provided – after much insistence from the Haitians, the IJDH and members of the US Congress – relied on their position that the claimants' demands did not constitute a dispute of a private law character in accordance with Section 29 of the CPIUN, but that it instead 'would necessarily include a review of political and policy matter'.[122]

This particular analysis has been criticized by many authors as well as Special Rapporteur Alston, who considered in his report on Haiti that the position adopted by the UN was questionable. In order to examine the validity of that decision, a look into the UN's own practice when it comes to the application of Section 29 of the CPIUN is required.

The UN has rather consistently recognised that it should be responsible for damages caused by members of United Nations forces.[123] On that basis, in a report drawn up by then Secretary-General Boutros Boutros-Ghali, details are given on what exactly has the UN considered to be a dispute of private law character. Paragraph fifteen of the report states that these disputes fall into two categories, namely contracts and 'claims for compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by members of a United Nations peace-keeping operation within the "mission area" concerned.'[124] Following Mégret, it is indeed 'difficult to conceive in which way the claim by the Haitian claimants does not fit exactly within this definition'.[125] Cholera *has* obviously caused personal injury and/or death, and it found its way into the Artibonite river due to the action of a United Nations peacekeeping operation. Even if the argument is that the decision not to test the Nepalese peacekeepers was not taken within the "mission area", the damage was caused by their presence.[126] Kristen Boon has a

[122] Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Brian Concannon (21 February 2013).
[123] See U.N. Secretary-General '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 Headquarters: Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation—Financing of the United Nations Peacekeeping Operations: Rep. of the Secretary- General' (20 September 1996) UN Doc A/51/389.
[124] U.N. Secretary-General 'Procedures in place for implementation of article 8, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, on 13 February 1946: report of the Secretary-General' (24 April 1995) UN Doc A/C.5/49/65, para. 15.
[125] Original quote: "Il est difficile de concevoir en quoi la réclamation présentée par les demandeurs haïtiens en l'espèce ne rentre pas exactement dans cette définition." Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du cholera' (2013) 46 Revue belge de droit international 161, 169.
[126] ibid.

similar viewpoint to Mégret with regards to the Haiti and Kosovo claims, as she believes that they 'involve elements of a private law dispute from which the UN would not be immune'.[127] Bruce Rashkow, former director of the UN Office of Legal Affairs' General Legal Division expressed confusion with regards to the wording of the non-receivability response given to the Haiti claims.[128] Furthermore, Rashkow pointed to the settlement negotiated between the UN and Belgium and the USSR following UN intervention in the Congo in the 1960s. The claims at the time were of damage to persons and properties, and the final amount for Belgium was of $1.5 million.[129] At the time, the UN seemingly accepted that the claims were receivable based on two criteria: that the injured parties 'may have suffered damage as a result of harmful acts committed by ONUC personnel', and that these claims were 'not arising from military necessity'.[130] This is evidence of the UN recognising injury and damage to property as valid claims for a third party outside of military necessity, with a negotiated settlement as the preferred solution. Crucially, it was never claimed in the Haiti case that the actions of the UN with regards to the screening of its peacekeepers was "military necessity".[131] In short, a number of academics – and former practitioners directly involved in the issues raised in the case of Rashkow – have expressed puzzlement at the conclusions drawn by the UN on its own responsibility with regards to the Haiti claims. This lack of support for the UN's position, as well as the frequent[132] reminders that continuing on such a path can lead to irreparable reputational damage,[133] paint the same tableau: by refusing to recognise its judicial responsibility, the UN goes against what is generally understood in law to be a dispute of private law character, disregarding the very real problem of the stain on its image.

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[127] Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 361.
[128] Bruce C Rashkow, 'Immunity of the United Nations: Practices and Challenges' (2013) 10 International Organizations Law Review 332, 344.
[129] Bruce C Rashkow, 'Above The Law? Innovating Legal Responses To Build A More Accountable UN: Where Is The UN Now?' (2017) 23 ILSA Journal of International & Comparative Law 345, 356.
[130] Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals (20 February 1965) 535 U.N.T.S. 198.
[131] Neither was it claimed that this was "operational necessity". It is likely that this would have been very difficult to argue, as there is a high threshold to cross to be able to use operational necessity as an exemption from liability. See U.N. Secretary-General '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 Headquarters: Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation—Financing of the United Nations Peacekeeping Operations: Rep. of the Secretary- General' (20 September 1996) U.N. Doc. A/51/389, para 13-14
[132] Bruce C Rashkow, 'Above The Law? Innovating Legal Responses To Build A More Accountable UN: Where Is The UN Now?' (2017) 23 ILSA Journal of International & Comparative Law 345, 357.
[133] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para 68.

Beyond the fact that the UN's own practice seems to indicate that the decision not to qualify the Haitian claim as a dispute of a private law character stands out, the lack of transparency of the UN during the entire process has also been criticised. Indeed, the original letter addressed to the IJDH on the rejection of the claims does not go into any details, simply assessing that the claims would 'necessarily include a review of political and policy matters'.[134] Following demands from members of the US congress, Secretary-General Ban Ki-Moon appeared to curtail the definition of disputes of a private law character, excluding cases relating to death and/or personal injury not caused by car accidents: '[i]n the practice of the Organization, disputes of a private law character have been understood to be disputes of the type that arise between private parties, such as, claims arising under contracts, claims relating to the use of private property in peacekeeping contexts or claims arising from motor vehicle accidents'.[135] An earlier letter from the from the U.N.'s Senior Cholera Coordinator (thereafter the Medrano Letter) is on the same wavelength. Disputes of a private law character, it states, are '[i]n the practice of the Organisation … disputes of the type that arise between two private parties.'[136]

The Haiti claims, because they relate to 'the political or the policymaking functions of the Organization'[137] do not qualify as disputes of a private law character. This constitutes a very obvious exclusion of the category that was until then included in the UN's own practice and that corresponded the most accurately to the Haitian situation. Despite the qualification of a private dispute as being "of the type that arise between two private parties", the distinction set by the letters ignores the tort-like elements of the claims and focuses instead on where the decision that led to the act originated, with references to claims 'related to actions or decisions taken by the Security Council or the General Assembly'[138] as examples of public claims. However, this reasoning does not stand to scrutiny, as any action on the ground can be traced back to a decision made by the Security Council or the General Assembly. One could argue, for instance, that an accident caused by a vehicle during a peacekeeping operation stems from the decision to use vehicles in the first place. In other words, under this definition, all matter of things can be related to the policymaking functions of the UN.

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[134] Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Brian Concannon (21 February 2013).
[135] Letter from Ban Ki-moon (United Nations Secretary-General) to Members of United States Congress (19 February 2015), extracts of which can be found in Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 360.
[136] Letter from Pedro Medrano (Assistant Secretary-General and Senior Coordinator for Cholera Response to Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque (24 November 2014), para 87.
[137] ibid para 89.
[138] ibid para 89.

Notably, the non-receivability decision also seemingly contradicts the aforementioned SOFA, as it specifically states in its paragraph 54 combined with its paragraph 55 that disputes of a private law character do indeed include personal injuries and deaths. Indeed, paragraph 54 explains that 'third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH, except for those arising from operational necessity' that 'cannot be settled through the internal procedures of the United Nations' have to be handled 'in the manner provided for in paragraph 55'.[139] Paragraph 55 subsequently sets out the standing claims commissions, adding that they ought to settle 'any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH'.[140] In other words, the SOFA explicitly states that disputes of a private law character, which have to be settled by the standing claims commissions in case internal UN processes fail, include personal injuries and deaths caused by or resulting from MINUSTAH.

This situation leaves us with more questions than answers. It is clear that the claims in the Haiti cholera case should have been considered of a private law character, or at the very least given the chance to appear in front of a competent entity created to consider if such claims are valid. This is according to analogies with regular tort and obligations claims, as well as according to the UN's own interpretation when it was given the opportunity to clarify Section 29. However, we know that the conclusion was not what Haitians could have reasonably expected, for reasons that were never made explicit. This is compounded with the absence of standing claims commissions, despite being included in every SOFA agreement for decades. Faced with a brick wall of dubious legal justification and endless and ultimately unsuccessful processes to address the UN itself, the victims had no other choice but to try and sue the United Nations, in the hope of getting reparations.

1.4. External immunity: protection in courts

As briefly seen in 1.2.2.2, the cases brought on before domestic courts in the Haiti case were all ultimately unsuccessful. This is because the UN also benefits from external immunity in addition to its internal immunity, which allows it to not be subjected to judicial responsibility. This section will start by examining the US court case for Haiti, *Delama Georges v. United Nations*, in order to show that the use of domestic courts was not of use

[139] Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations Operation in Haiti (adopted 9 July 2004, entered into force 9 July 2004) 2271 UNTS 235, para 54.
[140] ibid para 55.

to the claimants as it confirmed the UN's immunity. Second, the jurisprudence of the European Court of Human Rights (ECtHR) both in employment cases and in the Srebrenica massacre case will show that the decision in *Georges* can be considered as the latest instance of the confirmation of the UN's absolute external immunity, even in cases involving human rights. In other words, there is a general uneasiness regarding UN immunity even in the proven absence of an alternative forum to guarantee the right of access to justice.

1.4.1. Delama Georges v. United Nations: an unsurprising dismissal

The case of *Georges v UN* is a class action lawsuit brought before the United States District Court for the Southern District of New York in October 2013. After being dismissed there in January 2015 for reason of 'lack of subject matter jurisdiction'[141] as the UN was considered immune from suit, the case went on to the Court of Appeals for the Second Circuit. The Court of Appeals affirmed the District Court's judgment in a decision rendered on 19 August 2016.[142] The claimants attempted to file a petition for a writ of certiorari – and were granted more time to do it – but this is the last action they took regarding the case. Another case on the Haiti cholera crisis, *Marie Laventure, et al. v United Nations, et al.*[143] was denied a petition as well as a rehearing. It is likely that the same fate would have awaited a petition for *Georges* had they completed the process.

While the courts did engage with the argument that section 29 conditions the application of Section 2 (in other words, if Section 29 is violated, the UN cannot invoke the absolute immunity contained in Section 2), they dismissed it on the basis of two principles from contract law: *expressio unius est exclusion alterius* (express mention of one things excludes all others) and the principle that 'conditions precedent to most contractual obligations . . . are not favored and must be expressed in plain, unambiguous language'.[144] The argument of the material breach of Section 29 by the UN was also cast aside, though much more quickly, as the Court of Appeals concluded that the plaintiffs 'lack[ed] standing to raise it'.[145] Indeed, in the absence of 'protest or objection by the offended sovereign', no

[141] *Delama Georges v United Nations* 84 F Supp 3d 246 (SDNY 2015).
[142] *Delama Georges v. United Nations* 834 F 3d 88 (2nd Cir. 2016).
[143] See *Laventure v. United Nations* 279 F Supp 3d 394 (EDNY 2017) and *Laventure v. United Nations* 17 2908 cv (2nd Cir. 2018).
[144] Contained in *Matter of Timely Secretarial Service, Inc.* 987 F.2d 1167 (5th Cir. 1993) and *Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Capital, Inc.* 821 F.3d 297, 305 (2d Cir. 2016) ("Conditions precedent are not readily assumed. . . Thus, in determining whether a particular agreement makes an event a condition, courts will interpret doubtful language as embodying a promise or constructive condition rather than an express condition." (brackets and internal quotation marks omitted).
[145] *Delama Georges v. United Nations* 834 F 3d 88 (2nd Cir. 2016) 19.

individual can raise the issue of a violation of international law.[146] On the contrary, the US executive branch itself had asked the Court of Appeals to uphold the judgment of the District Court.[147]

This decision is unsurprising, particularly as the US courts have recognised that the CPIUN has a direct effect (in the words of the court: to be self-executing) in the US legal system.[148] They are therefore unlikely to go directly against the wording and the intent of the convention, which is to provide absolute immunity to the UN with only a few caveats. In addition, the US itself argued for the maintenance of the UN's immunity and described Article II Section 2 as 'unambiguously' establishing that 'the UN enjoys absolute immunity from this or any suit unless the UN itself waives its immunity'.[149] Subsequently, the courts dismissed the argument of the lack of adequate forum due to lack of standing, avoiding a deeper analysis of why the UN should need absolute immunity with no recourse at all for the claimants even as standing claim commissions ought to have been present. However, other court cases in other jurisdictions attempted to grapple with the difficult combination of the right of access to justice and immunity.

1.4.2. The lack of an adequate alternative forum: a failed attempt at upholding established rules and procedures to the UN

The arguments raised by the plaintiffs in the Haiti case are not new: the issue of the lack of an adequate forum, based on the globally recognised right of access to justice, has been raised in another case involving the United Nations, the case of *Stichting Mothers of Srebrenica v Netherlands*.[150] This case shows that while a method to identify violations of this right emerged within the ECHR system, its application to the UN has caused significant challenges.

1.4.2.1. *Waite and Kennedy*: a hopeful precedent under- and mis-applied

The *Waite and Kennedy* case[151] is a case involving employee contracts with the European Space Agency (ESA). The plaintiffs argued that the decision by German courts to recognise

[146] ibid.
[147] Preet Bharara et al., 'Brief for the United States of America as amicus curiae in support of affirmance' (26 August 2015).
[148] *Brzak v United Nations*, 597 F.3d 107 (2d Cir. 2010).
[149] Preet Bharara et al., 'Brief for the United States of America as amicus curiae in support of affirmance' (26 August 2015), 8.
[150] *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10.
[151] *Waite and Kennedy* v Germany (1999) 30 EHRR 261.

the European Space Agency's immunity violated their right of access to court under Article 6 of the ECHR. The ECtHR's judgment to this rather classic employment dispute constituted an important evolution in Strasbourg's case law on the matter. Indeed, the Court established a three-pronged method to establish if the immunity of an international organisation violates the right of access to court under Article 6.

The Court's method when it comes to determining whether or not there has been a violation of Article 6 relies on a set of criteria. Limitations to the right of access to court are accepted – meaning that there is no violation – if they fulfil a certain set of criteria. These criteria are the following: a) the limitation must not 'restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired';[152] b) the limitation must pursue a legitimate aim and c) there should be a 'reasonable relationship of proportionality'[153] between the mean employed and the aim of the limitation.

The first criterion is rarely considered in the Court – at most getting a cursory mention. It follows that if the legitimate aim and proportionality criteria are met, it would be difficult to argue that the essence of the right is impaired. More time is therefore spent on the second and third criteria, requiring an examination of what is available for claimants by the Court. The Court recognised that 'the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments'[154] and that the immunity from jurisdiction in particular is 'a long-standing practice established in the interest of the good-working of these organisations'.[155] Therefore, it concluded that there was a legitimate aim in the case of *Waite and Kennedy*. As for the proportionality criterion, the Court considered that it had been met by the existence of 'reasonable alternative means to protect effectively [the claimants'] rights under the Convention'.[156]

While the arguments put forward for the legitimate aim criterion show that it would be essentially impossible to argue that it is not met, as it is unlikely that the Court will agree that the proper functioning of international organisations should be ignored in favour of a claimant, the existence of the proportionality criterion and of what is needed to fulfil it – the

[152] ibid para 43.
[153] ibid para 43.
[154] ibid para 47.
[155] ibid para 47.
[156] ibid para 52.

presence of "reasonable alternative means" is a major step forward in the consideration of the right of access to justice in immunity cases.

As important as it is, the case of *Waite and Kennedy* is however only a case involving former/current employees of an international organisation, and as such quite distant from the circumstances of both Haiti and Kosovo. These crises involved **third parties** versus an international organisation. While the Kosovo crisis did not go before a court to futher exemplify the pattern of absolute external immunity, there is a case that not only fits this criterion, but also involves the United Nations and went before the ECHR: *Stichting Mothers of Srebrenica and others v the Netherlands*.[157] This case was a unique opportunity to see if the set of criteria set in *Waite and Kennedy* would be applied – and how – to a case involving the immunity of the United Nations.

1.4.2.2. *Srebrenica*, a disappointing show of restraint by the ECHR confirming the uneasiness to question the UN's absolute immunity

The case addresses the circumstances surrounding the Srebrenica massacre in July 1995, resulting in the death of an estimated 8,000 men, most of them Muslim. The association Stichting Mothers of Srebrenica was created following the massacre by the family members of the victims. The association made its first move in court in 2007, appearing before the Regional Court of the Hague. It alleged that both the Netherlands and the United Nations had 'failed to act appropriately and effectively',[158] leading to the massacre. While the case itself focuses a lot on the Netherlands, the ECtHR also addressed the arguments regarding the UN's immunity, which will be the focus here.

The claimants, anticipating that the UN would use its immunity to argue for a dismissal of the case in front of the Regional Court, argued that 'any immunity which that organisation enjoyed could go no further than was necessary for it to carry out its tasks, and moreover that access to a court was guaranteed by, in particular, Article 6 § 1 of the Convention'.[159] This led to the ECtHR to provide a judgment on Article 6 with regards to the UN, offering a breakdown of the arguments outlined in *Waite* as applied to a case involving a third party.

The first interesting point in the judgment concerns the application of Article 6; more precisely, the Court dedicates two paragraphs to establish that Article 6 is applicable in this

[157] *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10.
[158] ibid para 54.
[159] ibid para 58.

case as it applies to disputes 'concerning "civil" rights'.[160] In that regard, the Court 'accepts that the right asserted by the applicants, being based on the domestic law of contract and tort (see paragraph 55 above), was a civil one'.[161] Paragraph 55 does indeed detail the complaints, including one that the Netherlands 'with the connivance of the United Nations'[162] had committed a tort. The acts that constitute the tort are described as 'sending insufficiently armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.'[163] This assessment of the qualification of the suit by the ECtHR fits awkwardly with what was detailed in the Medrano letter, as these acts fit into his definition of relating with the policymaking functions of the UN, but are recognised to be "civil rights" for the purpose of Article 6 by the ECtHR. While it would be unwise to equal the formulation of "dispute of a private character" with that of "civil rights" in the context of the ECHR, it is one more piece of evidence that the qualification of the Haitian and Kosovar claims (as well as the Srebrenica claims) as addressing policymaking functions is not as clear as the UN pretends it to be.

Secondly, the Court dedicates some time to the question of the UN's immunity. The Court states that the existence of Section 29 'showed that there was a perceived need to avoid situations in which the immunity of the United Nations would give rise to a de facto denial of justice'.[164] The Court then stresses that 'absolute immunity was not acceptable if no alternative form of dispute resolution was available',[165] showing that the ECHR was at least committed to examining even the UN's actions in light of Article 6 and existing alternative modes of settlement.

With this established, the Court then looks at the criteria it had set out in *Waite* and applies them to the situation at hand. On the topic of a legitimate aim, the court states that 'the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments', and that the practice is 'long-standing' and 'in the interest of the good working of these organizations'.[166] Almost identical to the ones in *Waite*, these considerations were enough for the court to assess that there was indeed a legitimate aim in this case. On the issue of the lack of proportionality however, the Court is met with a

[160] ibid para 119.
[161] ibid para 120.
[162] ibid para 55.
[163] ibid para 55.
[164] ibid para 125.
[165] ibid para 134.
[166] ibid para 139.

problem. The criterion was considered to have been met in *Waite* through the existence of alternative means of settlement. Yet in this case it is unquestioned that there were no alternative means of settlement offered, particularly as the standing claims commissions had not ever been set up.[167] Therefore, if the Court were to follow its own jurisprudence, it would reasonably conclude that, since alternative means of settlement were not established, there was no relationship of proportionality between the legitimate aim and the means employed to fulfil the former.

Despite this seemingly obvious obstacle, recognising that there has been a violation of Article 6 with regards to the UN's immunity was not the Court's conclusion. Instead, the Court relied on the uniqueness of the case – not an employment case, but dealing with Security Council resolutions directly and thus the core of the UN's functions – to essentially avoid the issue.[168] The Court insisted that 'it does not follow […] that in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court',[169] adding that this was not a rule the ICJ agreed with for State immunity, and that the decision in *Waite* 'cannot be interpreted in such absolute terms either'.[170] The Court uses the ICJ as support of its argument, even though the ICJ was speaking only in terms of State immunity, and despite its previous decision in *Waite and Kennedy* with regards to an international organisation. The topic of the absence of these alternative means of settlement itself when they should be established is not addressed, as the Court establishes that 'this state of affairs is not imputable to the Netherlands'.[171]

Here, the limits of *Stichting Mothers of Srebrenica* with regards to the Haiti case, and more broadly with regards to the argument of non-access to adequate dispute settlement forum, are clear. It is of course impossible to state with absolute certainty that, in the absence of these means of settlement, the Court would have definitely made the conclusion it made in *Waite and Kennedy*, as other elements proving a link of proportionality may have instead been used. However, in the case of *Stichting Mothers of Srebrenica*, no such additional element was ever brought forward. The absence of the standing claims commissions was recognised and established, as was the precedent of *Waite and Kennedy*, but no alternative

[167] ibid para 163: 'In the present case it is beyond doubt that no such alternative means existed either under Netherlands domestic law or under the law of the United Nations.'
[168] Maria Irene Papa, 'The *Mothers of Srebrenica* Case before the European Court of Human Rights: United Nations Immunity versus Rights of Access to a Court' (2016) 14 Journal of International Criminal Justice 893, 902: 'It [the ECtHR] also referred to the case's uniqueness to dismiss the *jus cogens* argument… It therefore follows that the ECtHR gave great weight to the fact that the UN's core functions were at issue'.
[169] *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10, para 164.
[170] ibid para 164.
[171] ibid para 165.

way of establishing proportionality was presented by the Court. The relationship of proportionality may not have been disproven by the absence of these standing claims commissions, but it was also never proven by the Court. In other words, it can be considered that the proportionality criterion was never actually fulfilled, as the Court has given no evidence that it has. And yet, even with this ambiguity, the Court decided that there was no violation of Article 6.

The foray into ECHR cases has shown that even when courts establish a set of criteria regarding the right of access to a court, they struggle to apply them to cases involving the UN and a third-party claim in the case of peacekeeping missions, even when it is recognised that no standing claims commissions has ever been established. In other words, there is a pattern, from *Georges* to *Stichting Mothers of Srebrenica*, of courts upholding the UN's absolute immunity, even in the face of the absence of alternative means of settlement or SOFA-ordered standing claims commissions. The UN therefore benefits from internal and external absolute immunity. Even outside the procedures of the UN, the Haiti claims have turned out unsuccessful, and the ECHR examples show that the result would almost certainly have been the same had the plaintiffs been able to establish jurisdiction of the Court over their case.

Conclusion to Chapter 1

The Kosovo lead poisoning scandal and the Haiti cholera crisis constitute two examples of third parties attempting to get reparations from the UN following deaths and/or injuries in the context of a peacekeeping mission or territorial administration. While the Haiti case went further than the Kosovo case as the claimants were able to appear before a court, the decisions made both by the UN and the courts show a pattern in protecting the immunity of the UN – in particular, its absolute scope. The procedures within the UN, from the lack of transparency to the continuous failure to establish standing claims commissions, show the internal component of this protection. Court decisions, both domestic and regional, constitute the external element. The conclusion that can be drawn from this brief study is that it is incredibly difficult to get any reparations from the UN even if the claims can reasonably be considered to be of a private law character.

The UN, understandably, protects its own interests, even if it means relying on the vagueness of the qualification of a "dispute of private law character". However, reputational damage is already underway and caused not only by the actions of the peacekeeping missions, but also

by the response of the UN to the cholera and lead poisoning claims. In short, the thinking of the organisation is frustratingly short-termed, ignoring the potential grave impact of the scandals on its reputation and, ultimately, on its functioning.

This focus on the functioning of the organisation as being protected only by absolute immunity finds its root into the concept of functionalism as applied to immunities: functional necessity. In short, it is the idea that the basic functions of an international organisation – its *raison d'être* – cannot be guaranteed without absolute immunity. The next chapter intends to define the concept of functionalism (and its relations with functional necessity) and show its continuous influence on the UN and its immunity.

Chapter 2: The functional necessity narrative: a powerful argument to justify absolute immunity

Introduction

A study of the immunities of the United Nations requires consideration of its origin and its rationale – though it can be argued that the two are closely related in this case. An important clue as to where the starting point ought to be can be found in the Charter itself, with article 105 paragraph 1 stating that the privileges and immunities that the organisation benefits from should be 'as… necessary for the fulfilment of its purposes'.[172] Its paragraph 2 continues that, with regards to officials and representatives of the UN, they should 'similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.'[173]

The combination of both of these dispositions indicates that the immunity of the organisation as planned for in the Charter is meant to be functional, that is, related to its functions. This is commonly[174] pointed out as an example of the application of functionalism, an often met yet not fully described[175] concept that forms both the basis and the rationale behind the immunities of the organisation as well as, in its extreme form, its absoluteness.

The centring of functions for international organisations is an important component of the nature of international organisations in and of itself. Unlike States, organisations are typically created to fulfil a certain mission,[176] either too complex or too broad (and often both) for one State to handle.[177] Because their *raison d'être* is – in theory – specific and

[172] Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (UN Charter) art 105.
[173] ibid.
[174] See for instance Kristen E. Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 363: "functionalism is explicitly advanced by Article 105 of the UN Charter". See also Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 The European Journal of International Law 9, 10, calling functionalism 'the leading – dominant, paradigmatic – theory concerning the law of international organizations'.
[175] Klabbers for instance states that 'functionalism has never been authoritatively defined'. Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 The European Journal of International Law 9, 10.
[176] See Michel Virally, 'De la classification des organisations internationales' in Ganshof van der Meersch (ed), *Miscellanea W.J. Ganshof van der Meersch : studia ab discipulis amicisque in honorem egregii professoris edita* (Emile Bruylant 1972) 373-374: 'Les organisations internationales ne sont créées, dans la pratique, que sur la pression des besoins et en vue d'objectifs bien définis, sinon bien délimités'.
[177] Niels Blokker, 'Proliferation of International Organizations: An Exploratory Introduction' in Niels M Blokker and Henry G Schermers (eds), *Proliferation Of International Organizations* Kluwer Law International, 2001) 11-12. See also Jeffrey L. Dunoff, 'The Law and Politics of International Organizations' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds) *The Oxford Handbook of international Organizations* (1st edition Oxford University Press, Oxford 2016) 63: 'states create IOs to solve cooperation problems that cannot be resolved as well unilaterally or via decentralized solutions'. See also Anna Peters, 'International Organizations and International Law' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds) *The Oxford Handbook of international Organizations* (1st edition Oxford University Press, Oxford 2016) 35: 'the raison d'être of international organizations is the fulfilment of specific tasks (functions), which have become necessary to tackle problems which concern more than one States'.

specialised, it follows that their privileges and immunities are only applicable to the functions they were created to do. This is why article 105 of the UN Charter is written the way it is, with an express mention of both necessity and functions. The task is specific, so the protection must be specific as well, and *attached* to the task. Of course, as this chapter will show, this position is harder to defend when the specificity of the function(s) disappears – or was never really present in the first place – leading to the global acceptance of absolute immunity for a large number of international organisations.

Understanding the rationale behind international organisations immunity (and the UN in particular) is crucial to the broader subject of this thesis. Indeed, in order to be able to propose a reform of the UN immunity system that will address the main issues as I have identified them to be, having the full picture of the rationale of what led to absolute immunity is paramount. Additionally, establishing the origin of absolute immunity will allow for the thesis to go further in its reform proposal. While most authors tend to treat the continual functionalist influence on UN immunities as a given,[178] this thesis makes the argument that one must move past it in order to truly reform the system.

2.1. The definition of functionalism and functional necessity: a difficult exercise

Any analysis of the basis of the UN's immunity should start with an exercise of definition. Anyone familiar with the issue will know that the concepts of "functionalism" and "functional necessity" are most commonly seen as the rationale behind international organisations immunity. The use of "concept" to qualify functionalism is used here in its most general definition, ie a general idea or notion. Terms such as "theory" are used fairly frequently by authors: Klabbers talks of functionalism as being a 'principal-agent theory',[179] Kuntz writes of a 'functional theory'.[180] Mitrany seems to prefer the use of the term 'functional approach'.[181] An approach is also the word used by Peter H. F. Bekker when writing about functional necessity,[182] while Blokker states that the rationale of international

[178] See Introduction, Chapter 5.
[179] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 The European Journal of International Law 9, 10.
[180] Josef L. Kunz, 'Privileges and Immunities of International Organizations' (1947) 41 American Journal of International Law 828, 837-838.
[181] David Mitrany, 'The Functional Approach to World Organization' (1948) 24 International Affairs (Royal Institute of International Affairs 1944) 350.
[182] See for instance Peter H. F. Bekker *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers 1994) 5.

organisation immunity is founded on the 'principle of functional necessity'.[183] The introduction of "functional necessity", obviously linked to functionalism but at the same time seemingly distinct, complicates matters. The vocabulary used by Boon does nothing to clarify the situation: there are 'concepts of functionalism'[184] and a 'functional necessity doctrine'.[185] Noticeably, there are authors who use both terms (often with little explanation between the two), authors who clearly separate the two, and authors who pick one of them (usually functional necessity if they write on the specific topic of privileges and immunities of a given organisation). This section will constitute an exercise in attempting to define the terms as they will be used in this thesis.

2.1.1. The theory of functionalism: the reason for international organisation

The theory of functionalism is difficult to track in the doctrine on international organisations immunity. This is compounded by the use of the term "functional necessity", which presents an obvious linguistic link with functionalism and yet is sometimes presented as wholly separate.

The way to understand this complex link is by recognising that "functionalism" tends to mean different things for different authors. In his attempt at reconstructing the theory, Jan Klabbers wrote that the many authors who wrote on functionalism 'may have held different opinions on many issues' but ultimately all shared the 'basic insight that international organizations are functional entities, set up to perform specific tasks for the greater good of mankind and, as such, in need of legal protection.'[186] However, while this statement certainly sounds comforting, one cannot ignore that some of them outright rejected the theory of functionalism despite embracing the theory of international organisations being given specific functions to fulfil. Michel Virally wrote for instance that '[l]e choix du concept de fonction comme base de la théorie de l'Organisation internationale n'entraîne nullement l'adoption des thèses fonctionnalistes'.[187] Indeed, one way of thinking about functionalism is on a more socio-political scale: as a theory centred on the idea of international organisations having well-defined functions for the ultimate goal of achieving global

[183] Niels Blokker, 'International Organizations: the Untouchables?' (2013) 10 International Organizations Law Review 259, 260.
[184] Kristen E. Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 377.
[185] ibid 344.
[186] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 (1) The European Journal of International Law 9, 11.
[187] Michel Virally, *Le droit international en devenir: Essais écrits au fil des ans* (Presses Universitaires de France 1990) para 13.

welfare. This conception of functionalism has been presented in the past as an alternative to federalism[188] and the creation of a "super-State". In this world order, entities such as international organisations participate in the creation of 'a better and more peaceful world system'.[189]

2.1.1.1. Functionalism as an alternative to anarchy or a Super-State

This conception of functionalism with regards to international organisations 'pictures a world of nation-States, in which apolitical, specialized organizations carry out technical functions as the agents and in the service of those states, without infringing their sovereignty'[190].

With this conception of functionalism, international organisations would be the perfect middle ground between 'international anarchy'[191] and a unique world government through conquest of territories. This anxiety around the possibility of a world government[192] transpired through Articles 104 and 105 of the UN Charter. With their focus on functions, the idea was to reassure that the UN was not to become a "Super-State". The ICJ itself sought to prevent any "Super-State" interpretation from its 1949 advisory opinion establishing the UN as an international person: '[t]hat is not the same thing as saying that it is a State, which it certainly is not… Still less is it the same thing as saying that it is a "Super-State", whatever that expression might mean'.[193]

In that sense, functionalism is presented as a healthy alternative to either anarchy or global federalism. At the centre of this imagery are international organisations, all intended to share the same general purpose of global welfare.

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[188] David Mitrany, 'The Functional Approach to World Organization' (1948) 24 International Affairs (Royal Institute of International Affairs 1944) 350.
[189] Gayl D. Ness and Steven R. Brechin, 'Bridging the Gap: International Organizations as Organizations' (1988) 42 International Organization 245, 246.
[190] Guy Fiti Sinclair, 'Towards a Postcolonial Genealogy of International Organizations Law' (2018) 31 Leiden Journal of International Law 841, 863-864.
[191] ibid 864.
[192] David Mitrany, 'The Functional Approach to World Organization' (1948) 24 International Affairs (Royal Institute of International Affairs 1944) 350, 360.
[193] *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 11th April 1949 [1949] ICJ Rep 174, 179.

2.1.1.2. Functionalism explaining the reason why international organisations are created

In this broad interpretation of functionalism, it would not only be a seemingly neutral alternative to anarchy or a Super-State, but also the basis behind the creation of international organisations.

Indeed, this aspect of functionalism centres on the goal of achieving global welfare. Overall, the intention of following functionalism is meant as a guarantee of peace. This guarantee does not only come through the organisation of the world order (nation-States and apolitical international organisations), but also through what these organisations aim to *do*. This way of thinking is summed up by Fatouros explaining that functionalism posits the establishment of a 'working peace system' which ought to be brought about through 'a shifting of individual loyalties from national to international values' through 'a gradual process of continuing collaboration across national borders among persons working within international organisations engaged in serving particular human needs'.[194] Bekker adds that the theory of functionalism 'addresses the concept of the international organisation, i.e. **what instrumental value international organisations in general should have in society**'.[195]

It is this value, the achievement of global welfare through cooperation, that is the reason why international organisations are created according to this conception of functionalism. If one were to sum up in very broad terms, functionalism generally answers the "why" international organisations are created. But with the question of why comes the question of how these organisations work on a day-to-day basis. This is where the concept of functional necessity comes in.

2.1.2. Functionalism and functional necessity

Following the difficulties of establishing what functionalism represents for international organisations, the link between functionalism and functional necessity is just as unclear. Strictly speaking, functional necessity relates to the privileges and immunities an organisation is granted. It 'furnishes not only the basis but also the standard of the extent of

[194] Arghyrios Fatouros, 'On the Hegemonic Role of International Functional Organizations' (1980) 23 German Yearbook of International Law 9, 17.
[195] Peter H. F. Bekker *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers 1994) 44 (emphasis added).

the privileges and immunities required',[196] in that it is the reason for immunities (functions must be protected) but also sets the scope (only to the extent that the privileges and immunities are necessary to protect the function).

While some separate the two as clearly as possible, they are for others intrinsically linked. This section will argue that the link between the two is a corollary one, although there is now some confusion between functionalism and functional necessity as an attempt to strengthen immunity.

2.1.2.1. Functional necessity as a corollary of functionalism

The assessment that functional necessity is a corollary of functionalism is not unanimous in the doctrine. While the confusion between the different terms in the introduction of this chapter shows that the link between the two is recognised (particularly in the newer contributions), not every author agrees or has specified what the link is.

Bekker, for instance, explains that the theory of functionalism is 'at a macro level', while functional necessity is 'a micro concept related to the identifiable purposes and functions of any given organisation'.[197] However, while this explanation seemingly creates a link between the two, Bekker insists that his approach to the concept of function is to consider it 'in an objective and neutral sense',[198] one that 'significantly differs from the theory of "functionalism"'.[199] This interesting distinction – all the while recognising that the theory of functionalism *does* have an impact,[200] even on a neutral study of the function of an international organisation – has been criticised,[201] as the separation of the two concepts can be quite artificial. Indeed, the choice of analysing international organisations based on their functions implies that the choice of a specific function has been made. In that, Singer writes, there are 'political dimensions'[202] to the purpose/function of an international organisation.

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[196] Josef L. Kunz, 'Privileges and Immunities of International Organizations' (1947) 41American Journal of International Law 828, 847.
[197] Peter H. F. Bekker *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers 1994) 44.
[198] ibid.
[199] Peter H. F. Bekker *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers 1994) 43.
[200] ibid 44, albeit carefully worded: 'with a view to interpreting the proper purposes and functions of an organisation, recourse may be have to be had to the broader, socio-political phenomena that lay behind its creation'.
[201] Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 107: 'However, the mere fact that a view of function has been created, becomes established and can be observed within the organization does not make this view "neutral."'
[202]ibid 106.

Any given function does not appear out of thin air; it was conceived, thought of, and enacted by the drafters of any given constituent instrument of an international organisation. It would be difficult to argue that said drafters managed to be entirely neutral and apolitical when creating an international organisation. The very act of creating an international organisation may in fact be considered a political act in and of itself.[203]

However, while the link between functionalism and functional necessity is not authoritatively established, the *definition* of functional necessity itself is not controversial. Niels Blokker, writing about privileges and immunities, presents the concept of functional necessity as the following: 'international organizations need immunity in order to be able to perform their functions'.[204] Bekker writes of the functional necessity concept that it posits that 'an entity shall be entitled to (no more) than what is strictly necessary for the exercise of is functions in the fulfilment of its purposes'. The UN Charter itself explicitly mentions the necessity of the fulfilment of the Organisation's purposes as a justification for the granting of immunities.[205] The link with functionalism is not entirely apparent from these definitions alone however.

The first argument for a corollary link between functionalism and functional necessity might seem obvious, but it is relevant. Both deal with the concept of function, that is, 'an organisational task devoted to the service of particular needs'.[206] Functionalism as explored above treats a function as something that is given to an international organisation to handle in its uniquely capable way; while for functional necessity, a function is something that both ought to be protected and aims at limiting the privileges and immunities of a given organisation. In other words, functionalism deals with function in a broad sense, while functional necessity deals only with privileges and immunities. Ultimately, the function can be the same, but it will be assessed generally by functionalism and applied specifically as justification for, and limit to, privileges and immunities for functional necessity. The relationship between the two concept is akin to a funnel.

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[203] In that sense, we can already see the weaknesses of the argument that functionalism aims to create apolitical organisations.
[204] Niels Blokker, 'International Organizations: the Untouchables?' (2013) 10 International Organizations Law Review 259, 260.
[205] Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (UN Charter) art 105, para 1.
[206] Arghyrios Fatouros, 'On the Hegemonic Role of International Functional Organizations' (1980) 23 German Yearbook of International Law 9, 16.

The link does not stop there. Indeed, functional necessity has a second component: the protection given by immunities must be necessary. This idea that international organisations need immunities in order to fulfil their purpose ties in with the broader concept of functionalism: without privileges and immunities, an organisation would not be able to exist properly, and the reason for its existence would also not exist. Functional necessity protects the very concept of functionalism as a theory about a world view distinct from complete anarchy or federalism.

In more general terms, functional necessity speaks the language of functionalism. If one were to attempt a timeline, functionalism would come "first", establishing the reason why international organisations are created. Functional necessity would come "second", setting up the protection for these international organisations to thrive.

This corollary link explains why Klabbers can write that 'resort is usually had to functionalism, more particularly "functional necessity", in order to explain and delimit the privileges and immunities of organisations'.[207] However, the relationship between the two concepts is not just strictly corollary: they both feed into each other, in a confusion that benefits the argument for the broadest scope possible of privileges and immunities.

2.1.2.2. The confusion between functional necessity and functionalism: a strengthening of immunity

If functional necessity is the corollary of functionalism, it can be said that it is functionalism as applied to privileges and immunities. There are two ways to understand this statement. The first one is that the concept of an organisation having functions is to be applied to the concept of privileges and immunities, that is, that privileges and immunities should protect the organisation's function. It is the interpretation developed above. The second one, however, is that functionalism *in as much as it is the rationale for international organisation creation* is linked to privileges and immunities. In other words, it is considering that privileges and immunities are not only necessary because they protect a given organisation's function, but because they protect the reason why international organisations exist in the first

[207] Jan Klabbers, *An introduction to International Organizations Law* (4th edn, Cambridge University Press 2022) 133.

place, and consequently the functionalist world view that apolitical, benevolent organisations are the only option if one wants to achieve global welfare and peace.[208]

This interpretation gives a lot of weight to privileges and immunities, putting them in the position of being indispensable for the survival of international organisations, and thus of global welfare. Klabbers explains it best when writing that '[f]unctionalism … suggests that international organizations generally perform specific functions in the service of the common good and their work, thus, ought to be facilitated – the 'salvation of mankind' may be at stake.'[209] By linking privileges and immunities to the salvation of mankind, any criticism of them or their scope becomes quasi-impossible to formulate. Even in cases involving a large number of casualties like in Haiti, could this really be held up in opposition to the fulfilment of global welfare? Additionally, as will be seen below, this conception of functionalism gives an apolitical, good-doers image to international organisations that they can rely on, regardless of whether or not that is true. An attack on their privileges and immunities is an attack on their existence as organisations that only ever intend to fulfil worthy purposes.

In short, the definitions of functionalism and functional necessity and that of their relationship to one another is a complex exercise. However, a few common elements do emerge: functionalism is a theory that aims to explain the creation of international organisations; functional necessity is mostly mentioned with regards to privileges and immunities; and there is an undeniable link between the two. As a general rule, these next two parts will use functional necessity when dealing with the concept of privileges and immunities as protection an organisation's given function, and functionalism when relating them to the broader goal of achieving global welfare and the salvation of mankind. It is however to be expected that the cited authors have their own definitions and delimitations of the terms. The aim of this detailed study of the origins of functionalism and functional necessity was to settle on a delimitation of the terms as applied to the rest of the thesis. International organisations, and the UN in particular, were founded with these concepts as their rationale and as the justification of their existence; it – functionalism in particular – is their *raison d'être*.

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[208] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 (1) The European Journal of International Law 9, 18: 'since the interests of all are being served, it follows that the functioning of organizations must be facilitated by law and, from this, stem such staples of functionalist teachings as the doctrines of attributed and implied powers or the existence of privileges and immunities'.
[209] Jan Klabbers, 'Notes on the ideology of international organizations law: The International Organization for Migration, state-making, and the market for migration' (2019) 32 Leiden Journal of International Law 383, 385.

2.2. The characteristics of functionalist organisations

While some of these characteristics were already explored in the sections above, this part intends to dissect the particularities of a functionalist organisation as functionalism sees it. Three main characteristics will be explored in this section: the idea that international organisations are good-doers, their apolitical nature, and the rejection of State influence. It is these characteristics, particularly the relationship to States and the idea that international organisation benefit from the assumption that there are always benevolent and a net positive on the international stage, that will be used to examine the UN and critically assess whether it still deserves the protections it is given as a "functionalist" organisation.

2.2.1. International organisations as apolitical and technical

Functionalism sees international organisations as (aiming to be) generally apolitical and technical, based on the works of experts rather than politicians.

This commitment to an organisation being built around a specific function can be seen in some the earliest writing on functionalism. Using the example of the United States following Roosevelt's election in 1932, Mitrany sees the development of functions as an almost automatic process,[210] and one free of political influence.[211] The emphasis on a specific field of activity (in other words, a function) supports the later argument for international organisations of being given specific functions that States could not fulfil on their own. Early examples include the International Telecommunication Union established in 1965 and the International Opium Commission from 1909, as well as the early collaborations on rivers such as the Central Commission for the Navigation of the Rhine (founded in 1815). From their designation, there is already a focus on one specific function, or one specific entity (the river). A later example of international organisations explicitly calling themselves "functional", and thus technical and apolitical, is the International Bank for Reconstruction

[210] David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (The Royal Institute of International Affairs 1944) 21: 'Every function was left to generate others gradually, like the functional subdivision of organic cells; and in every case the appropriate authority was left to grow and develop out of actual performance'.
[211] ibid 25.

and Development (IBRD, or World Bank) arguing with the UN on the obligation to refuse membership for States still applying policies of apartheid.[212]

The idea of organisations being given functions and being as a result separated from politics is one of the core tenets of functionalism. Mitrany wrote on how 'different' 'the core of the political [is] from the functional approach',[213] asserting as well that 'functional "neutrality" is possible' (as opposed to political neutrality). And because of the technical nature of the function – in that it defines its own scope and limits – any change due to the evolution of a particular situation or technological progress is far easier than for political institutions. In that sense, the apoliticisation of international organisations is both a characteristic and necessary for the good functioning of the organisation.[214] The focus on function is considered a net positive: because it is neutral, and because its scope of action is quantifiable and verifiable, political considerations (should) have no place in the process. In short, the arrangement wished for by early functionalists in the first half of the 20th century is that of international organisations organised around the distribution of specific, technical functions, far from any political considerations, for the overall goal of welfare.[215]

Thus, a certain vision of functionalism has emerged and is consistently referred to in the doctrine. It emphasises '"low", as opposed to "high" politics, and on the de-politicization of international cooperation by replacing diplomats and politicians with jurists and experts.'[216] A link can be made to the global welfare goal of functionalism, as a 'basic feature' of functionalist thinking is 'an acceptance of a radical conceptual as well as operational separation of power from welfare'.[217] This separation between power and welfare extends to the people in charge of either. Politicians are distrusted, while technical experts are preferred. The emphasis on experts versus politicians is what gives international

[212] Samuel A. Bleicher, 'UN v. IBRD : A Dilemma of Functionalism' (1970) 24 International Organizations 31, 42, citing the general counsel of the Bank : 'I should like to add that, in my opinion, the prohibition contained in express terms in Section 10 or Article IV of the Articles of Agreement of the Bank is no more than a reflection of the technical and functional character of the Bank as it is established under its Articles of Agreement.'
[213] David Mitrany, 'The Functional Approach to World Organization' (1948) 24 International Affairs (Royal Institute of International Affairs 1944) 350, 357.
[214] David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (The Royal Institute of International Affairs 1944) 33 : '… devolution according to need would be as easy and natural as centralization, whereas if the basis of organization were political every such change in dimension would involve an elaborate constitutional re-arrangement'.
[215] David Mitrany, 'The Functional Approach to World Organization' (1948) 24 International Affairs (Royal Institute of International Affairs 1944) 350, 358.
[216] Jens Steffek, 'The cosmopolitanism of David Mitrany: Equality, devolution and functional democracy beyond the state' (2015) 29 International Relations 23, 25.
[217] Arghyrios Fatouros, 'On the Hegemonic Role of International Functional Organizations' (1980) 23 German Yearbook of International Law 9, 16.

organisations their image of being apolitical. If the experts are the ones bringing in global welfare, and not politicians, they are both inherently good and inherently apolitical. This is of course a simplified way of speaking of *any* international organisations (even the most precise, specific, and technical ones – as seen above, their very creation can be considered to be a political act), but this point of view has stuck over the years.[218]

The characterisation of a perfect functionalist international organisation as being technical, apolitical, and centred on the notion of a well-defined function immediately opposes it to another entity on the international stage: States.

2.2.2. The influence of the State: both creator and threat

One cannot speak of international organisations without mentioning States. Indeed, according to Klabbers, functionalism is 'a principal–agent theory, with a collective principal (the member states) assigning one or more specific tasks – functions – to their agent.'[219] There are two, seemingly contradictory elements in any such relationship: firstly, the agent must have a certain amount of autonomy,[220] otherwise the purpose of setting such a relationship is useless; secondly, the agent 'is considered to be under general and comprehensive control of the principal'[221], and cannot run wild. This cannot be clearer than in the relationship between States and international organisations in the conception of functionalism: while the former are the creators of the latter, functionalism also presents States as one of the main threats to international organisations. This Janus-faced conception of the State in relation to a functionalist international organisation is a central component of

[218] It is a point of view effectively summed up in Jean-Pierre Murray, 'The UNODC and the Human Rights Approach to Human Trafficking : Explaining the Organizational (Mis)Fit' (2019) 10 Journal of International Organizations Studies 107, 109 : 'The organizations matter because they perform some well-needed action, and are supposedly effective because they use technical expertise to tackle specific technical problems'. Additionally, neo-functionalism has a more ambivalent position on the apolitical position of international organisations (ibid.). This is supported by the increasing politicisation of international organisation – examples include the departure of the US from the ILO due to politics and the barring of South Africa from the UPU due its apartheid policies. Today's international organisations cannot necessarily claim to be completely apolitical. However, functionalism presents the apolitical stance as more of an ideal to reach.

[219] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 (1) The European Journal of International Law 9, 10.

[220] Richard Collins and Nigel D. White, 'Moving Beyond the *Autonomy-Accountability* Dichotomy: Reflections on Institutional Independence in the International Legal Order' (2010) 7 International Organizations Law Review 1, 1: 'Since the end of the First World War, and throughout most of the twentieth century, enhancing the functional autonomy of intergovernmental organizations to restrain the unbridled sovereignty of States has been something of a noble vision amongst international lawyers in seeking the progress of their discipline and the achievement of the elusive rule of law in international affairs.'

[221] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 (1) The European Journal of International Law 9, 25.

both functionalism and the narrative that has since materialised around modern international organisations.[222]

Indeed, the literature and the international organisations themselves have an ambiguous relationship with States. On the one hand, States create international organisations. On a very basic level, States are the ones assigning function(s) to an entity, as a way to address an issue that they cannot solve on their own. This recalling of events certainly puts States in a, if not positive, at least neutral light. At the same time, the concept of functionalism is often defined by its position as an alternative to a world government or a Super-State.[223] The nation-State 'has become too weak to secure us equality and too strong to allow us liberty',[224] leading to a strong rejection by functionalists of anything resembling a federalism that would put States as the centre. This ties in with the idea that a functional approach is different from a political approach; a functionalist international organisation will be apolitical, while a State will inevitably have considerations of power.[225] In this angle, the position of the State makes logical sense: it is a creator because its own way of dealing with specific issues is not adequate.

The ambivalence appears when the State is not only presented as a creator out of necessity but also as a constant and serious threat to international organisations' autonomy.[226] This image of the State strays far from the one drawn in the paragraph above. This imagery goes from presenting the State as a too-tight bridle on international organisations in fear of the 'Frankenstein problem'[227] to the State and its institutions (particularly courts with regards to privileges and immunities) as a threat to an organisation's functions, from creator to destructor. International organisations have certainly taken note of this potential role of the State. It is particularly apparent through the first iterations of immunity for large organisations – the League of Nations and its Memorandum on Privileges and Immunities,

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[222] See 2.3.2.
[223] David Mitrany, 'The Functional Approach to World Organization' (1948) 24 International Affairs (Royal Institute of International Affairs 1944) 350.
[224] David Mitrany, *The Progress of International Government* (Allen & Unwin 1933) 140.
[225] Arghyrios Fatouros, 'On the Hegemonic Role of International Functional Organizations' (1980) 23 German Yearbook of International Law 9, 15: 'The state is seen as primarily devoted to the pursuit of power and domination.'
[226] See for instance Thomas G. Bode, 'Cholera in Haiti: United Nations Immunity and Accountability' (2016) 47 Georgetown Journal of International Law 759, 781, describing the UN as 'a disadvantaged and potentially disliked deep-pocketed foreigner, in national courts around the world' and litigation as being potentially 'unfavorable judgements from cooked-up charges heard by courts acting at the will of unhappy governments'.
[227] See Andrew Guzman, International Organisations and the Frankenstein Problem' (2013) 24 European Journal of International Law 999. Throughout the article, the author compares States to the doctor and international organisations to the monster that would expand well beyond the functions it has been given. But contrary to the doctor, States are aware of the risk and exercise a greater amount of control over their creation, which the author deems too severe.

which focused on its relationship with its Host State.[228] Similar arrangements can be found with the United Nations and its Headquarters Agreement with the United States.[229] Most importantly though, the argument that international organisations are to be independent from States, and that privileges and immunities guarantee this independence, is regularly used by international organisations themselves in court cases involving their immunities. For instance, the International Finance Corporation (IFC) argued[230] that the purpose of immunity for international organisations 'is entirely distinct from the purpose of foreign sovereign immunity', in that State immunity is based on reciprocity while their immunity is 'to allow such organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country.'[231] In his letter, Assistant Secretary-General and Senior Coordinator for Cholera Response Pedro Medrano indicates that the immunity the UN benefits from is 'a vital condition for any international organization to exist',[232] adding that its absence would make the UN 'reluctant to establish offices, implement projects and conduct operations in their Member States',[233] implying that the lack of immunity would make it impractical for international organisations to have a presence on the territory of their Member States. Such protection would not be necessary if the UN did not fear undue interference from States in its operations.

This argument that States can be dangerous for an international organisation and its purposes and that privileges and immunities provide a necessary defence is also usually accepted by the courts. The European Court of Human Rights recognised as part of the 'principles established by the Court in its case-law' that 'the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.'[234] This indicates that the threat of State interference is not only accepted but also largely uncontested.

[228] Communications from the Swiss Federal Council Concerning Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office, entered into by the League of Nations and the Swiss Government on 18 September 1926, (1926) 7 League of Nations Official Journal 1142 annex 911a.
[229] See for instance Agreement Regarding the Headquarters of the United Nations (signed 26 June 1947, entered into force 21 November 1947) 11 UNTS 11.
[230] In the Supreme court case *Jam v. International Finance Corp.*, 586 U.S. ___ (2019). For a detailed analysis of the case and its repercussion on the field of international organisation immunities, see Chapter 4.
[231] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019), 8. Interestingly, this line of argument focuses on interference from a State's *courts* and not its government, indicating a fear of instrumentalisation of its courts by a State determined to interfere.
[232] Letter from Pedro Medrano (Assistant Secretary-General and Senior Coordinator for Cholera Response to Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque (24 November 2014), para 100.
[233] ibid para 100.
[234] *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10, para 139.

Furthermore, the accent is often put on absolute immunity in particular – this is what the IFC was trying to keep – as the necessary extent of this protection.[235]

Additionally, no assessment of the relationship between States and international organisations can be complete without a mention of implied powers. Recognised by the International Court of Justice in its 1949 advisory opinion on Reparations for Injuries Suffered in the Service of the United Nations, this legal doctrine states that 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication. as being essential to the performance of its duties'.[236] The ICJ is consistent on this matter, as it continues to recognise the existence of 'subsidiary powers which are not expressly provided for in the basic instruments which govern their activities'[237] to international organisations. This expansion of international organisations' powers puts States in a peculiar position once again. The functions (or purposes, as those terms are often interchangeable in practice) in an organisation's constituent document are the product of their own doing, but by recognising the existence of implied powers, the Court opened the door to an expansion of an organisation's functions (and by association of the competence required to fulfil them) that is not in control of the States.

International organisations are therefore not under the sole command of States: they may be their creators, but the implied powers and the privileges and immunities they specifically use to defend themselves against undue interference by States show the complexity of this principal-agent relationship.

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[235] See Thomas O'Toole, 'Sovereign Immunity Redivivus : Suits against International Organisations' 4 Suffolk Transnational Law Journal 1, 4, noting that in the Broadbent v. Organization of Am. States, 628 F.2d 27 (D.C. Cir. 1980) case, the argument that international organisations ought to have broader immunities than States was 'not only by the defendant OAS, but also in briefs filed as *amici curiae* by the United Nations, the International Bank for Reconstruction and Development, the Inter-American Development Bank and the International Telecommunications Satellite Organization'.

[236] *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 11th April 1949 [1949] ICJ Rep 174, 182.

[237] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 8th July 1996 [1996] ICJ Rep 226, para 25.

2.2.3. International organisations as good-doers

Functionalism helps to present international organisations as overall good-doers.[238] This goes back to the very essence of Mitrany's functionalism, as the idea is that international organisations are created to achieve global welfare. There is however a need for a slight temperament. The argument this section makes is not that international organisations face no criticism – chapter 1 of this thesis alone exemplifies the numerous critiques the UN received about its handling of the Haiti cholera crisis. What it does argue is that, despite the criticisms, international organisations still have a generally positive image in that they are seen as *necessary*. There is an established link there with the technical and apolitical image as well as the pursuit of welfare: because an international organisation is created to fulfil a specific goal a State cannot, and because it is considered to be (or ought to be) more of a gathering of experts than that of politicians, and because the overall goal is global welfare, the worst thing it can be is a necessary evil – and the best thing it can be is necessarily good.

This view of international organisations remains despite the reputational damage endured by some of them – the UN chiefly amongst them, as chapter 1 of this thesis shows. This positive image is promoted firstly by none other than the organisations themselves. Consistently, in every letter addressed to the various critiques of its actions in Kosovo and especially Haiti, the UN reaffirms its commitment to combat what afflicts the region… all the while defending its decision not to grant reparations. The most egregious example is the letter from the Under-Secretary General Pedro Medrano, who spends most of his letter justifying the UN's response to the Haitians' claims detailing the ways the United Nations is helping Haiti fighting the epidemic, stating that '[t]he Secretary-General is personally committed to ensuring that the United Nations does everything in its power to help Haiti combat and eliminate cholera'.[239] Considering the context of the letter – that is, the continued refusal of the UN to offer reparations to the Haitians affected by the epidemic – this reaffirmation of the organisation's commitment to address the crisis on an aid-based basis rings hollow at best, and cynical at worst. It is an example of how the UN sees itself with regards to Haiti: they may have caused the epidemic, but they want to focus on what they can do to help,

[238] Described and decried in Eyal Benvenisti, 'Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?' (2018) 29 European Journal of International Law 9, 11, writing about the 'laudatory stance on the trustworthiness of international bureaucrats' in the jurisprudence of the ICJ.

[239] Letter from Pedro Medrano (Assistant Secretary-General and Senior Coordinator for Cholera Response to Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque (24 November 2014), para 2.

putting forward solutions rather than apologies.[240] Specifically, the letter mentions measures relating to water and sanitation. In court, the UN defended itself and its immunities, following the exact viewpoint that Klabbers described a "functionalist" would do: 'the functionalist may (and probably will) deplore the outbreak of cholera but would maintain that immunity law protects the UN and does so for good reason.'[241]

While it is of course expected for international organisations to present themselves as a positive force, the impact of this positive image can also be felt in the doctrine, albeit with some criticism. As an example, while deploring the restrictions that States place on international organisations, Andrew Guzman declares that, in his own view, 'the net impact of IO activity is quite clearly positive, notwithstanding the dangers inherent in the Frankenstein problem'.[242] As a critique, José Alvarez denounces the 'culture of the General Convention's absolute immunity' which is 'where the venerable organization, the hope of the international community, is accorded privileges exceeding those accorded to states because of the greater good that it does'.[243] Despite this pushback, other authors reject the very idea that absolute immunity for international organisations can be challenged.[244] Even when arguing for human rights-based limitations for the immunities of other international organisations, the UN can often stand out as the one organisation that, because of its special place linked to its extensive and important functions, should be allowed to keep its absolute immunity.[245] Moreover, the perception also exists amongst public international lawyers 'that IOs are by and large good things, performing a number of important, even necessary, tasks in the world'.[246]

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[240] Of course, this focus is not entirely surprising considering the timing of the letter, which still relied on the first expert panel that concluded that what happened in Haiti was a combination of different circumstance and not the fault of any one singular actor (this point of view would change, particularly with the decision of the second expert panel and general pushback).

[241] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 (1) The European Journal of International Law 9, 68.

[242] Andrew Guzman, International Organisations and the Frankenstein Problem' (2013) 24 European Journal of International Law 999, 1025.

[243] José Alvarez, 'The United Nations in the Time of Cholera', (*American Journal of International Law Unbound*, 4 April 2014) <http://www.asil.org/blogs/united-nations-time-cholera> accessed 6 February 2024.

[244] See for instance Niels Blokker, who despite asserting that international organisations can now be seen as wrong-doers instead of good-doers, insists that 'the existing standard immunity rules should remain as they are' – and the implementation of the rules that should change instead. Niels Blokker, 'International Organizations: the Untouchables?' (2013) 10 International Organizations Law Review 259, 275.

[245] Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 88: 'Given the special privileges and status of the United Nations, it is appropriate that member states should allow the organization to put its own house in order… However there is no basis for extending this principle to other international organizations'.

[246] Guy Fiti Sinclair, 'The Original Sin (and Salvation) of Functionalism' (2016) 26 The European Journal of International Law 965, 968.

In conclusion, international organisations – and the UN in particular, even when other organisations are criticised – continue to benefit from a certain amount of goodwill both before the courts and in the doctrine. This positive reputation is linked to functionalism: these organisations are meant to be apolitical, technical, and "do good" for global welfare. As such, they need the immunities necessary to continue to be good actors on the world stage. If they do not have the necessary immunities, they are open to challenges from hostile States (including through their courts) and would be unable to fulfil their functions. This viewpoint is defended by the organisations themselves, creating a powerful narrative buttressing absolute immunity as an unchangeable element of international organisations law.

2.3. Functionalism and the United Nations

The effects of this perception of functionalism on international organisations is where lies the "genius" of functionalism in that it presents international organisations as 'neutral and apolitical, solely functional entities, which do not compete with States over the good life but, instead, help to achieve it once it is decided what the good life shall be and which can serve the interests of all precisely by focusing on a specific functions'.[247] Yet, a glance at the characteristics of functionalism regarding the organisations themselves shows that few organisations today can be considered the idealised functionalist example of what an organisation ought to be. However, despite these shortcomings, international organisations benefit from a general good reputation that is used to justify their immunities – and their extent. The UN, as the subject of this study, is no different. This section aims to show that functionalism and functional necessity have evolved from being a reasonable rationale to the existence and extent of the UN's immunities to becoming a powerful narrative the UN relies on, leading to situations such as Haiti.

2.3.1. A justification for the absolutism of its immunities

As seen above, functionalism and functional necessity are linked: functional necessity is the expression of functionalism, here in the category of privileges and immunities. Moreover, the UN benefits from a special place in the doctrine in that its immunities and their extent are rarely challenged. This is because the UN is generally considered to be a special organisation, necessitating all the protection it can get.

[247] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 (1) The European Journal of International Law 9, 18.

The basis for the UN's immunities and their extent can be found in the UN Charter, article 105. It explicitly describes functional immunities, ie only to the extent that they are necessarily needed for the UN to fulfil its purposes. The CPIUN endorses absolute immunity in its section II. The use of the term "functional" is not to be understood as opposed to 'absolute', but rather as it has been presented throughout this chapter. It is indeed unlikely that the CPIUN would adopt a radically different position on the extent of the UN's immunities than the Charter did, especially considering the fact that the two documents were adopted only a few months apart.[248] It is expected, and by now globally accepted, that the CPIUN is just a much of a reflection on the drafters' intent regarding immunities than the Charter is.[249] In that sense, there was no big evolution: when the Charter indicates that the UN's immunities are "functional", it is not intended as a limit on its immunities. It is instead based on the functions of the United Nations, and it is the extent of which that gives its immunities their extent in turn. This is the reason why, if the CPIUN were to be terminated tomorrow, its replacement would almost certainly be extremely similar, at least in terms of its dispositions on the immunities of the organisation.

The identification of what is an organisation's given function(s) is always a thorn in the side of the functionalist. However, in the case of the UN, it would seem logical to make the assumption that the overall purposes (or functions) are the ones listed in article 1 of its Charter: to 'maintain international peace and security', to 'develop friendly relations among nations', to 'achieve international cooperation in solving international problems', and to 'be a centre for harmonizing the actions of nations in the attainment of these common ends'.[250] These functions have two characteristics. Firstly, they are very broad. In fact, maintaining peace and security alone can include a large amount of the UN's activities, including peacekeeping missions such as the one that brought cholera in Haiti. Secondly, they are a call back to the goals of the early functionalism as theorised by Mitrany, particularly in that it mentions 'international cooperation' in order to solve 'international problems of an

[248] The Charter was signed on 26 June 1945, while the CPIUN was adopted on 13 February 1946.
[249] See Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 84: 'It seems unlikely that the General Convention enlarges the privileges and immunities embodied in the U.N. Charter. The General Convention was opened for accession early in 1946132 when the Charter surely still represented the views of the United Nations membership.'
[250] Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (UN Charter) art 1.

economic, social, cultural or humanitarian character'.[251] The notion of global welfare is quite apparent here, although the UN seems to take on this goal on its own.[252]

These lofty goals are the ones setting the tone for the extent of the immunities,[253] as according to functional necessity: the organisation only gets immunities to the extent that it needs them to fulfil its functions. The catch here is that the UN's functions are so broad that nothing other than absolute immunity would suffice. With the addition of ad hoc creations such as the peacekeeping missions, and in keeping with the implied powers doctrine, the UN has now transformed into a formidable behemoth, rendering the argument that its immunities should be reduced quite difficult to make.

However, the argument for reducing the UN's immunity is difficult to make only if one buys the entire narrative around functionalism and functional necessity, including the risk posed by States and the necessity of this extent even in cases where the UN has very clearly engaged one of the caveats listed in article 29 of the CPIUN.

2.3.2. Functionalism/functional necessity: from rationale to narrative

At its creation, and despite its broad ambitions, it would have been difficult to argue that the UN could not certainly use a bit of protection in the form of immunity. Back then, it was only 'still a fledgling organization with limited activities and relatively few employees'.[254] A certain amount of protection would make sense, particularly considering the fact that it was in the immediate post-War period. An interference from a hostile State was conceivable, and with how young and relatively small the organisation was, it could have had a severe impact.

Today, the situation is much different. The UN now accounts for thousands of employees and has operations active throughout the world, eleven of which are peacekeeping missions. What it does has also evolved: notwithstanding the ad hoc creation of the peacekeeping missions, their range of actions has expanded over the decades, from cease-fires to, in some

[251] ibid.
[252] This itself is a representation of how David Mitrany saw the UN's tasks: to 'protect functional organizations', implying that it cannot claim to be one in and of itself. The UN would certainly disagree with this second assertion.
[253] Jens Steffek, 'The cosmopolitanism of David Mitrany: Equality, devolution and functional democracy beyond the state' (2015) 29 International Relations 23, 26: 'For functionalists, the task determines the geographical scope of the cooperative endeavour, the competencies of the international institutions, their instruments and the resources needed, both material and immaterial.'
[254] Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 54.

cases, a veritable State-building goal.[255] In some cases, the UN has even acted as a de facto State, acting in place of institutions that were absent.[256] Its position on the international stage and its level of influence is unmatchable by any other organisations, and its reach extends directly to vulnerable populations – with at times disastrous results.[257] Yet, despite this immense influence and power, the UN continues to rely on its absolute immunity and the good reputation helped by the perception given by functionalism. As seen above, this reliance is so established that the doctrine struggles to argue against it, and any reform proposals tend to focus more on the better application of existing rules, refusing to consider a change in the UN's immunities.[258]

I argue that this state of affairs is because the UN's need of absolute immunity has evolved from being a logical assumption to a narrative, one that is firmly established in international organisations law. In fact, it is the concept of functional necessity itself, the idea that the UN needs absolute immunity to achieve its goals, that is the narrative.

This narrative is centred on the UN as a protagonist, trying to achieve its broad goals connected to the – certainly positive – idea of global welfare. The "enemies" of our protagonist (doubling as its creators) are the States, though they take different forms. There is the main form, what the ECtHR refers to as the 'interference by individual governments'.[259] The most likely scenario would be of a State not granting immunities within its own territory, and opening the UN to legal action. However, the CPIUN counts 162 parties, with no reservations made on the provision stating that the UN has absolute jurisdictional immunity. The second possible form that an enemy State could take is through its courts. This statement is not meant to confuse an executive government – who would make the decision to not sign the CPIUN – with the court of a given State. Rather, when mentioning a "court", the fear is that an individual (possibly supported by a State) could be able to successfully argue before a court that the UN does not benefit from absolute immunity, or that it should not.

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[255] An example of State-building can be seen in East Timor with the United Nations Transitional Administration in East Timor. Its mandate included, inter alia, 'to support capacity-building for self-government' and 'to assist in the establishment of conditions for sustainable development'. UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272, 3.

[256] A prime example of that is the UNMIK operation in Kosovo, mentioned in Chapter 1.

[257] This thesis focuses on Haiti as an example of this direct and severe impact, but a mention can also be made of the numerous allegations of sexual misconduct and rape against peacekeepers.

[258] The various shortcomings of most of the reform proposals in the doctrine will be explored in detail in Chapter 5.

[259] *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10, para 139.

But even this concern is overblown. In the US system, the CPIUN is considered self-executing,[260] and this decision still stands despite the recent decision by the US Supreme Court to restrict the immunity of certain international organisations to what States currently have.[261] While not a domestic court, the ECtHR fully accepted the narrative that the UN needed immunities for protection, and considered this to be a legitimate aim to prevent third parties from accessing a court.[262] However, this distrust of courts has led to multiple authors stating that no municipal/domestic court should ever assess whether an organisation's immunity does serve to fulfil its function.[263] This section does not intend to discuss whether this part of the narrative is correct; it only intends to show the existence of a narrative.

While the States are the enemies in this narrative, there are "helpers", or allies, along the way. The most important one is the notion that, because of the functionalism basis, an international organisation like the UN ought to have privileges and immunities to protect itself not just because its functions are broad, but also because of its goals (particularly global welfare and international cooperation). This is supported by the ECtHR stating that '[t]he importance of this practice [the immunity from jurisdiction international organisations have] is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society.'[264] This argument directly contributed to the court recognising the granting of immunity to the UN in this case as a legitimate aim. In fact, the fact that it has privileges and immunities is in and of itself a helper/ally. Without them, according to functional necessity, the UN would not be able to achieve its – very important, very functionalist – goals.

Of course, the discussion on narratives could go even further, with functionalism itself being a narrative. After all, it was originally presented as a good alternative to either anarchy or a Super-State, but there is no guarantee that this was the only one, or even that a Super-State (or anarchy, although that might be harder to defend) would be a "bad thing" for the world. As this thesis centres on privileges and immunities, and as the rationale behind their absolute

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[260] *Brzak v United Nations*, 597 F.3d 107 (2d Cir. 2010).
[261] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019).
[262] *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10, para 139.
[263] See for instance Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 63-64: 'It would be inappropriate for municipal courts to cut deep into the region of autonomous decision-making authority of institutions such as the World Bank.' See also August Reinisch 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2013) 10 International Organizations Law Review 572, 581: 'it appears difficult to argue that, as a matter of principle, domestic courts are not apt to solve such international issues' and 587 : 'closing the accountability gap through national courts should be the measure of last resort (*ultima ratio*) only, not the new matter of course'.
[264] *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10, para 139.

extent is functional necessity, the focus had to narrow down somewhere. However, it must be acknowledged, even if just in the background, that functionalism *in and of itself* is also a narrative.

It is this narrative that allows the UN to avoid being forced to deal with the Haiti crisis head on. It is also this narrative that allows it to redirect the focus on what it does well for Haiti, because its goals – and by extension, the protections given to achieve them – are more important than granting them reparations.

Conclusion to Chapter 2

This chapter aimed at establishing the relationship between functionalism and functional necessity, the main characteristics of functionalism, and its impact on the UN. From functionalism flows functional necessity, the idea that the UN needs absolute immunity in order to achieve its goals. This narrative allows it to "get away" with never having its absolute immunity seriously questioned. However, the UN still received criticisms for its handling of the Haiti crisis, prompting the question of the case of a "lighter" form of absolutism for other international organisations, specifically financial organisations, as a potential model for the UN. The next chapter will examine the immunities of other international organisations, showing the continued influence of the UN system, and with it the narrative of functional necessity, even when financially oriented international organisations have some form of limited immunity in their constituent instruments.

Chapter 3: The continued reliance on the functional necessity narrative by international organisations

Introduction

Broadly speaking, international organisations are mostly designed to address issues that have 'outgrown the national legal order'[265] such as global peace and security and human rights. As such, they are given limited functions to fulfil, and the immunities that goes with it. This, of course, is the functional necessity narrative described in the previous chapter. It was present when the immunity system of the UN was set up, and it continues to be of a significant importance and influence on more recent international organisations.[266] Thus, even taking into account the vast differences between international organisations, the narrative underpinning them is the same.

International organisations are now considered to be 'concrete and relevant public authorities that form part of a global governance framework',[267] and as such their activities 'affect [our] daily lives, indirectly or directly'.[268] This growing involvement in people's lives, alongside the multiplication of international organisations in recent years,[269] result in an increasing number of opportunities for legal cases involving them and their effects on daily life. Particularly, there has been recent pushback on international organisations' immunities through employment disputes. Examples such as the Waite and Kennedy[270] and Beer and Regan[271] cases in the European Court of Human Rights have shown that IOs are no longer able to completely avoid jurisdiction. International organisations then not only offer an interesting perspective because of the similar ideas behind their creation, but also because their evolution had led to a body of cases and studies that allows us to see two different patterns when it comes to immunities. First, most international organisations follow the UN's immunity system – absolute immunity with a functionalist justification. However, second, financial institutions – development banks in particular – have chosen a different method, allowing themselves to be sued in order to retain the trust of their shareholders. It is this latter category that this chapter will mostly focus on.

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[265] Niels Blokker, 'Proliferation of International Organizations: An Exploratory Introduction' in Niels M Blokker and Henry G Schermers (eds), *Proliferation Of International Organizations* Kluwer Law International, 2001) 11-12.
[266] Yohei Okada, 'The immunity of international organizations before and after Jam v IFC: Is the functional necessity rationale still relevant?' (2020) 72 Questions of Law Zoom-in 29, 35 (footnote 26).
[267] Niels Blokker, 'International Organisations: the Untouchables?' (2013) 10 International Organisations Law Review 259, 261.
[268] ibid.
[269] Jan Klabbers, *International Law* (4th edn, Cambridge University Press 2023) 90.
[270] *Waite and Kennedy* v Germany (1999) 30 EHRR 261.
[271] *Beer and Reagan v Germany* (1999) 33 EHRR 19.

This voluntary limitation seemingly presents an interesting cog in the machine of the functional necessity narrative. Indeed, as it was explained in the previous chapter, this narrative allows the UN (but more broadly international organisations in general) to acquire a significantly broad scope of immunities. Why then would a set of international organisations voluntarily limit themselves, seemingly for better functioning? The reasoning for such a limitation is indeed purely functionalist, understood here to be considered as a justification for the scope of immunity (which can be restrictive). At first glance, there is little evidence of the influence of the *narrative* of functional necessity that, when given the opportunity, international organisations will fit as much as they can under the remit of the nebulous term 'function'. Could these financial organisations then be used as examples for the UN to follow, on how to limit one's immunities even in a very controlled manner as a way to function "better"?

This chapter ultimately intends to show that this particular limitation is not as exemplary as it may seem. Not only does it not solve many of the criticisms already faced by the UN – the confusion around acts that can be considered "torts" chiefly among them – but, when given the chance, none of these organisations jump at the chance of voluntarily limiting their immunities. In other words, if a domestic legislative act gives them broader immunities than their constituent acts, they will not follow the functionalist justification but the functionalist narrative, and thus are a lot more similar to the UN than originally thought.

3.1. An overview of international organisations' practice of immunities

The rationale underpinning the UN's immunity system is generally recognised to be based on functionalism.[272] The UN Charter established the basis for functional immunity in its article 105, leading to the de facto absolute immunity in the CPIUN. This choice of dealing with immunities, motivated by the desire to prevent the organisation from being unable to function and failing to fulfil its mandates, was then adopted by a large number of international organisations. Indeed, while international organisations had existed since the beginning of the 19th century, usually dealing with specific, technical matters such as rivers[273] or means of communication,[274] their popularity increased exponentially after 1945,

[272] See functionalism chapter.
[273] See for instance the Central Commission for Navigation on the Rhine, founded in 1815.
[274] See for instance the International Telegraph Union, founded in 1865.

particularly in the realm of regional organisations.[275] An overview of international organisations immunities following the UN shows that the system established in its Charter and General Convention was largely followed by other international organisations. The UN system – and absoluteness – became the blueprints for many international organisations when it came to dealing with their own immunities (3.1.1). There are however a few examples of other international organisations or entities following a slightly different system, namely the European Union (EU), the Organisation for Security and Cooperation in Europe (OSCE) and the Organisation for Economic Cooperation and Development (OECD). These entities will be briefly studied, showing both their potential as inspiration for reform and their specificities rendering a direct comparison with the UN too complex to be feasible (3.1.2).

3.1.1. The UN as a model since 1945

While the main focus of this chapter will be to identify and study international organisations that do not follow the UN model of de facto absolute immunity, it would not be complete without addressing the elephant in the room: the vast majority of international organisations do follow the UN on the questions of privileges and immunities. There is of course an argument to be made that they are simply following the functionalist doctrine, which pushed to an extreme can give way very easily to absolute immunity despite the apparent opposition between the two concepts. Yet, the organisation with the most influence since 1945, and presented as a model on privileges and immunities by scholars remains the UN. It does not mean that the other organisations did not follow the functionalist doctrine: *they did*. More precisely, they followed the functionalist doctrine as applied to the UN to justify its extensive privileges and immunities, and thus followed the functional necessity narrative which underpins the UN's absolute immunity.

The first, and most obvious example, is that of the Convention on the Privileges and Immunities of the Specialised Agencies (thereafter CPISA), adopted on 21 November 1947, about a year after the CPIUN. These specialised agencies, some of them founded before the UN itself, include the Food and Agriculture Organisation (FAO), the International Labour Organisation (ILO), and the International Monetary Fund (IMF), amongst others. In terms of their privileges and immunities, the wording is the exact same as the CPIUN, in Section 4 this time:

[275] Jan Klabbers, *International Law* (4th edn, Cambridge University Press 2023) 90.

> The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.[276]

The "caveats section" – Section 29 in the CPIUN – is also identical, and can be found at Section 31 of the CPISA:

> Each specialized agency shall make provision for appropriate modes of settlement of:
> (a) Disputes arising out of contracts or other disputes of private character to which the specialized agency is a party;
> (b) Disputes involving any official of a specialized agency who by reason of his official position enjoys immunity, if immunity has not been waived in accordance with the provisions of section 22.[277]

These similarities are not particularly surprising, considering that the CPISA was established only a year after the CPIUN and is part of the same UN infrastructure. However, the modelling of IO immunity after the UN continues far beyond that of organisations that are part of the UN circle.

Indeed, both the CPIUN and the CPISA had soon 'become the standard since adoption'[278] for future organisations. Beyond the wording of the treaties on privileges and immunities, there are even similarities in the way they are introduced in the constituent instrument of these IOs – as a functional conception of privileges and immunities at first, placing the emphasis on the 'necessity' being the criteria for the degree of privileges and immunities, then as a much stricter de facto immunity in the instrument on privileges and immunities of the organisation. The international organisations following the UN model do not just copy its de facto absolute immunity; they also follow the functional necessity justification at the origin of it. This narrative is therefore given a new life in these modern international organisations, ensuring its continued relevance on the international stage and in the domain of immunities.

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[276] Convention on the Privileges and Immunities of the Specialized Agencies (opened for signature 21 November 1947, entered into force 2 December 1948) 33 UNTS 261, article III, section 4.
[277] ibid article III, section 16.
[278] Niels Blokker, 'International Organisations: the Untouchables?' (2013) 10 International Organisations Law Review 259, 269.

In his article on international organisations and immunities, Niels Blokker goes into detail about three international organisations that follow the UN model: the 2002 Privileges and Immunities Agreement of the International Criminal Court (ICC Agreement); the 2009 Privileges and Immunities Agreement of the Association of South East Asian Nation (ASEAN Agreement); and the 2012 Privileges and Immunities Agreement of the International Renewable Energy Agency (IRENA Agreement).

As Blokker points out, a lot of the same elements present in the CPIUN/CPISA are present in these constituent agreements and their subsequent agreements on privileges and immunities. Indeed, 'the foundation of privileges and immunities has remained unchanged: functional immunity',[279] as can be seen in the Charter of the ASEAN and the Rome Statute.[280] Likewise, the equivalent to Section 2 of the CPIUN/Section 4 of CPISA is present in all three constituent instruments,[281] with the exact same wording save for the name of the organisation.[282] Finally, on dispute resolution, the dispositions are once again very similar, with only the ASEAN lacking one for disputes arising out of a contract or a dispute of private character. All three also have a waiver in place.

These are not the only organisations following the same model. The North Atlantic Treaty Organisation (NATO) – albeit more contemporary to the UN than the previous three – is another example of an international organisation adopting the same approach as the UN and its specialised agencies. The Agreement on the status of the North Atlantic Treaty Organization similarly disposes that

> The Organization, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as any particular case the Chairman of the Council Deputies, acting on behalf of the Organization, may expressly authorize the waiver of this immunity.[283]

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[279] ibid 270.

[280] See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, article 48 paragraph 1; Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223, article 17, paragraph 1.

[281] See Agreement on the Privileges and Immunities of the International Criminal Court (adopted 9 September 2002, entered into force 22 July 2004) 2271 UNTS 3, article 3; Agreement on the Privileges And Immunities of the Association of Southeast Asian Nations, <https://asean.org/wp-content/uploads/2021/09/Agreement-on-Privileges-and-Immunities.pdf > accessed 7 August 2023, article 3, paragraph 1; IRENA Doc. A/3/13 < https://www.irena.org/-/media/Files/IRENA/Agency/About-IRENA/Assembly/Third-Assembly/A_3_13_Privileges-and-Immunities.pdf> accessed 7 August 2023, article III.

[282] Niels Blokker, 'International Organisations: the Untouchables?' (2013) 10 International Organisations Law Review 259, 270: 'Literally the same words are used as those in the General Convention and in the Specialized Agencies Convention: they provide for immunity "from every form of legal process, except insofar as in any particular case the organization has expressly waived its immunity"'.

[283] Agreement on the Status of the North Atlantic Treaty Organisation, national representatives and international staff (adopted 20 September 1951, entered into force 18 May 1954) 200 UNTS 3, article 5.

Part V, Article 24 of the status uses the same wording as Section 29 of the CPIUN, disposing that the Council 'shall make provision for appropriate modes of settlement' for, amongst others, 'disputes of a private character to which the Organization is a party'.[284]

Similarly, the African Union follows the same model as the UN through its Organisation of African Union-era General Convention on Privileges and Immunities.[285] Article II of the convention uses the same wording as the CPIUN and CPISA, detailing that the Organisation 'shall enjoy immunity from every form of legal process'[286] except in case of a waiver.

In short, international organisations or various size, scope, and mandates follow the UN system of immunity: setting out functional immunity in their constituent instruments, then establishing de facto absolute immunity in a subsequent treaty on privileges and immunities. Before addressing the category of international organisations that seemingly do not follow the strict model of the UN – and the category that will be our main focus for this chapter – a few exceptions need to be addressed.

3.1.2. The exceptions to the strict UN model: the EU, the OSCE, and the OECD

While the UN model is transcendent amongst international organisations, there are some exceptions. The rest of this chapter will focus on the more obvious category, where there is an explicit lack of absolute immunity in the constituent instruments of some international organisations. However, this part of the chapter will concentrate on the exceptions that do not fall into an easily discernible pattern. It will follow a *sui generis* institution (the EU), an institution with no privileges and immunities as its very qualification of an "international organisation" is unclear (the OSCE), and an organisation distinguishing privileges and immunities based on the State a legal claim is brought in (the OECD).

3.1.2.1. The curious case of the European Union

The European Union (EU) is one of the most relevant regional organisations in recent years. While it might seem obvious to include such an organisation in this study, it is excluded from the main argument of this chapter for the reason that a study of the immunities of the

[284] ibid article 24.
[285] Still in force for the African Union. See Tiyanjana Maluwa, 'Ratification of African Union treaties by member states: law, policy and practice' (2012) 13 Melbourne Journal of International Law 636, 657.
[286] General Convention on the privileges and immunities of the Organization of African Unity (concluded 25 October 1965) 1000 UNTS 393, article II.

EU shows a *sui generis* concept of privileges and immunities for an international organisation, one based partly on the EU as an organisation, and partly on the EU as a quasi-State.

There are dispositions on EU immunity within the constituent instruments. For instance, article 343 of the Treaty on the Functioning of the European Union (TFEU) provides that '[t]he Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks',[287] a wording very similar to the CPIUN. The EU does however open itself to potential claims, therefore not necessarily following the UN model to the extent the ASEAN or NATO does. Indeed, article 340 of the TFUE states that '[i]n the case of non-contractual liability, the Union shall, in accordance with the general principle common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.[288] With the addition of dispositions in the TFUE relating to contractual claims, this indicates that the Union 'a priori accepts that it can be confronted with claims'[289] While a parallel can be drawn between this disposition and article 29 of the CPIUN (sans the mention of alternative modes of dispute settlement), other dispositions of the treaties of the EU increase the contrast between the two systems of immunities. Article 274 of the TFUE indeed states that '[s]ave when jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'.[290] By keeping the option of appearing before a domestic court open, the EU does not therefore have full jurisdictional immunities, a rare phenomenon amongst international organisations.[291] In practice, as the Court of Justice of the European Union (CJEU) has an extensive jurisdiction, the jurisdiction of these domestic courts will be 'residual at best'.[292] In that sense, any non-contractual claims emerging in a member State and involving the Union is open to domestic jurisdiction, though the practice is much more likely to lead to the case being dealt with by the CJEU. Nonetheless, this is an instance of a difference, at least in theory, between the EU and other

[287] Treaty on the Functioning of the European Union (Treaty of Rome, as amended) article 343.
[288] ibid article 340.
[289] Ramses A. Wessel 'Immunities of the European Union' (2014) 10 International Organisations Law Review 395, 404.
[290] Treaty on the Functioning of the European Union (Treaty of Rome, as amended) article 274. See Pierre Schmitt, Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations (Edward Elgar 2017) 296: 'Article 274 TFUE opens the door to national jurisdictions of Member States in disputes for which the ECJ has no jurisdiction'.
[291] Isabelle Pingel, 'Les immunités de l'Union Européenne' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2014) 302-303.
[292] Ramses A. Wessel 'Immunities of the European Union' (2014) 10 International Organisations Law Review 395, 402.

international organisations. Claimants have access to a judge, albeit it is the CJEU practically every time, thus providing a solution to the thorny issue of the right of access to justice that plagues other international organisations.

This unusual approach to immunity amongst international organisations is compounded by the fact that, for agreements with non-EU states, the rules of immunities are once again different. Indeed, while the rules for the immunities of the EU on the territory of its member States was a matter of *droit primaire*, the rules regulating its immunities on the territories of non-member States are conventional in origin.[293] With regards to military or civilian missions deployed in a third State, with the SOFAs and SOMAs[294] providing extensive privileges and immunities to the mission members, or with regards to the permanent delegations of the UN in third States, these immunities are very broad.[295] In the case of the military or civilian mission, they apply to every member of the mission (not just the high-ranking ones), in a situation that has been described as 'unusual'.[296] As for the permanent delegations, a few examples stand out. Via an Executive Order, the Mission to the United States of America of the Commission of the European Communities is granted immunities analogous to that of a State, equating it to a diplomatic mission.[297] In Canada, the EU 'shall have in Canada the legal capacities of a body corporate and shall, to such extent as may be necessary for the performance of its functions, have the privileges and immunities set forth in Articles II and III of the Convention',[298] with the "Convention" here being the Convention on the Privileges and Immunities of the UN.

As such, there is a duality in how the EU handles its immunities, with very different rules inside its borders and outside.[299]

In sum, the EU is a very particular case in the study of privileges and immunities amongst international organisations. Its special position as (at has been argued) a quasi-federal State can be seen through the reliance on diplomatic privileges and immunities for certain

[293] Myriam Benlolo-Carabot, 'Les immunités de l'Union européenne dans les États tiers' (2009) 55 Annuaire Français de Droit International 783, 797-798.
[294] Status of Forces Agreement (SOFA) for military missions, Status of Mission Agreement (SOMA) for civilian missions.
[295] Isabelle Pingel, 'Les immunités de l'Union Européenne' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2014) 308.
[296] Frederik Naert, *International law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) 250.
[297] Executive Order 11689 (5 December 1972).
[298] European Communities Privileges and Immunities Order (C.R.C., c. 1308) para 3.
[299] Isabelle Pingel, 'Les immunités de l'Union Européenne' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2014) 308.

agreements – particularly with third States. An important point in how this particular immunity system functions is the presence of the CJEU. Indeed, cases mostly end up there rather than in front of a domestic court, and the Court's extensive jurisdiction allows it to deal with cases even involving nationals not from the EU. This is in contrast with the UN, where the closest equivalent to a body with jurisdiction to deal internally with claims are the never-established standing claims commissions.

Yet the results in practice are the same: there are no cases where the EU was not ultimately able to claim immunity successfully. In short, while the EU certainly constitutes a potentially interesting comparison point, the particularity of the organisation on the international stage (its *sui generis* nature, but also its regional component, in that the EU deals with "third States", unlike the UN) makes a more direct comparison infinitely more complex. A note can be made however on the similarities between the EU to a State, as well as its position as a quasi-federalist organisation. It would indeed be difficult to argue that the UN is alike the EU on these points, but, on the rejection of a similarity to a State, it must be said that the UN has acted as an interim State before.[300] With regards to federalism, there is an interesting call back to the birth of functionalism as applied to international organisation evoked in Chapter 2 of this thesis. Indeed, the desire to create a "third category" between total anarchy and a world government fuelled the development of functionalism and international organisations, particularly after the Second World War. It is therefore interesting to see similarities between the UN – still ostensibly functionalist – and the quasi-State EU.

3.1.2.2. The OSCE: an international organisation that is not an international organisation

The Organisation for Security and Cooperation in Europe, formerly known as the Conference on Security and Cooperation in Europe, was founded in 1975 by the Helsinki Final Act. From the start of its existence, the organisation was not considered to be an international organisation. The Helsinki Final Act itself was meant to bind the signatory States 'politically, but not legally'.[301] Indeed, the document was 'certainly not an international treaty'.[302] In fact, specific dispositions for the host State of the conference leading to the Final Act (Finland) were added to the text of the agreement itself that while

[300] See the Kosovo case, to be developed in the next chapter.
[301] Miriam Sapiro, 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation' (1995) 88 American Journal of International Law 631, 631.
[302] Isabelle Pingel, 'Privileges and Immunities of the Organisation for Security and Cooperation in Europe (OSCE)' (2018) Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper 2018-37, 1.

the document was to be transmitted to the Secretary-General of the United Nations, it was 'not eligible for registration under Article 102 of the Charter of the United Nations'.[303] As article 102 of the UN Charter dealt with the registration of 'every treaty and every international agreement entered into by any Member of the United Nations',[304] the Helsinki final act was never meant to be a treaty. Subsequent conferences and summits did not clarify the situation of the OSCE and its legal qualification, despite efforts led by some of its member States to clarify the situation and eventually install the OSCE as a fully-fledged international organisation,[305] with the status and legal personality of one – and consequently the corresponding privileges and immunities.

Therefore, while the OSCE might bear the name of one and has similar institutions (a Secretary general, for instance), it cannot be considered an international organisation on a legal basis. As a result, its privileges and immunities – which were never defined – cannot use the same system the UN and other international organisations did. This lack of defined status has been linked to the idea of a flexible and dynamic organisation.[306] Its member States remain divided over the question of its status,[307] but for some authors its position is that of a de facto international organisation.[308] It is in this context that its lack of uniform system of privileges and immunities ought to be addressed.

Firstly, the argument that the OSCE is a de facto international organisation is used to fuel calls for a uniform system of privileges and immunities. The OSCE is not an organisation functioning harmoniously and problem-free in the absence of clear privileges and immunities – quite the contrary in fact. This can be seen from the general assertion that 'work would be much easier if it [the OSCE] enjoyed a clearly defined status'[309] to the OSCE's own report to the Ministerial Council that 'the lack of clear legal status for the OSCE has led to administrative difficulties and financial implications for the day-to-day

[303] Conference on Security and Cooperation in Europe, Final Act (adopted in Helsinki, 1975), available at <https://www.osce.org/files/f/documents/5/c/39501.pdf> accessed 9 August 2023, 59.
[304] Charter of the United Nations (signed on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (UN Charter) article 102.
[305] Miriam Sapiro, 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation' (1995) 88 American Journal of International Law 631, 634.
[306] Isabelle Pingel, 'Privileges and Immunities of the Organisation for Security and Cooperation in Europe (OSCE)' (2018) Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper 2018-37, 2.
[307] Russia and France were said to be in favour of the OSCE as a fully-fledged international organisation, for instance.
[308] Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (14th edn, Dalloz 2018) 180.
[309] Christian Tomuschat, 'International Law: Ensuring the survival of mankind on the eve of a new century: General course on public international law' (1999) 281 Recueil des cours de l'Académie de droit international de la Haye 9, 148.

work of the Organisations' executive structures'.[310] There is no equal and uniform protection for the OSCE's staff. Indeed, without a uniform system in the form of a single agreement for all member States, the OSCE has to negotiate bilateral agreements when it can, costing 'a substantial amount of money'.[311] In fact, 'the amount lost annually as a direct result of its lack of uniform privileges and immunities is approximately 1 per cent of the total OSCE budget'[312] – around 14 million euros.[313] More importantly, the report established a direct link between this lack of uniform rule on privileges and immunities and the 'lack of progress in developing the operational capacity and progressing the aims of the Organisation'.[314]

In short, while the OSCE is an example of an entity with a large presence on the global stage – to the extent that it is considered a de facto international organisation despite the lack of legally binding constituent document – the lack of a uniform system of privileges and immunities have caused a number of issues over the years, both in terms of budget and in terms of achieving its aims. With regards to the goals of this chapter – looking at how other international organisations deal with their immunities – there is an obvious caveat with the OSCE in that it is not an international organisation. It did however ought to be mentioned for two reasons. The first is that it constitutes an exception to the current systems of privileges and immunities on the global stage, unlike a State but also unlike most international organisations. The second reason is linked to the reform this thesis aims to propose: the OSCE should not be used as an example of things to do, but of things not to do. Rather than argue that the UN should have no immunities whatsoever, any reform proposal will be stronger if the aim is to keep the uniformity of the system, even if it ends up being more restrictive than the current one. In other words, the proposed immunity system may not be *à la carte* – doubly so for the UN, which dwarves the size of the OSCE in terms of numbers of member States 193 to 57. The OSCE experience shows that a reform of immunity system has better chances to succeed if the change is to be uniform, equal across the board, even with an intention to reduce. Failure to do so would only lead to total chaos and a complete inability for the UN to function, mirroring – and duplicating – the difficulties faced by the OSCE since its creation.

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[310] Organisation for Security and Cooperation in Europe (OSCE) 'Report to the Ministerial Council on strengthening the legal framework of the OSCE in 2012' (7 December 2012) MC.GAL/15/12, 1.
[311] ibid.
[312] ibid.
[313] See <https://www.osce.org/who/86> for the overall annual budget of the OSCE, accessed 10 August 2023.
[314] Organisation for Security and Cooperation in Europe (OSCE) 'Report to the Ministerial Council on strengthening the legal framework of the OSCE in 2012' (7 December 2012) MC.GAL/15/12, 1.

In sum, the OSCE gives a useful glimpse into a non-uniform system of immunities, with all the instability and loss of money it causes. In that, while the OSCE ought to be mentioned simply because of its position and influence on the world stage as well as its unique position of a de facto international organisation with no legal status or personality, it also ought to be mentioned as an example of what not to do when dealing with the idea of a reform of the UN system.

Before moving on to the development banks and other financial institutions, there is one last organisation to mention: the Organisation for Economic Cooperation and Development (OECD), and its divided set up of rules on privileges and immunities.

3.1.2.3. The OECD: a vulnerable set up based on multiple bilateral agreements

Its origin is in the Organisation for European Economic Cooperation (OEEC) established in 1948, which changed its name and geographical range to include non-European States in 1960 with the adoption of the Convention on the Organisation for the Economic Cooperation and Development,[315] with its dispositions on privileges and immunities in Supplementary Protocol 2.[316] This protocol sets out different systems of immunity *depending on the signatory State*. States that were part of the original OEEC follow Supplementary Protocol 1 for the privileges and immunities owed to the organisation and their officials in their territories. Canada is to have a specific agreement with the Organisation; the United States follow their International Organisations Immunities Act (IOIA), and all other States (either joining after 1960 or non-parties to the OECD) follow any agreement between them and the Organisation. To date, the OECD has concluded 18 agreements with State parties (19 counting Canada) and 6 with non-member States.[317]

In theory, this creates a system running the same risk as the OSCE mentioned above: a lack of harmonisation causing discrepancies between different systems of immunities. In practice however, despite the different treaties concluded by the OECD and its member States plus a handful of non-member States, the OECD broadly benefits from de facto absolute privileges and immunities, including in the non-member States. In Chile, a member-State that joined the organisation after 1960, the Organisation and its property 'wherever located and by

[315] Convention on the Organisation for Economic Cooperation and Development (with Supplementary Protocols Nos. 1 and 2) (signed on 14 December 1960, entered into force on 30 September 1961) 888 UNTS 179.
[316] ibid article 19.
[317] See <https://www.oecd.org/legal/privileges-immunities-agreements.htm> accessed 14 August 2023.

whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity'.[318] This exact same wording is found in the agreement with a Ukraine,[319] a non-member, and in Supplementary Protocol 1.[320] It is also the same wording found in the CPIUN, the CPISA and countless other international organisations' privileges and immunities agreements. In other words, despite the different agreements in place, the OECD follows the same system of immunity as the UN, showing the clear inspiration.

There is however one exception: the United States, with which the OECD has no bilateral agreement, relying instead on their Immunities Act. This was not a problem for years, as the Immunities Act granted absolute immunities to all the organisations under its remit. However, with the recent changes brought on by the *Jam* case,[321] the IOIA now no longer guarantees absolute immunity, as it is now dynamically linked to the Foreign Sovereign Immunities Act (FSIA), a much more restrictive act based on the recent evolution of State immunity.[322] The result of this change of precedent now means that the OECD is subjected to the rules of State immunity in one domestic legal order – that of the US – while retaining absolute immunity in others, such as France, Chile, or Ukraine. This causes an inequality of treatment of the same organisation; in fact, the OECD now has less protection in theory in one of its member States than in a third party it has an agreement with, such as Ukraine. The OECD therefore finds itself in a complicated situation: whereas before it had to deal with multiple agreements on privileges and immunities, they were all broadly similar, particularly when it came to the immunities of the Organisation itself. It now has to deal with a different level of immunity based on the State it is dealing with. In short, while the OECD may have generally functioned in much the same way as many other international organisations – with de facto absolute immunity despite the divided set up of bilateral agreements – this may now change due to a precedent set in the domestic sphere of one of its member States. In the end, much like the OSCE, this situation shows the limits of the fragmentation of the rules on privileges and immunities for a single organisation between multiple (mostly) bilateral

[318] See Agreement between the Government of the Republic of Chile and the Organisation for Economic Co-operation and Development on the Privileges, Immunities and Facilities granted to the Organisation, <https://www.oecd.org/legal/Chile_PandI_Agreement.pdf> accessed 14 August 2023.
[319] See Agreement between the Government of Ukraine and the Organisation for Economic Co-operation and Development on the Privileges, Immunities and Facilities granted to the Organisation, <https://www.oecd.org/legal/41384557.pdf> accessed 14 August 2023.
[320] Convention on the Organisation for Economic Cooperation and Development (with Supplementary Protocols Nos. 1 and 2) (signed on 14 December 1960, entered into force on 30 September 1961) 888 UNTS 179, Supplementary Protocol No. 1, article 2.
[321] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019). See II.A.3 in this chapter for more details.
[322] The FSIA reflects the recent evolution from absolute to restrictive immunity in the State immunity discourse. See Chapter 4.

agreements, combined with the limits of the reliance on domestic laws on privileges and immunities.

In conclusion of this Part 1, most international organisations tend to follow the model set by the UN and its Specialised Agencies when it comes to their privileges and immunities. While there are some exceptions, these are usually linked to the specificity of the organisation itself – *sui generis* like the EU, or not an actual, legal international organisation like the OSCE. The case of the OECD also shows the dangers of choosing an à la carte system, particularly when one of these agreements rely on domestic legislation susceptible to change without the organisation's input. It ought to be noted however that even in bilateral agreements, the OECD still follows the UN system of de facto absolute immunity, even in the territories of non-member States provided they have concluded an agreement. There is however an exception to the rule. While the examples of the EU and the OECD are indeed different from other international organisations, the basis of privileges and immunities and the wording remains the same as the UN. The differences rest mostly on how the system is set up, but not on the system itself. There is however a category of international organisations whose constituent instruments are a lot less ambiguous, and where immunities are not **in theory** absolute: financial institutions, in particular development banks.

3.2. Multilateral Development Banks and the World Bank Group: a *different* system?

This chosen category of organisations will be collectively called "multilateral development banks" or MDBs. This is because they generally share the same specific immunity system, in a way that sets them apart from the few exceptions mentioned above (the EU, the OSCE, and the OECD). Indeed, while the three other institutions were different in a unique manner, there is a clear pattern with MDBs. These institutions have broadly the same functions – they are more differentiated by their geographical scope of actions than anything else[323] – and their system of immunity is different from the UN in the same way across the board. In other words, this chapter is based on a patterned difference, not a unique one specific to a single organisation.

This section will first (3.2.1) detail the system of immunities of these institutions and the reasons behind this difference with most international organisations before (3.2.2) looking

[323] In that there is an African Development Bank, and Asian Development Bank, etc.

at intersections of comparisons with the UN and what it means for the broader narrative of this argument.

3.2.1. The system of immunity of multilateral development banks: an openness to legal action?

While the UN system of immunity is considered extremely closed off – with only the Section 29 caveats and the waiver of immunity available as options to get damages in cases of harm – (3.2.1.1) most MDBs actually offer the possibility of legal action expressly in the dispositions establishing their immunity. However, this optimistic assertion needs to be examined in light of what was explored in Chapter 2 of this thesis. While MDBs (3.2.1.2) outwardly use the functional immunity justification – which is not particularly remarkable as they are international organisations after all – they also (3.2.1.3) hide behind the functional necessity narrative. This reliance on the functional necessity narrative therefore allows MDBs to argue that they need the broadest scope of immunity possible, even if that is not what their constituent instruments states. In short, MDBs may *look* different from the UN, but they actually follow the exact same narrative, with the exact same drawbacks.

3.2.1.1. The possibility of legal action

While the UN's provisions on immunity only mention "appropriate" modes of settlement in Section 29 and the waiver in Section 2, the development banks have, in contrast, an explicit mention of legal action. Section 3 of the International Bank for Reconstruction and Development Articles of Agreement starts with that, stating that '[a]ctions may be brought against the Bank',[324] though it adds the immediate caveat that any such actions may not be brought 'by members or persons acting for or deriving claims from members'.[325] On top of this personal limit, there is a geographical one as well, as the action can only be brought before 'a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issues or guaranteed securities'.[326] Yet, despite these caveats, the option to bring a case in front a jurisdiction does exist, unlike in the UN system, where even the caveat of Section 29 CPIUN only offers alternative means of settlement (via arbitration, mostly).

[324] Articles of Agreement of the International Bank for Reconstruction and Development (concluded on 27 December 1945, entered into force 27 December 1945) 2 UNTS 134, article VIII, section 3.
[325] ibid.
[326] ibid.

This disposition exists in other MDBs' constituent instruments, albeit worded slightly differently to also include limits on the *type* of actions that may be brought before a court – a *ratione materiae* competence. The Agreement establishing the Asian Development Bank states that it shall 'enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities'.[327] In these cases, actions are available in court, with the same requirements and limitations as detailed in the IBRD Articles of Agreement. Similar dispositions can also be found in the Agreements establishing the African Development Bank,[328] the European Bank for Reconstruction and Development,[329] the Inter-American Development Bank,[330] or the International Finance Corporation,[331] *inter alia*.

These dispositions are particularly important in the context of plaintiffs usually not using the existing internal compliance mechanisms within the organisations such as the World Bank Inspection Panel. These mechanisms were created following the publication of internal reports as well as pressure from civil society.[332] The World Bank set up the first mechanism, then other financial institutions followed suit.[333] However, these mechanisms are often perceived in a negative light by affected parties, as it is seen as futile.[334] A combination of non-bindingness (in most cases) and a dependence on the financial institution to voluntarily participate have contributed to this perception. As a result, affected parties prefer domestic courts, which triggers the immunity system described above.

Therefore, the possibility of legal action is not merely a mention in an instrument, never to be used. In this, it presents a clear distinction from the UN system, as the UN system only works with a set rule and caveats. In the MDBs system, the rules integrate the possibility of

[327] Agreement establishing the Asian Development Bank (signed on 4 December 1965, entered into force 22 August 1966) 571 UNTS 123, Chapter VIII Article 50.
[328] Agreement establishing the African Development Bank (signed on 4 August 1963, entered into force 10 September 1964) 510 UNTS 3, chapter VII, article 52.
[329] Agreement establishing the European Bank for Reconstruction and Development) (signed on 29 May 1990, entered into force 28 March 1991) 1646 UNTS 97, chapter VIII, article 46.
[330] Agreement establishing the Inter-American Development Bank (signed on 8 April 1959, entered into force 30 December 1959) 389 UNTS 69, article XI, section 3.
[331] Articles of Agreement of the International Financial Corporation (signed on 25 May 1955, entered into force 20 July 1956) 264 UNTS 117, article VI, section 3.
[332] Richard E. Bissell and Suresh Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges' (2009) 6 Manchester Journal of International Economic Law 2, 6.
[333] See eg the Inter-American Development Bank's Independent Consultation and Investigation Mechanism (MICI) established in 2010 and the Asian Development Bank's Accountability Mechanism established in 2003.
[334] Clemens Treichl and August Reinisch 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 International Organizations Law Review 105, 114.

suing. However, much like other international organisations, the narrative behind its immunities is still functional necessity. These next two sections show that the immunities of the MDBs are both based on the functional necessity theory – in that there are functions for them to fulfil, and they need immunities in order to do that – and on the functional necessity narrative – where the broadest scope of immunity is the one an international organisation ought to have, even if its functions might not justify it.

3.2.1.2. A functional necessity justification

Despite the differences in how the UN and MDBs deal with the scope of their immunities, they are still based on the same theory. This is explicitly stated in each agreement. Preceding every Section on immunities in all the agreements is a disposition stating that the purpose of the Article on status, privileges, and immunities is 'to enable the Bank to fulfil its purposes and the functions with which it is entrusted'.[335] This is classic functional necessity, embodying all of its elements when it comes to its application to privileges and immunities: the idea of a necessity of the immunities to enable the institution to function, the institution having "functions" which are implied to be defined and therefore limited in scope, and the entrustment by States towards international organisations to fulfil said functions. The theoretical basis of immunities for MDBs is therefore no different from the UN. In fact, it exemplifies that functional necessity still has a solid grasp on international organisations law – the basis for the difference in scope of immunities is *not* based on a brand new theory of international organisations law. It is simply functional necessity, in the form it perhaps should take: a limitation on immunities for the good of the organisation.

Indeed, in the case of MDBs (and financial organisations in general), "good" functioning is tied to a certain amount of accountability. As Klabbers explains, '[the financial institutions'] credibility on the financial markets depends, in part, on the possibility of being sued'.[336] In the case of the waiver present in all disposition on immunities, it is used so that the organisation may been seen as 'a worthy partner to do business with'.[337] Without these openings for accountability, these organisations may not be able to fulfil some of their obligations. As these obligations can involve financing or co-financing or providing technical assistance to plans and projects, being unable to enter into business because of a lack of accountability in case something goes wrong would severely limit the range of action

[335] See for instance Agreement establishing the Asian Development Bank (signed on 4 December 1965, entered into force 22 August 1966) 571 UNTS 123, chapter VIII, article 48.
[336] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 The European Journal of International Law 9, 57.
[337] ibid.

of these organisations.[338] This argument is buttressed by the interpretation given by the United States Court of Appeals (District of Colombia Circuit) in the *Mendaro v World Bank*[339] case. The court stated that while its interpretation of Article VIII Section 3 of the World Bank's Articles of Agreement is not of a 'blanket waiver of immunity',[340] it explains that it is 'evident' that the drafters 'could only have intended to waive the Bank's immunity from suits by its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have to subject itself to suit *in order to achieve its chartered objectives*'.[341] In other words, the immunity in place *as well as* its (in this case) limited scope are *both* intended to aid the organisation in achieving its functions.

This restriction on immunity for better functioning is best exemplified through the annexes to the CPISA. Indeed, while many of the development banks mentioned so far in this chapter are not in the UN system per se, the World Bank is considered a specialised agency, and thus falls under the remit of the CPISA. However, Annex VI of the CPISA explicitly states that Section 4, which is the disposition stating that the specialised agencies have absolute immunity (a copy of Section 2 of the CPIUN), shall be replaced by the version of the immunity disposition present in the Bank's Articles of Agreement, Article VIII Section 3. The same change happened with the IFC, set out in Annex XIII of the CPISA: the broad immunity disposition of the CPISA was substituted for the more restricted disposition of the IFC's Articles of Agreement. This shows the specificity of both the World Bank and the IFC: they are more in line with the other MDBs, and therefore should have more restricted immunities than other specialised agencies.

The presence of functional necessity as a justification for the MDBs' restricted immunities is therefore not surprising and aligns particularly well with what functional necessity should be: a limit on immunities. However, the narrative of functional necessity is never far, and while it may perhaps be a little less obvious for international organisations that seem to embrace the difference in their system versus that of the UN, it is very evident when looking at how they behave when faced with a court action.

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[338] Or eliminate it altogether. See Clemens Treichl and August Reinisch 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of Jam v International Finance Corporation' (2019) 16 International Organizations Law Review 105, 115: 'if the partners of IFIs in financial transactions were precluded from bringing claims against the institution, the latter's promises would amount to nothing on the capital market'.

[339] *Mendaro v World Bank*, US Court of Appeals (DC Cir) (27 September 1983) 717 F.2d 610.

[340] ibid 615.

[341] ibid 615. Emphasis added.

3.2.1.3. A functional necessity narrative

The first possibility that an international organisation has to open itself up to the scrutiny of a court is of course its waiver. It is however rarely used in practice.[342] The second element, and one ostensibly available to MDBs, is their restrictive immunity. The restriction in this case is after all based on functional necessity in its purest form, with a purpose to allow the organisation to fulfil its goals. Therefore, enquires Singer, '[o]ne might expect that the international organizations themselves, normally so protective of their functions, would loudly insist on their right to be vulnerable to suit whenever it is necessary to enable them to fulfill their purposes.'[343] And in particular, 'the financial organizations would be leading the chorus.'[344] In other words, if the limited scope of immunities that they were given is explicitly granted to guarantee their functioning – something that even the courts' ruling in favour of international organisations in immunities disputes recognise[345] – then international organisations should welcome it with open arms.

However, that is not the case. The supreme court case of *Jam v IFC*, where third parties claimants argued that the IFC was responsible for the pollution of their environment and should therefore be compelled to provide reparations, shows this particularly well, in that the main objective in this case was for the IFC (an MDB) to be allowed to keep the absolute immunity it was granted under the IOIA *despite the fact that its own constituent instrument did not grant it absolute immunity*.

The IFC was indeed very aware of what could result from the interpretation the Supreme Court ended up siding with. In their argument, the IFC worries that, on top of the functionalist argument that restrictive immunity equals more potential lawsuit and less money, and therefore a decrease in their ability to fulfil their functions properly, the decision to apply the FSIA rules to its acts would have a particularly acute effect on development banks. The IFC argues that, as development banks 'use the tools of commerce to achieve their objectives, they may be subject to suit under the FSIA's commercial activity exception for most or all of their core activities'.[346] This is also picked up by Justice Breyer, the only dissenting opinion in this decision, who states that while the UN is able to still benefit from absolute immunity in US courts due to the self-executing status of its CPIUN, '… several

[342] Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 137.
[343] ibid 136-137.
[344] ibid 137.
[345] See *Mendaro v World Bank*, US Court of Appeals (DC Cir) (27 September 1983) 717 F.2d 610, 618.
[346] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019), 13.

multilateral development banks [,] continue to rely upon that Act to secure immunity'.[347] The Supreme Court was overall unsympathetic to these arguments, pointing out that the IFC's Articles of Agreement do not guarantee absolute immunity, that there are other conditions to fulfil in order for the FSIA commercial activity exception to be accepted in court,[348] and that organisations now exposed to restrictive immunity due to this change of precedent do have the option to change their constituent agreement to a 'different level of immunity',[349] as the IOIA rules were always default rules. In short, though it might not have been its goal, the Supreme Court pushed back against the *narrative* of functional necessity to focus on the *justification*: if functional necessity justifies the scope of immunity an organisation needs to function, then the scope in the case of MDBs should be limited/restricted. It should not be that these organisations should claim more immunities than they need. Therein lies the key difference between the justification and the narrative: the former can reasonably be conceived as a limit, while the latter is the complete opposite. Of course, the term "key difference" is to be understood with nuance: these two concepts are not completely separate from each other, and the justification can very easily lead to the narrative as long as an international organisation has a vague enough "function". The case of the MDBs does however show that while the language of the immunity dispositions in instruments can be different, what lies underneath is anything but.

Nonetheless, such a difference is noticeable. There is a possibility of access to justice – one that might be increasingly less theoretical once the fallout of *Jam* is complete – and as such, it matters to look at how MDBs have handled the criticism levelled at the UN when it comes to the lack of accountability (particularly with regards to third parties).

3.2.2. MDBs and the UN: same narrative, same problems

Multilateral development banks all share the same overall purpose: finance-based support for projects[350] in order to aid with the development of States. The United Nations, on the other hand, prioritises international peace and security as its overarching goal. While on the surface these organisations *seem* very different – and with, *in theory*, different scopes of immunities – they share similarities in the criticisms that they face, showing that they do not just share a narrative. In fact, from the beginning, these organisations are not actually

[347] ibid 11.
[348] And in the case of *Jam*, these conditions were ultimately not fulfilled, leading to the IFC not being recognised legally liable. The change of precedent may not therefore become the "open season on organisations" it was portrayed as.
[349] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019), 14.
[350] Private projects in particular.

different when it comes to their privileges and immunities and the issues they face trying to continually argue for the broadest scope possible. This section will examine three major components of the criticism levelled at them: the growing proximity to right-holders across the broad (3.2.2.1), the reputational damage when a crisis (aided by this proximity) does not lead to acceptable[351] reparations (3.2.2.2), and the specific "private" acts undertaken by international organisations (3.2.2.3).

3.2.2.1. The growing proximity to right-holders

The argument of the UN's increased proximity to right-holders is easy to make. Over time, peacekeeping missions in particular have become more involved with vulnerable populations, leading to an increased possibility to cause harm. Peacekeepers remained in Haiti, under either MINUSTAH or MINUJUSTH, for 15 years. In fact, it can be argued that their physical proximity to the inhabitants participated in the rapid spread of cholera: their camp was just upstream a river that would become a large source of water for the population affected by the January 2010 earthquake. On a deeper level, peacekeeping missions are increasingly involved in much more than the application of cease-fire they were originally tasked with. Mission mandates now include tasks such as assistance for the organisation of free and fair elections,[352] disarmament, demobilisation, and reintegration (DDR),[353] and the protection, promotion, and restoring of human rights and the rule of law.[354] In short, peacekeeping missions have become multifaceted, and through these extensive mandates the harm that could be caused to an often already vulnerable population constitutes a growing risk.

The close proximity to right-holders is not a new criticism for MDBs. Authors have pointed out that while the rules on immunities of the MDBs allowed them to be accountable largely to their own shareholders, little options remained for right-holders. This can be seen through the push for the creation of internal mechanisms. As Richard Bissell and Suresh Nanwani describe it, '[c]learly the MDBs had always been "accountable" to their shareholders',[355] unlike the right-holders they may have a more direct impact on. In fact, despite the restrictive immunity framework described above – which was the framework organisations like the World Bank had been operating on since their respective creations – the establishment of

[351] Whether perceived or legally speaking.
[352] See for instance UNSC Res 1159 (27 March 1998) UN Doc S/RES/1159, para. 10.
[353] See for instance UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100, para. 16.
[354] See for instance UNSC Res 1473 (4 April 2003) UN Doc S/RES/1473, para. 1.
[355] Richard E. Bissell and Suresh Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges' (2009) 6 Manchester Journal of International Economic Law 2, 3.

these internal mechanisms shows that there was in fact a problem of accessing justice for some aggrieved parties. In fact, despite the establishment of such internal mechanisms in a number of MDBs, Bissell and Nanwani write in 2009 that 'citizens are still clamouring for MDBs to adopt new approaches or ways to hear their voices and handle their grievances'.[356]

The case of *Jam* also demonstrates the proximity to right-holders and the impact that IFC-backed projects can have on the population. Allegations of pollution of water and soil were made, leading to a severe impact on people's lives. The impact on local population is as directly evident as the impact of a peacekeeping mission, even though the actions itself – and the international organisations themselves – were there to fulfil different goals. This was argued in Daniel Bradlow's article in the Financial Times on MDBs, where he stated that 'as the scope of their operations expanded, they began to interact more directly and intensively with the citizens of their member states, and the scale and severity of the social and environmental impact of MDB operations became more obvious'[357]. In response to the only judge on the Supreme Court dissenting on the majority judgement on *Jam*, Justice Breyer, arguing that the impact of the decision on organisations like the IFC would 'at the very least create uncertainty',[358] Diane Desierto criticizes the lack of consideration for 'indigenous peoples and affected local communities'.[359] Her argument goes against the view of international organisations (specifically here financial institutions) as a good-doers, or rather, it goes against the argument that technocrats in international organisations on one hand and respecting human rights holders on the other can be compatible. In other words, the "ideal" technocracy and specificity of (financial) international organisations that was the basis for the functionalism rationale finds itself at a loss when it comes to human rights, and more generally considerations of rights-holders. She also points out the ineffectiveness of the procedures put in place for individuals to act against the WTO and other international financial organisations, writing that it is 'trusting to a process that is neither open or representative to the actual bearers of human rights impacts, and where States themselves often fail to represent their own vulnerable communities'.[360]

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[356] ibid 4.
[357] Daniel Bradlow, 'Multilaterals must earn the right to limited immunity' Financial Times (London, 28 March 2019) <https://www.ft.com/content/2512aa84-515d-11e9-9c76-bf4a0ce37d49> accessed 30 August 2023.
[358] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019), 12.
[359] Diane Desierto, 'SCOTUS Decision in Jam et al v. International Finance Corporation (IFC) Denies Absolute Immunity to IFC… With Caveats' (*EJIL:Talk!*, 28 February 2019) <https://www.ejiltalk.org/scotus-decision-in-jam-et-al-v-international-finance-corporation-ifc-denies-absolute-immunity-to-ifc-with-caveats/> accessed 19 February 2024.
[360] ibid.

This quote not only shows the perceived ineffectiveness of the jurisprudence before *Jam* in a pursuit of accountability for right-holders, but also that of the internal mechanisms, despite the fact that their creation was meant as a way to offer more opportunities for the voices of the affected to be heard. In that, *Jam* seems to offer a much better way already, with access to courts and a possibility of reparations. The jurisprudence is still very recent – and the case itself, when back before courts of first instance, did not meet the threshold for commercial activity under the FSIA – but the possibility is here.

The criticisms faced by both organisations, the MDBs on one hand and the UN on the other, are then not the only similarities. The onset of said criticism are also similar. Without this proximity to right-holders and the very real potential to do harm (and in some cases, the allegations that harm *has already occurred*) exemplifies the likeness between these international organisations.

3.2.2.2. Reputational damage

This section is tied in with the first section on right-holders, as they are inexorably linked. Logically, an organisation dealing so closely with right-holders in a vulnerable situation opens itself to risks of causing harm, leading to reputational damage. The point of comparison here is the degree of damage between the UN and MDBs: despite the overall smaller scales of most MDBs, the risk of reputational damage and the impact it can have on an organisation's functions are very similar.

When dealing with the concept of reputational damage, one must be careful not to put an excessive amount of weight on it. In the case of the UN, while the reputational damage suffered in Haiti following the cholera crisis – violent demonstrations against peacekeepers, international backlash in newspapers, etc – can have an impact, it is important not to overstate it. This thesis has been grappling with the issue throughout: while the reputation of an international organisation matters, and even more so when it comes to peacekeeping missions that are authorised only with the consent of the host State, the UN is still able to send and keep active multiple peacekeeping missions around the world. However, the reason why it is still a worthy element to write about is because, despite the apparent lack of direct consequences thus far, the UN *is* worried about its reputation. It is apparent in its messaging post-Haiti crisis. The Secretary-General at the time, Ban Ki-Moon, described the UN's handling of the crisis as 'leav[ing] a blemish on the reputation of UN peacekeeping and the

organization worldwide',[361] and stated that the UN's 'responsibility to act' was in part 'for the sake of the United Nations itself'.[362] In other words, the admission of responsibility (albeit only moral, not judicial) is not just aimed at the Haitians, but also at other States who may host peacekeeping missions in the future – it a form of damage control, and there would be no need for control if there were no damage, even if the effects might not be seen right away.

Additionally, authors and observers have pointed out the dire consequences that could follow the UN digging its heels in in case another crisis like the one in Haiti emerges. Writing in his report presented at the General Assembly in 2016, former Special Rapporteur Philip Alston explains that 'the message that the Organization is unprepared to accept responsibility for negligent conduct (…) will not have escaped other States that are contemplating agreeing to host or participate in peacekeeping operations'.[363] In her article on the reputation of international organisations, Kristina Daugirdas argues that reputation is a key component for an international organisation's life. Indeed, she explains, 'for an IO, the cost of a bad reputation may include termination'.[364] Without being as definitive, Steven Herz argues that, in the context of multi-development banks, the directly affected might refuse to engage with the organisation if they cannot bring their issues before a court.[365] And though Daugirdas' argument centres on the reputation of complying with legal obligations, she also points out that 'eradicating cholera from Haiti would partially restore the status quo before UN peacekeepers introduced cholera'[366] and echo obligations of reparation present in instruments such as the Draft Articles on the Responsibility on International Organisations. Since then, the UN's attempt at providing non-binding reparations to Haiti via voluntary contribution and an action plan to eradicate cholera in Haiti could indeed be seen as expressions of these rules – although most likely involuntarily on the part of the UN, as it has never accepted legal responsibility for the Haiti cholera crisis.

[361] Ed Pilkington and Ben Quinn, 'UN admits for first time that peacekeepers brought cholera to Haiti' The Guardian (London, 1 December 2016) <https://www.theguardian.com/global-development/2016/dec/01/haiti-cholera-outbreak-stain-on-reputation-un-says> accessed 31 August 2023.
[362] ibid.
[363] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para. 68.
[364] Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25 European Journal of International Law 991, 1010.
[365] Steven Herz, 'International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity' (2008) 31 Suffolk Transnational Law Review 471, 524.
[366] Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25 European Journal of International Law 991, 1016.

The same potential reputational damage argument can be seen for MDBs. Not only are MDBs very close to right-holders and capable of causing great harm (the situation in the case of *Jam* involves pollution that allegedly 'destroyed or contaminated much of the surrounding air, land, and water'),[367] but the damage itself can cause issues for the organisation. MDBs are in a rather interesting position where they have contended with two different categories of "holders": shareholders and right-holders. In creating the internal review mechanisms post-1993, they have attempted to reconcile these two sides by allowing them access to a court or alternative mode of settlement should an issue arise. However, what is necessary for the shareholders can be detrimental to right-holders and vice versa, leading MDBs to be stuck between a rock and hard place. The recent trend towards greater accountability as well as the *Jam* case have given much-needed space to right-holders. Digging their heels in now could have important consequences for the MDBs, as a loss of reputation could lead to a loss in projects to finance/co-finance. In order to fulfil their obligations, MDBs need to cultivate as positive a relationship as possible with the right-holders from now on. Ignoring this dynamic led the IFC to the *Jam* case; and while it would be preposterous to attribute more to the intentions of the plaintiffs in the *Jam* case than what was actually there, one cannot ignore the that fact that this was the case that cemented IO absolute immunity in the US[368] as a thing of the past. In his article on Multilaterals and immunity, Bradlow describes the consequences of MDBs digging their heels in following the *Jam* litigation and entering multiple cases in lieu of strengthening the existing internal mechanisms for better accountability. Arguing that doing the opposite would be the 'conservative' option, Bradlow plainly states that the current cases the IFC is involved in other than *Jam* (at time of writing) 'will be expensive in financial, human resources and reputational terms'.[369]

The decisions of international organisations on their immunity and how they chose to deal with it – from the waiver to internal mechanisms if they exist – can therefore have an impact on their reputation. While it is too early to tell if that impact will expand beyond the borders of the affected States, this is not one they can ignore, as the potential to do harm also increases as international organisations remain in close contact with vulnerable populations. As that part of the equation – peacekeeping missions, for instance – is unlikely to change,

[367] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019) 6.
[368] Generally speaking, although the UN does still benefit from absolute immunity.
[369] Daniel Bradlow, 'Multilaterals must earn the right to limited immunity' Financial Times (London, 28 March 2019) <https://www.ft.com/content/2512aa84-515d-11e9-9c76-bf4a0ce37d49> accessed 30 August 2023.

the trade-off must be regarding immunity, be it through reinforced internal mechanisms or a *Jam* situation.

3.2.2.3. 'Corporate-like' and 'tort-like' acts

This section deals with the similarities of both types of organisations not only with each other, but with private companies, who do not generally benefit from expansive immunities.

The case of the UN is certainly the harder of the two to make. While it is difficult to compare the UN with any private entity,[370] some of its actions can be considered "tort-like". In fact, this was one of the main contentions of the Haiti cholera case. Section 29 of the CPIUN does compel the organisation to find appropriate modes of settlement in cases of "disputes of a private law character". A possible – even likely – interpretation of such a disposition would be to consider tort as part of a dispute of private law character. In that case, the Haiti cholera claims 'appear to have all of the characteristics of a private law tort claim'[371] writes Philip Alston in his cholera report. The allegations of negligence and poor waste management can even be said to be 'classic third party claims for damages for personal injury, illness and death'.[372] Yet, the most important part of this report on tort is the assertion by Alston that 'the duties owed by the United Nations are directly analogous to those owed by a company or private property owner to ensure adequate waste management and to take adequate precautions to prevent spreading diseases'.[373] This sentence makes a direct analogy between the UN's obligations and those of a private entity – who, crucially, would not benefit from the immunities the UN has. Despite this line of argument, the UN refused to grant compensation to the Haitian victims by arguing that their demands did not constitute a dispute of private law character, but instead 'raised broad issues of policy that arose out of the functions of the United Nations as an international organization, they could not form the basis of a claim of a private law character'.[374]

The UN seemed to at least be aware of this contradiction between the obligations they were bound by and their response. They are however aided by the fact that the very definition of

[370] It is in fact much easier to compare it to a State.
[371] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para. 34.
[372] ibid.
[373] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para. 35.
[374] Letter from Ban Ki-moon (United Nations Secretary-General) to Members of United States Congress (19 February 2015), extracts of which can be found in Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 360.

"disputes of a private law character" is entirely obscure. No precision is made in the body of the text, and it has varied greatly in practice. While some UN documents do seem to include death and injury caused by the peacekeeping mission in the category of "dispute of a private law character",[375] the Secretary-General, in a letter written to members of the US Congress following the Haiti case, seemed to go back on this previous interpretation. Disputes of a private law character, he wrote, 'have been understood to be disputes of the type that arise between private parties, such as, claims arising under contracts, claims relating to the use of private property in peacekeeping contexts or claims arising from motor vehicle accidents'.[376] Kristen Boon indicates that this constitutes an exclusion of all torts as part of "dispute of private law character", with the exception of motor vehicles accidents.[377] This is an attempt by the UN to reconcile both aspects of the case: its obligations towards the disposal of waste and other tasks linked to the day-to-day of the peacekeeping mission, and the realisation that this is a tort issue that they have previously included under the remit of Section 29 in previous documents. A very cynical view would be to see this as the UN eschewing its responsibilities by changing the scope of Section 29 based on the case before them. At the very least, despite the clear category of obligations it had to follow and the analogy with private companies, the UN got to explain the scope of dispute of a private law character in a way that specifically excludes the Haiti claims.

This analogy, and the criticism that goes with it that a similar non-international organisation does not benefit from immunity, can also be found with MDBs. In his article 'The Best of Both Worlds or the Worst of Both Worlds? Multilateral Development Banks, Immunities and Accountability to Rights-Holders',[378] Gamze Erdem Türkelli details the similarities between MDBs and private financial entities. From the very start, the drafters of the Articles

[375] See for instance the status-of-forces agreement (SOFA) between Haiti and the UN for MINUSTAH, itself following the model SOFA signed for every peacekeeping mission, where 'dispute or claim of a private law character' explicitly include 'third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH' – Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations Operation in Haiti (signed on 9 July 2004, entered into force 9 July 2004) 2271 UNTS 235, article 54 and 55. See also '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' (24 April 1995) A/C.5/49/65, para. 15, where the Secretary General states that this category of disputes include 'claims for compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by members of a United Nations peace-keeping operation within the 'mission area' concerned.'

[376] Letter from Ban Ki-moon (United Nations Secretary-General) to Members of United States Congress (19 February 2015), extracts of which can be found in Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 360.

[377] Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 361.

[378] Gamze Erdem Türkelli, 'The Best of Both Worlds or the Worst of Both Worlds? Multilateral Development Banks, Immunities and Accountability to Rights-Holders' (2020) 12 Hague Journal on the Rule of Law 251.

of Agreement of each bank 'had followed a model similar to commercial banks' despite the broad immunities fitting for an international organisation. But more importantly, while the UN has 'tort-like' obligations that render its current immunity system incompatible with said obligations, MDBs, according to Türkelli, have 'corporate-like attributes'.[379] While arguments can be made to compare them to States, Türkelli indicates that the corporate-like attributes are at least three-fold: form, in that there are 'important areas of overlap'[380] with the idea of the economic corporation; function, with the evidence of what Türkelli calls a 'corporate modus operandi';[381] and relationship, in that 'the operations of MDBs are interlinked and intertwined with corporate actors from different sectors, including finance, construction, transport among others.'[382] The last point is particularly evident when MDBs are co-partners in projects with private actors and share the risk. Yet when people are affected by the actions of the partnership, MDBs get to use their immunities to escape any type of justice. While arguments can certainly be made against the analogy – starting with the one linking MDBs closer to States than to corporations – it is a convincing one. It can even be said to be supported, albeit in a circumvented way, by the *Jam* case. While the Supreme Court chose a strictly textual interpretation for the IOIA-FSIA issue, the result remains that international organisations under the remit of the IOIA now find their immunities reduced in the same way as they were for States. That reduction of the scope of immunities for States was itself in large part driven by the increasing involvement of States on the economic stage, leading to comparisons between the actions of a State and that of a private entity, akin to a corporation. It is unwise to read too far into the Supreme Court decision, but the link is there nonetheless.

In conclusion, there are far more similarities between the UN and MDBs. They tend to face the same criticisms, from their proximity to right-holders to their blurring of the lines between public and private law. Their reputations are also at stake: many authors have argued that long litigations against right-holders will do some damage; the UN itself is aware of it, though it has yet to have an impact on how they deal with immunities.

[379] ibid 264.
[380] ibid 266.
[381] ibid 270. This includes their operations, their discourses, and their evaluations of performance.
[382] ibid 273.

Conclusion to Chapter 3

This chapter has shown that the landscape of international organisations is deeply influenced by the functional necessity narrative. On a very basic level, most international organisations have followed the example of the UN and its specialised agencies when it came time to devise their own immunity systems, an absoluteness that plays right into that narrative. At first glance, organisations such as MDBs could be considered different however, as they did seem to restrict their immunities according to the functional necessity justification. In other words, they were following the justification in the way it can be interpreted most positively for the alleged victims of IO activities – as a *limit*. Despite this progressive element, in practice MDBs argue for absolute immunities anywhere they can, and fight any attempt at limiting the scope, even when said limitations would more closely align with what their constituent instruments state. Additionally, MDBs have been criticised for very similar reasons to the UN – proximity to right-holders leading to more possibilities of harm, analogies with entities with far less immunities than them, etc, showing even more clearly that these "differences" are only surface level.

The case of *Jam* poses several interesting questions. Firstly, the fact that this is a domestic case brings to the front the risk of fragmentation when it comes to the rules on IO immunity – a risk also raised in the case of the OECD. Secondly, and more relevant to the topic of this thesis, the wholesale application of State immunity principles to international organisations has been criticised. The common understanding in the doctrine is that these two entities ought to be kept separate when it comes to their privileges and immunities, as they have different bases and justifications. The next chapter will address State immunity, as its relevance is twofold: State immunity is now broadly considered to be restrictive, and the difference between a State and international organisations (particularly one as peculiar as the UN) might not be so stark after all.

Chapter 4: State immunity: an evolution from absolute to restrictive immunity

Introduction

This chapter examines State immunity in both its evolution and its links to international organisations immunity. First, State immunity went through a change in the latter half of the 20th century, with foreign immunity being increasingly considered restrictive instead of absolute. While this change is not entirely uniform nor the dichotomy it relies on (acts of a State versus acts that could be taken by a private entity) free of awkward situations, it is now generally accepted, at the very least, that State immunity should no longer be absolute. In that, there is now an entity on the international stage that has willingly accepted for its immunities to be reduced and is seemingly still able to "work".[383] Secondly, the difference between State immunity and international organisations immunity – which asks the broader question of the differences between States and international organisations – may not be as clear cut as it may appear in the doctrine or in the documents produced by said international organisations.

The combination of these two elements form the basis of the arguments developed in this chapter: if States and international organisations (and particularly the United Nations) can be compared, and if State immunity has been reduced over time to a restrictive scope, why cannot the same phenomenon happen to international organisations? Of course, absolute immunity for international organisations is enshrined in constituent documents, but that is only the practical side of things. The question this chapter asks and attempts to answer is why even the mere theory that there could be a restriction, whether based on the specific dichotomy States use or not, should not be applicable to the United Nations?

4.1. The history of the evolution of State immunity

No comparison between two entities can be made without an understanding of each of them separately. The explanation behind the immunity of the United Nations is detailed in Chapter 1 and 2 of this thesis. The goal of this part is to detail State immunity (sometimes called foreign sovereign immunity in the literature and court cases). The origins of State immunity will be retraced, as well as its evolution and the reasons behind it. Much like UN immunity, there will be a particular focus on the rationale behind State immunity, which is different from international organisations as it does not use the language of functionalism but of reciprocity. This section will detail State immunity, from its roots in both reciprocity and

[383] The use of the word "function" here, while tempting, might induce confusion with the idea of functionalism and functional necessity.

sovereignty as absolute immunity (4.1.1) through case law (4.1.2), ending in the current evolution from absolute immunity to restrictive immunity (4.1.3).

4.1.1. Reciprocity and sovereign equality: the bases of absolute State immunity

The idea that there should be immunities in place for States or those representing them is not new.[384] Indeed, '[m]ankind has learned the hard way that negotiations between States would be made extremely difficult if whenever a negotiator was sent, he was put in prison or killed'.[385] Beyond the considerations for the early diplomats, the concept of State immunity rests on two vital elements: sovereign equality and reciprocity.

Sovereign equality is the principle that all States are equal – as they are all sovereign – and that, therefore, none should have power over another via means of its courts. State immunity, particularly in its absolute form as it completely bars a State from being able to sue another State, stems from this principle.[386] It is generally summarised with the maxim *par in parem non habet imperium* (an equal cannot have authority over an equal),[387] and is a cornerstone of international law and international relations.[388]

The principle of reciprocity is closely linked to sovereign equality, and can even be seen in the maxim. Underlying the concept of equality is the concept of a balance/counter-balance between States.[389] This equilibrium can serve as a limitation on the scope of immunities a

[384] David J. Bederman, *International Law in Antiquity* (Cambridge University Press 2001), pp 88-136. Though it ought to be said that envoys in ancient times were quite often considered hostages rather than the modern image we may have of a diplomat.
[385] Jan Klabbers, International Law (3rd edn, Cambridge University Press 2020) 112.
[386] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgement) [2012] ICJ Rep 99, para 57.
[387] See for instance Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (14th edn, Dalloz 2018) para 127, or Gerhard Hafner and Leonore Lange, 'La Convention des Nations Unies sur les Immunités Juridictionnelles des États et de leurs Biens' (2004) 50 Annuaire Français de Droit International 45, 45: 'L'immunité est une notion classique de droit international. Elle est fondée sur le principe de l'égalité souveraine des États, duquel découle la maxime "*par in parem non habet imperium*"'. See also *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), 137: A foreign State is 'bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another'.
[388] Christian Tomuschat, 'The International Law of State Immunity and Its Development by National Institutions' (2011) Vanderbilt Journal of Transnational Law 1105, 1117: '[i]mmunity is derived from the basic principle of sovereign immunity of states, a proposition that belongs to the ground axioms of the entire edifice of international law and is also reflected in Article 2(1) of the UN Charter. States are duty-bound to respect one another.'
[389] *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), 137: 'This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation'

State can allow itself, as reciprocity will dictate that any immunity granted to it will have to be granted *by it* to all the other States.[390]

This represents a stark contrast to international organisations. Indeed, organisations are not considered to have sovereignty over a territory, and have no requirement of reciprocity towards States or towards other international organisations, as they are considered to be too different (on a fundamental level when it comes to States, and with considerations to the various sizes and functions with regards to other organisations).[391] State immunity is based on the nature of the actor, which is sovereign. There is no mention of functions; States have immunity (absolute or restrictive) because they are equal sovereign, not because of any specific functions or mandate that they were given and that would entitle them to immunity in order to carry out.[392]

As such, while international organisations immunity is based on functional necessity, State immunity is based on sovereign equality and reciprocity. However, there has been an evolution in State immunity from absolute to restrictive. This evolution was helped by the fact that, unlike international organisations immunity, State immunity was largely uncodified.[393] It was recognised as a rule of customary law,[394] but only to the extent that there *are* immunities, the scope of which may vary. The major changes can instead be traced through case law, the study of which will follow this first section.

4.1.2. State Immunity in case law

That State immunity is absolute was overall uncontested until the second half of the 20th century. However, unlike international organisations, its absoluteness was not enshrined in conventions. As a result, its existence is mostly "officialised" through case law.

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[390] Frédéric Mégret, 'La Responsabilité des Nations Unies aux Temps du Choléra' (2013) 46 Revue belge du droit international 161, 177-178: 'un État qui entend se prévaloir de certaines immunités sera presque inévitablement astreint à les garantir à d'autres États, ce qui agit comme une sorte de frein naturel à une conception trop extensive des immunités'.

[391] Philippa Webb, 'Should the 2004 un State Immunity Convention Serve as a Model/Starting point for a Future UN Convention on the Immunity of International Organizations?' (2013) 10 International Organizations Law Review 319, 324.

[392] See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 180.

[393] Rosa Freedman, UN Immunity or Impunity? A Human Rights Based Challenge' (2014) 25 European Journal of International Law 239, 242: the fact that IO immunity is enshrined in documents: 'restricts the extent to which such immunity can be interpreted or evolve.'

[394] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgement) [2012] ICJ Rep 99, para 56.

4.1.2.1. The Schooner Exchange case – a controversial starting point

The *Schooner Exchange v. McFaddon*[395] US Supreme Court case (thereafter the *Schooner Exchange*) started as a dispute between US citizens John McFaddon and William Greetham and the State of France. They claimed that the vessel The Exchange, which they say had been 'violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French',[396] was not a public vessel belonging to France but their private property which had been taken from them. The ship, which was used by the French under a new name as a warship, had to dock in a US port following damage caused by a storm. Once there, McFaddon and Greetham went to court to claim ownership of the ship and to get her back.

The district court dismissed the case on 4 October 1811, but the circuit court reversed that decision on 28 October 1811, leading to the final decision in 1812 by the US Supreme Court.

In this decision, Justice Marshall gives his interpretation of State immunity in the absence of any expressly written rules on the matter. In expressing the Court's opinion, he starts by explaining that 'in exploring an unbeaten path with few if any aids from precedents or written law, the Court has found it necessary to rely much on general principles and on a train of reasoning founded on cases in some degree analogous to this'.[397] This outright difficulty explains that, while the case itself is often used in the doctrine as the first evidence in case law of absolute State immunity,[398] the facts of the matter made it ambiguous.

Firstly, he states that '[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself… All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.'[399] He adds that 'the world being composed of distinct sovereignties, possessing equal rights and equal independence… all sovereigns have consented to a relaxation in practice, **in cases under certain peculiar circumstances**, of that absolute and complete

[395] *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).
[396] ibid 117.
[397] ibid 136.
[398] See for instance Ernest K. Bankas, *The State Immunity Controversy in International Law* (2nd edn, 2022 Springer) 33: 'The *locus classicus* in explaining the doctrine of sovereign immunity in modern international law can be traced back to Chief Justice Marshall's famous judgment in the Schooner Exchange v McFaddon of 1812.'
[399] *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), 136.

jurisdiction within their respective territories that sovereignty confers'.[400] This reasoning is similar to the one expressed by the International Court of Justice 200 years later in its *Jurisdictional Immunities* case (though at the time of this decision State immunity was already globally understood to be restrictive).[401] However, there are elements in this early case that make it only a "partial" expression of absolute State immunity, in the sense that, with different facts, the decision might not have been to grant France absolute immunity.

Firstly, the ship in question is a warship used by France. This allows the Court to base its reasoning on a 'generally adopted'[402] rule that:

> If, for reasons of state, the ports of a nation generally or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.[403]

Additionally, 'in almost every instance, the treaties between civilized nations contain a stipulation to this effect in favour of vessels driven in by stress of weather or other urgent necessity'.[404]

In that, the case 'impinged on something that is quintessentially sovereign'[405] (a foreign warship), rendering it difficult to determine if the case was decided that way because of absolute immunity or because of the status of the ship in question. Indeed, the status of an object (a ship in this case) could indeed have an impact on the judgement. In modern international law for instance, whether a target of an attack is a civil one or a military one does have an effect on the qualification of the act.[406] In short, the qualification of the object can have a significant influence on what is ultimately decided: the fact that the ship in question was a warship does not make it a "perfect" case to determine State immunity.

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[400] ibid. Emphasis added.
[401] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgement) [2012] ICJ Rep 99, para 57.
[402] *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), 141.
[403] ibid.
[404] ibid.
[405] Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 8.
[406] See for instance *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgement) [2003] ICJ Rep 161 for the qualification of an armed attack.

Secondly, France was at the time an ally of the US, and thus considered the US a friendly port. This element also helps the Court's argument, in that the ship:

> constitutes a part of the military force of her nations; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign states. Such interference cannot take place without affecting his power and his dignity. The implied licence, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seems to the Court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality.[407]

In other words, the case lends itself well to the conclusion of State immunity being absolute: it is a foreign warship, a representation of sovereignty, docking in a friendly port due to weather damage. Would the Supreme Court's decision had been different had the ship been commercial, or had France not considered the US a friendly port?

A second example of such ambiguity comes with the 1880 Court of Appeal decision of *Parlement Belge*, which did state that at one time a foreign State, its ruler, its official representatives, and its property were 'not regarded as amenable to the jurisdiction of any State's courts',[408] as a consequence, according to the Court of Appeal, of 'the absolute independence of every sovereign authority',[409] but also grappled with the implications of a ship used for commercial purposes. In this case, the court decided that the ship was only used 'subordinately and partially for trading purposes',[410] rendering the discussion of the distinction between public and commercial uses unnecessary. However, the very presence of such a discussion proves that this was a potential point of contention.[411]

While the *Schooner Exchange* case might be considered the main jurisprudence on the matter of State immunity, other cases dealt with the issue with far less ambiguity. In the US, the *Berizzi Brothers Co. v. SS Pesaro*[412] case (thereafter the *Pesaro* case) built on and clarified the *Schooner Exchange* case, while in the UK the *Compania Naviera Vascongado*

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[407] *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), 144.
[408] John P. Grant, *International Law* (Dundee University Press 2010) 66.
[409] *The Parlement Belge*, Court of Appeal 5 P.D. [1880] 214.
[410] ibid 220.
[411] ibid 219: the only reason why immunity is granted is because the trading activities are considered secondary.
[412] *Berizzi Brothers Co. v. SS Pesaro*, 271 U.S. 562 (1926).

v. Steamship "Cristina" And Persons Claiming An Interest Therein[413] case (thereafter the *Cristina* case) was far less ambiguous of a leading case on absolute State immunity.

4.1.2.2. *Pesaro*, *Cristina*: significantly less ambiguity on absolute State immunity

The *Pesaro* case, decided by the US Supreme Court in 1926, was not about a warship. Instead, claims for damages were made against the steamship Pesaro 'out of a failure to deliver certain artificial silk by her as a port in Italy for carriage to the port of New York'.[414] In this unambiguous commercial context, the decision from the Supreme Court could not have been clearer. While the court acknowledged that the *Schooner Exchange* decision 'contains no reference to merchants ships owned and operated by a government', that omission 'is not of special significance', as back then 'there was little thought of governments engaging in such operations',[415] and commercial ships were handled by private owners. Declaring that the *Schooner Exchange* decision cannot be considered to be 'excluding merchant ships held and used by a government there announced', the court established absolute immunity for foreign States, even in cases of commercial ships, as they 'must be held to have the same immunity as warships'.[416] This ended the ambiguity regarding the question posed above: what would a court decide if the ship in question was *not* a warship, or was used for commercial purposes? For the judges in *Pesaro*, the answer could not be clearer. States still have absolute immunity even when engaging in a commercial act.

In the UK, the leading case of *Cristina* relied on the *par in parem non habet imperium* principle, with Lord Atkin explaining that 'the foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law … which seems to me to be well established and beyond dispute',[417] with the first being that 'the courts of a country will not implead a foreign sovereign', and the second that they will not 'seize or detain property which is his or of which he is in possession or control'.[418] Such an

[413] *Compania Naviera Vascongado v. Steamship "Cristina" And Persons Claiming An Interest Therein*, [1938] AC 485.
[414] *Berizzi Brothers Co. v. SS Pesaro*, 271 U.S. 562 (1926), 569.
[415] ibid 573.
[416] ibid 574.
[417] *Compania Naviera Vascongado v. Steamship "Cristina" And Persons Claiming An Interest Therein*, [1938] AC 485, 495.
[418] ibid.

explanation, according to him, 'leaves little room for imagining that the judge would *not* have granted immunity with respect to commercial activities'.[419]

Therefore, after this brief run through some of the case law, the overarching conclusion is the same leading up to the second half of the 20th century: State immunity is to be considered broadly absolute, even in cases of commercial activity. Over the next few decades however, this absoluteness would be gradually abandoned to give way to restrictive immunity.

4.1.3. From absolute immunity to restrictive immunity

Over the years, absolute State immunity gave way to restrictive immunity. The doctrine is divided on a clear starting point, but all agree on the main cause – a greater involvement from States in private economic affairs. However, the difficulty for international and regional conventions recognising this distinction to enter into force, as well as the insistence from some States to rely on their own domestic rules on the matter show the limits of the distinction. Finally, the distinction itself has shown its limits, with multiple contradicting criteria emerging, further complicating the process of separating 'private' acts from 'public' acts.

4.1.3.1. The starting point of the absolute to restrictive evolution: a growing involvement of States in economic affairs

Most authors tend to agree on the main cause for the evolution from absolute to restrictive immunity: the growing involvement from States into economic affairs as opposed to their sovereign domain, with a particular focus on when the State acts as a private person – a company. This creates a potential situation of inequality, when a person employed by a non-State private person could have recourse before a court, and a person employed by a State could not. This situation led to growing calls to consider the State as a private person, without immunity, when it behaves as such.

Indeed, the restriction of State immunity is generally considered to be due to 'their increasing involvement in economic life for which they operate as a private person, particularly in

[419] Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 9.

commercial matters'.[420] As a result, the acts of a State were now either *jure acta gestionis* (private acts, such as commercial acts, for which the State no longer benefits from immunity) or *jure acta imperii* (sovereign or public acts, for which the State retains absolute immunity).[421]

The start of the dissatisfaction with the absolute immunity of States has been placed at different dates. Establishing a specific date would be difficult, no less because this was gradual and over the jurisdiction of every States in the world: when Germany (for instance) might have changed its position might not be when France did.[422] The First World War is a useful focus point: before, broadly speaking, instances of States espousing the doctrine of restrictive immunity are rare, if not non-existent.[423] Afterwards however 'increased participation of States in trading activities following the First World War'[424] leads to the development in multiple States (mostly small and European) of the doctrine of restrictive State immunity.[425] Philippa Webb explains that further support was given to the doctrine of restrictive immunity with the adoption in 1926 of the Brussels Convention for the Unification of Government Vessels and its 1934 protocol.[426] However, the centrality of the Tate Letter[427] is unquestioned.[428] Indeed, the letter not only represents the change in the US from absolute to restrictive immunity, but it also serves as a mini report of what other States have been doing so far, leading to the conclusion that the tide is turning and that the US

[420] Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (14th edn, Dalloz 2018) 147: '… [du fait de] leur implication accrue dans la vie économique, pour la réalisation de laquelle ils agissent à l'instar d'une personne privée, notamment en matière commerciale'. See also Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 19: 'The doctrine of restrictive immunity has been formulated and developed as a response to a new development in the international community, that is, the phenomenal increase of State trading, commercial and other activities in foreign countries.'

[421] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgement) [2012] ICJ Rep 99, para 60.

[422] Ernest K. Bankas, *The State Immunity Controversy in International Law* (2nd edn, 2022 Springer) 67.

[423] ibid.

[424] Philippa Webb, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in Malcolm D. Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 318.

[425] Eleanor Wyllys Allen, *The Position Of Foreign States Before National Courts, Chiefly In Continental Europe* (Macmillan 1933) 301: '…a growing number of courts are restricting the immunity to instances in which the state has acted in its official capacity as a sovereign political entity. The current idea that this distinction is peculiar to Belgium and Italy must be enlarged to include Switzerland, Egypt, Romania, France, Austria and Greece.'

[426] Brussels Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels (signed 10 April 1926) and its additional protocol (signed 24 May 1934) 4062 LNTS 199.

[427] Letter from Jack B. Tate (US State Department Acting Legal Adviser) to the Acting Attorney General (19 May 1952). It recognises the existence of two 'conflicting concepts' regarding State immunity (restrictive and absolute), and indicates that '[t]he Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases.' In that, the letter states that it follows the existing examples of France, Belgium, Italy, Switzerland, Austria, Greece…

[428] See Xiaodong Yang, *State Immunity in International Law* (Cambrige University Press 2012) 12, where Yang describes the Tate Letter as a 'middle point' in the evolution from absolute to restrictive immunity.

should catch up. Other focal points of the evolution from absolute immunity to restrictive immunity also include the 1976 US Foreign Sovereign Immunities Act[429] and the signature, in 1972, of the European Convention on State Immunity,[430] both enacting the now broadly accepted doctrine of restrictive State immunity.

4.1.3.2. Restrictive immunity for States: a not so widely accepted concept and the difficulties of harmonization

While the evolution towards restrictive immunity for States is now considered broadly accepted, there is a lack of harmony regarding the precise rules to follow.

An international convention, the United Nations Convention on Jurisdictional Immunities of States and their Property,[431] was adopted by the General Assembly in 2004. It espouses the doctrine of restrictive immunity, as can be seen in its Part III, titled '[p]roceedings in which State immunity cannot be invoked', detailing situations such as commercial transactions (Article 10) and contracts of employment (Article 11).[432] However, with only 23 ratifications since 2004 (at time of writing), it is not yet in force as it has not reached the threshold of 30 ratifications.[433] Similarly, a European convention (by the Council of Europe) was also established in 1972, setting out the many situations in which a State cannot invoke absolute immunity, but once again the level of participation is low, with only 7 ratifications since then.[434]

The low number of ratifications (and the stalemate situation with the entry into force of the UN convention) does not necessarily mean that every non-ratifying State is aligned with absolute immunity. Indeed, the low number of ratifications does not mean that only the States that are parties of either convention have adopted the restrictive immunity doctrine. For instance, there exist States that disagree with some portions of the Convention yet

[429] 28 U.S.C. §1602: 'Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.'
[430] European Convention on State Immunity (adopted on 16 May 1972) 1495 UNTS 171.
[431] United Nations Convention on Jurisdictional Immunities of States and Their Property, UNGA Res 59/38 (LXV) (2 Dec 2004) (adopted without a vote, on the recommendation of the Committee).
[432] ibid 5.
[433] ibid 12: 'The present convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratifications, acceptance, approval or accession with the Secretary-General of the United Nations'. As of February 2024, the States that have ratified the Convention are the following: Austria, Benin, Czech Republic, Equatorial Guinea, Finland, France, Iran, Iraq, Italy, Japan, Kazakhstan, Latvia, Lebanon, Liechtenstein, Mexico, Norway, Portugal, Romania, Saudi Arabia, Slovakia, Spain, Sweden, and Switzerland.
[434] Austria, Belgium, Cyprus, Federal Republic of Germany, Luxembourg, Switzerland, and the United Kingdom, which includes some overlapping ratifications with the UN convention.

endorse the change and even apply it in their own courts. France is only a party to one, the United States to neither, but both have consistently followed the concept of restrictive immunity for State immunity. French cases have usually used the ECHR-enshrined right of access to justice,[435] as well as customary international law for cases regarding Article 11(2) of the UN convention on work contracts.[436] The US, on the other hand, relies on the Foreign Sovereign Immunities Act of 1976, which lists all the exceptions to absolute State immunity.[437] Secondly, the preamble of the UN convention notes that the immunities of States are 'generally accepted as a principle of customary international law' and that the convention aims to take into account 'developments in State practice with regard to the jurisdictional immunities of States and their property'.[438] The customary nature of the convention itself is not unilaterally recognised, but there are signs in the case law that all or part of it could be.[439] Despite this uncertainty, there is ample amount of State practice already regarding the *idea* that State immunity is restrictive, even if there may be disagreements on the form this restriction may adopt.

However, States dealing with the absolute to restrictive evolution in their own domestic legal systems – such as the US – brings its own share of problems. They can expand on it individually, leading to a lack of harmonisation on the rules applying to State immunity even if they agree with the overarching change from absolute to restrictive. Questions also remain about certain States' commitment to restrictive immunity. China, an early signatory of the UN convention (though not a ratifier), appeared to apply an absolute doctrine in its courts until recently.[440] However, in September 2023, China adopted a new law on foreign sovereign immunity which will put it 'in line with international practices'.[441] The law appears to be built on the same model as the US FSIA, with the restrictions to absolute State immunity being presented as "exceptions". These exceptions include for instance

[435] See for instance Soc. 1er juill. 2020, n°18-24.643 or Civ, 1ère, 28 mars 2013, n°11-10.450.
[436] See Soc. 1er juill. 2020, n°18-24.643, following ECHR jurisprudence *Sabeth el Leil v France*, 29 June 2011, n°34869/05, para 57.
[437] 28 U.S.C. §1602: 'Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.'
[438] United Nations Convention on Jurisdictional Immunities of States and Their Property, UNGA Res 59/38 (LXV) (2 Dec 2004) (adopted without a vote, on the recommendation of the Committee) 2 (Preamble).
[439] See Philippa Webb, 'The United Nations Convention on Jurisdictional Immunities of States and Their Property' (*United Nations Audiovisual Library of International Law*) <https://legal.un.org/avl/ha/cjistp/cjistp.html> accessed 23 March 2024.
[440] Philippa Webb, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in Malcolm D. Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 321.
[441] Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson's Remarks on Rolling out the Law on Foreign State Immunity' (*Ministry of Foreign Affairs of the People's Republic of China* 5 September 2023) <https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/202309/t20230905_11138090.html> accessed 24 March 2024.

commercial activity and property damage. The spokesperson's pointed comment that this law aims at 'promoting friendly exchanges with other countries' refers to the principle of reciprocity evoked earlier, this time applied to restrictive State immunity. Additionally, there is once again a mention of extensive State practice on restrictive State immunity, as the law is said to 'fully adheres to international law' and to be 'consistent with general state practices'.[442]

Overall, the UN convention on State immunity 'indicates a consensus of State support for the restrictive doctrine of State immunity in its application to civil proceedings relating to commercial matters in national courts'.[443] Ample State practice buttresses this statement. Despite the setbacks that the lack of harmonisation can cause, restrictive State immunity as a concept has replaced absolute State immunity. The next step is therefore to evaluate *how* exactly does State immunity work. As briefly mentioned earlier, the restriction is based on the type of act of the State. Generally, States are granted immunity for *acta jure imperii* and not for *acta jure gestionis*. But the very definition of these two categories of acts – how to differentiate them in practice – continues to cause problems.

4.1.3.3. The contrasting nature-purpose criteria: the limits and weaknesses of the imperii/gestionis distinction

The distinction between *acta jure gestionis* and *acta jure imperii* is not as easy as it may seem. At first glance, it seems relatively straight-forward.[444] However, difficulties arise in situation that are not completely clear-cut (ie the warship situation in *Schooner Exchange*). Multiple ideas have emerged to form the basis for the distinction: the nature of the act, the purpose of the act, and the subject matter (the latter less mentioned in the doctrine). However, they each come with difficulties and blind spots, making it difficult to settle on a rule that all can follow when it comes to distinguishing between *acta jure imperii* and *acta jure gestionis*.

The purpose-based approach focuses on the purpose of the transaction to determine whether or not immunity should be granted. If the purpose regards a sovereign act – a contract for

[442] ibid.
[443] Hazel Fox, 'In defence of State immunity: why the UN Convention on State immunity is important' (2006) 55 International and Comparative Law Quarterly 399, 399. See also David P. Stewart, 'The UN Convention on Jurisdictional Immunities of States and Their Property' (2005) 99 American Journal of International Law 194, 210: 'The convention's text reflects an emergent global consensus, increasingly demonstrated in doctrine as well as practice, that states and state enterprises can no longer claim absolute immunity from the proper jurisdiction of foreign courts and agencies, especially for their commercial activities'.
[444] Jan Klabbers, International Law (3rd edn, Cambridge University Press 2020) 112.

steel to build a war ship – then the act is *jure imperii*. If on the contrary the purpose is deemed private, then the act is considered commercial, and thus *jure gestionis*; immunity cannot be invoked. While it may seem logical at first glance, one could reasonably expect 'most commercial activities of a government to have a public purpose, whether it be the purchase of army boots for its soldiers or the lease of computer equipment for its *fonctionnaires*'.[445] In the *Victoria Transport Inc. v Comisaria General De Abastecimientos y Transpertos*[446] case, the court pointed out that 'conceptually, the modern sovereign always acts for a public purpose'.[447] In other words, it can quickly end up in a catch all situation, where everything is for public purpose or nothing is,[448] and the distinction becomes meaningless.

The nature-based approach focuses instead on the nature of an act. If the nature is commercial or deals with a private law matter, then it should be considered *acta jure gestionis* even if the purpose is public. With this method, even if the purpose of the act is public, if the nature can be established to be (for instance) commercial and therefore private, as it could be the act of a private party, the act is not covered by immunity. This is no matter whether the contract is about goods to be used by the army or to build a war ship. Switzerland, Austria, and Germany were amongst the first ones to follow this approach,[449] which is also the one used by the United States.[450] The UN convention also prefers this approach over the purpose based one, with its Article 2, paragraph 2 disposing that, on determining whether an act is commercial:

> …reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.[451]

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[445] ibid 113.
[446] *Victory Transport Inc. v. Comisaria General* 336 F.2d 354 (2d Cir. 1964).
[447] ibid 359.
[448] And it is much more likely that everything will be public, and therefore covered by immunity, if this approach is preferred. See Leo J. Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution' (1979) 10 Netherlands Yearbook of International Law 3, 15: 'if the purpose of the act were to be decisive, the state involved could nearly always construe a relationship between its activities, whatever the nature thereof, and its public responsibilities; this approach would pave the way for state immunity lato sensu, in particular for those states where foreign trade is a state monopoly; application of the criterion of the purpose of the act might in fact come close to the doctrine of absolute immunity'.
[449] Yas Banifatemi, 'Jurisdictional Immunity of States – Commercial Transactions' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 127.
[450] 28 U.S.C. §1603(d): 'A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.'
[451] United Nations Convention on Jurisdictional Immunities of States and Their Property, UNGA Res 59/38 (LXV) (2 Dec 2004) (adopted without a vote, on the recommendation of the Committee) 2-3.

This approach is criticised too however, on the account that, for instance, it does not take into account that some contracts can only be made by a State.[452] The outcomes of the decisions made in cases that used the nature-based approach have also been criticised, with the court in the *Victoria Transport* case pointing out that 'it ofttimes produces rather astonishing results, such as the holdings of some European courts that purchases of bullets or shoes for the army, the erection of fortifications for defence, or the rental of a house for an embassy, are private acts'.[453] In other words, we run into the same problem as the purpose-based approach, a blanket application that ignores the specificity of some cases running the risk of making – this time – everything private.

In both approaches, the decision of whether an act is public or private is left to domestic courts. The third approach takes the decision out of their hands, but only moves the distinction to another actor (sometimes still domestic, such as a State's legislature), and also has its own blind spots.

The subject matter approach emerged as a result of rejecting the previous two tests, and attempting to come up with a pragmatic solution. This method requires a list of 'predetermined inventory of specific activities'[454] to be drawn up and used as a reference by courts. This would in theory take the burden of the decision away from the national courts, but it would also simply move the difficulty of the classification to another actor. Additionally, judges would still have to interpret certain acts. Indeed, the list approach might seem sensible, but it is near impossible to create a comprehensive and exhaustive list.[455] In the case of the UK, the legislation reverts to an item on the list meant to capture 'any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority'. This leaves a large opening for judges to interpret a particular act.

In other words, no method of distinction is perfect. All of them run the risk of ignoring the specificities of a case, and the general lack of harmonisation leads to States being unable to

[452] *Victory Transport Inc. v. Comisaria General* 336 F.2d 354 (2d Cir. 1964) 359: 'this test merely postpones the difficulty, for particular contracts in some instances may be made only by states'.
[453] ibid.
[454] Yas Banifatemi, 'Jurisdictional Immunity of States – Commercial Transactions' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 126.
[455] ibid.

know whether or not their situation will lead to protection or a lawsuit. This is particularly difficult for developing States who would want to protect and increase their economic development, and at the same time would not want to face lawsuits.

The UN convention did attempt to solve the matter by including all three methods. It makes use of the listing idea of the subject matter method – a method that can also be found in the 1972 European Convention – stating explicitly for instance that contracts of employment do not invite State immunity 'unless otherwise agreed between the States concerned'.[456] However, the convention also uses both the nature and purpose-based approaches as seen above, though with a marked preference for the former.

There is not one approach that is accepted by all States. The US, with its FSIA, holds that nature is decisive when looking at whether or not an act is considered commercial. Italy, on the other hand, uses the purpose-based approach.[457] Additional difficulties arise when looking at the very definition of "State" or "commercial transaction",[458] which the UN convention acknowledges at its article 2(3).[459]

While the *acta jure imperii* and *acta jure gestionis* distinction may appear clear, a closer look at State practice and international conventions shows that there is a lack of harmony on how to enact this distinction. This is the case also in disputes involving *jus cogens* norms versus State immunity, with the 2012 ICJ decision in the *Jurisdictional Immunities* case (Italy v Germany)[460] leaving much to be desired: when confronted with the question, the

[456] United Nations Convention on Jurisdictional Immunities of States and Their Property, UNGA Res 59/38 (LXV) (2 Dec 2004) (adopted without a vote, on the recommendation of the Committee) 6.
[457] *Borri v. Repubblica Argentina*, Corte di Cassazione, 27 May 2005, (2005) Case No. 11225.
[458] Christoph H. Schreuer, *State Immunity: Some Recent Developments* (Grotius Publication Limited 1988) 14, on the difficulty of defining what a "commercial activity" is: 'The brief survey of some of the more important recent efforts to come to terms with the notion of "commercial activities" of foreign States is sufficient to demonstrate how elusive and vague this concept has remained. No doubt there are clear textbook situations of commercial activity. The trouble starts with the numerous borderline cases which cannot be clearly and definitely classified as commercial or non- commercial. Some of the definitions are a bit more detailed than others. But it is still unrealistic to think that this most complex of all problems in the field of State immunity can be resolved by means of a simple definition. The inherent problems are perhaps best demonstrated by the fact that so many of these definitions have a circular element in that they use the word "commercial" in order to explain that very term.'
[459] United Nations Convention on Jurisdictional Immunities of States and Their Property, UNGA Res 59/38 (LXV) (2 Dec 2004) (adopted without a vote, on the recommendation of the Committee) 3: 'the provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any States'.
[460] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgement) [2012] ICJ Rep 99. Italy invoked the argument (*inter alia*) that State immunity should not apply in cases involving a jus cogens norm – in this instance, violations of international law during the Second World War.

Court argued that 'the two sets of rules address different matters',[461] one on a substantial plane (*jus cogens* norm) and another on a procedural plane (State immunity). This led to a controversial decision by the ICJ to uphold State immunity even in a case involving gross violations of human rights.

In conclusion, the bare bones of the narrative of State immunity are generally the same across the doctrine: it evolved from being initially absolute to restrictive due to the increasing involvement of States in private affairs. This restriction is generally based on the distinction between private acts (*acta jure gestionis*) and public or sovereign acts (*acta jure imperii*). While the reality of the *gestionis*/*imperii* distinction is far more complex than it might appear, with grey areas exemplifying the difficulties of categorising States activities, State immunity did manage to evolve from absolute to restrictive.

4.2. A case for the application of State immunity to international organisations

The idea of a direct comparison between State immunity and international organisations immunity does not sit easily in both the literature[462] and the organisations themselves.[463] This awkwardness should not come as a surprise: at first glance, there are indeed glaring differences between the two actors. Indeed, as seen in the previous chapters, IO immunity is usually based on functional necessity, while State immunity relies on equal sovereignty and reciprocity. On a very prosaic level, States and international organisations are two distinct actors. States have a territory while IOs do not, States are assumed to have sovereign power instead of specific functions, and States create international organisations, leading to a relationship that is, at least at its infancy, one of subservience: the functions of the international organisations are given to them by States.

[461] ibid para 93.

[462] See for instance Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (14th edn, Dalloz 2018) para 189, justifying the larger scope of immunities for international organisations as opposed to States due to their necessary implementation on State territory (in short, this is to protect them): '… il apparaît raisonable de maintenir à l'immunité de jurisdiction des organisations le champ d'application le plus large, eu égard à leur necessaire implementation sur le territoire d'un État…'. See also Eric de Brabandere, 'Immunity of International Organizations in Post-conflict International Administrations' (2010) 7 International Organizations Law Review 79, 89: 'The functional nature of an international organization does not permit simply applying all rules applicable to states, to international organizations.'

[463] UN Office of Legal Affairs, Memorandum to the Legal Adviser, UNRWA, UNJYB (1984) 188: '[t]he immunity accorded international organizations [...] is an absolute immunity and must be distinguished from sovereign immunity which in some contemporary manifestations, at least, is more restrictive'.

However, the differences between States and IOs, and the UN in particular, are not as stark as they might be presented. From a possible analogy through the disposition of Article 29 of the General Convention with restrictive State immunity (4.2.1), to the example of the UN acting as an interim State in instances like UNMIK in Kosovo (4.2.2), to the various court cases making a direct connection between the two (4.2.3), States and international organisations cannot be kept completely separated. From then, the question of whether international organisations should go through the same evolution that State immunity did towards restrictive immunity becomes increasingly salient.

4.2.1. A possible analogy through Section 29?

While the distinction *acta jure gestionis*/*acta jure imperii* is not entirely settled, as seen throughout this chapter, there is a common ground: commercial activities are always in the *gestionis* category, and the evolution from absolute to restrictive immunity itself was a consequence of the growing involvement of States in private and economic affairs, much like a big company.

In the case of the UN, Section 29 of the General Convention, the SOFA, and the official communications from UN officials in the cases of Haiti and Kosovo make a distinction between "dispute of a private law character" and disputes regarding the policies or performance of the UN. The mention of "private law character" in particular immediately brings to mind the private/sovereign, or private/public distinction that forms the basis of restrictive State immunity.[464] It seems to echo, at least in part, the *jure imperii*/*jure gestionis* distinction for State immunity. The comparison itself can be controversial, as many have already stated that the two – IO and States – are different and should not be compared. However, there are a few elements one could point to in order to support this comparison.

The link between the disputes of a private law character of Section 29 and *acta jure gestionis* is not as simple as to say that they both seem to deal with private law related matters, particularly as neither is that simple in practice. However, there are a few additional clues to allow for such a comparison to be made. The distinction between *acta jure gestionis* and *acta jure imperii* was established once States became increasingly involved in private

[464] See Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 The European Journal of International Law 9, 69: stating that Section 29 is 'roughly analogous' to the distinction in State immunity. See also Frédéric Mégret, 'La Responsabilité des Nations Unies aux Temps du Choléra' (2013) 46 Revue belge du droit international 161, 166: 'En revanche, les litiges de droit privé font l'objet d'un traitement préférentiel, un peu par analogie avec la manière dont les immunités des États cèdent en matière d'actes *de jure gestionis,* car ces litiges remettent moins directement en question l'action des Nations Unies.'

matters, acting in much the same way as a private person such as a company. In his report on the Haiti cholera crisis, Philip Alston makes this statement with regards to the UN's handling of faecal waste: 'the duties owed by the United Nations are directly analogous to those owed by a company or private property owner to ensure adequate waste management and to take precautions to prevent spreading disease'.[465] While the act in question is very specific here – handling of waste – the link is made between the UN and a *private company* when it comes to their duties. It stands then that when these duties are not fulfilled – where there is negligence for instance – any given private company would not be able to hide behind absolute immunity the way the UN has been able to do. The echo with State immunity, restricting once States started to act as a private company would, is definitely there.

Nonetheless, one can argue that it is not this part of the comparison that is problematic. That the UN has a provision to deal with third party private claims, and that this section is similar to State immunity's *acta jure gestionis*, also dealing with private claims (both internal and external) is not entirely surprising. What is notable is that the UN *itself* can be compared to a State. The main differences pointed out by authors who dismiss this argument in the literature is that States do not have functions – they can do what they want, within reason – while IOs have functions given to them by States. But this state of affair, which may have been true at the emergence of IOs which were focused on one or a few specific functions and apolitical in a functional ideal, is no longer applicable to the present situation. In the case of the UN in particular, the organisation cannot reasonably be said to be functionalist. It has expanded, particularly via its peacekeeping missions, to take on tasks that a State would normally be in charge of.

4.2.2. What happens when the UN acts like a State

This section does not intend to argue that the UN is a State, or strictly analogous to one. Rather, it explores the few instances where the UN acted *as* an interim State, while still benefiting from absolute immunity.

In the case of UNMIK (the United Nations Mission in Kosovo), the UN acted as an interim State authority in the absence of a functioning government at the time. It was involved in the promotion of human rights, the safe return of refugees and displaced persons, the

[465] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para. 35.

establishment of an interim civilian administration, assistance in the organisation of elections, usually a State prerogative, and now a not uncommon addition to a peacekeeping mission mandate,[466] etc, all to be part of a network under the UNMIK umbrella.[467] Despite this significant foray into State-like governance, the UN continued to benefit from absolute immunity, on the basis that it was an international organisation and not a State – and despite the particular situation the UN had found itself in in Kosovo.

This impunity drew sharp criticism,[468] in that the UN was getting "the best of both worlds": acting as a State but without the restrictions put upon one when it comes to immunity. The UN not only enjoyed immunity, but it enjoyed immunity of a greater scope than a State (Kosovo, in this case) would at the time of UNMIK. The cholera in Haiti situation is not strictly equivalent, as the UN did not act as a de facto government, though the weakness of the Haitian government can lead some to question whether it could act as a State on its own. Modern peacekeeping missions in general are much more involved in the daily life of both the population and that of the State. At what point then does a UN peacekeeping mission 'which seizes the reins of governance in a fragile state whose own government owes its existence to the UN'[469] start to look more like a State than an international organisation? If an organisation acts as a State, should it not then benefit from the same immunity granted to a State – restrictive? This is the same argument that brought on the *jure imperii*/*jure gestionis* comparison in the first place – if the State is to act as a private person, then it stands to reason that it should benefit from the same scope of immunity as a private person – effectively none. If the UN is to act as a State, then it stands to reason that it should benefit from the same scope of immunity as a State currently does – restrictive, based on *gestionis*/*imperii* distinction.

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[466] See for instance UNSC Res 1159 (27 March 1998) UN Doc S/RES/1159, para 10.

[467] Anne Holohan, 'Peacebuilding and SSR in Kosovo: an Interactionist perspective' (2016) 17 Global Crime 331, 332: 'Back in 1999, the UN Security Council UNSC Resolution (UNSCR) 1244 on 10 June authorised the creation of the United Nations Interim Administration Mission in Kosovo (UNMIK). It was the first real attempt by the UN at governance and its mandate was extensive and unprecedented both in scope and structural complexity, as it included establishing an interim civilian administration including police, promoting autonomy and self-government in Kosovo, creating a democratic political atmosphere respectful of human rights, supporting the reconstruction of infrastructure and the economic system, maintaining civil law and order, promoting human rights, and ensuring a safe return of refugees and displaced persons to their homes.'

[468] ibid 334-335, mentions an 'accountability deficit' and adds that '[t]his deficit in UNMIK was manifested by a protracted concentration of power, ruling by imposed decrees, the absence of (internal) elections, and a lack of transparency; all of which was further exacerbated by wide-ranging immunities and virtual impunity for international officials'. See also Jay Chopra, 'The UN's Kingdom of East Timor' (2000) 42 Survival 27, 29, describing the UN's administration in East-Timor as 'comparable with that of a pre-constitutional monarch in a sovereign kingdom', and citing as evidence the fact that the 'international staff of the mission, in accordance with international convention, are given immunity from prosecution'.

[469] José Alvarez, 'The United Nations in the Time of Cholera', (*American Journal of International Law Unbound*, 4 April 2014) <http://www.asil.org/blogs/united-nations-time-cholera> accessed 6 February 2024, 28.

The defenders of a strict separation between States and international organisations, particularly when it comes to immunity, put forward the argument that the two actors serve different purposes, and that the immunities and their scope reflect that. Absolute immunity for the organisations which have a specific and definite function, and restrictive immunity for the States that exercise sovereign power. But when the distinction blurs, when the UN takes on "State-like" power, why should it be allowed to keep its absolute immunity?[470] This argument is supported by the Special Report of the former International Ombudsperson in Kosovo, noting that:

> With regard to UNMIK's grant of immunity to itself and to KFOR, the Ombudsperson recalls that the main purpose of granting immunity to international organisations is to protect them against the unilateral interference by the individual government of the state in which they are located, a legitimate objective to ensure the effective operation of such organisations (see, e.g. Waite and Kennedy v. Germany judgment of 18 February 1999, Reports of Judgments and Decisions, 1999-I, para. 63). ***The rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration (United Nations Mission in Kosovo – UNMIK) in fact acts as a surrogate state.*** It follows that the underlying purpose of a grant of immunity does not apply ***as there is no need for a government to be protected against itself***. The Ombudsperson further recalls that no democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility. Such blanket lack of accountability paves the way for the impunity of the state.[471]

In short, if an international organisation acts like a State, it should get the same scope of immunity as one, as the main purpose for absolute immunity is no longer applicable. There is no State to defend itself from, rendering the illusion of functional necessity very difficult to maintain. Two potential arguments that can be raised against such a comparison are that, first, the absolute immunity granted to UNMIK is also here to protect it against the

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[470] Julia Werzer, 'The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor' (2008) 77 Nordic Journal of International Law 105, 140: 'UNMIK and UNTAET can by no means be compared to traditional peace-keeping operations as they are vested with all the powers of a "normal" state and function as the sole authority.'

[471] Ombudsperson in Kosovo, 'Special Report no. 1 on the compatibility with recognized international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo' (*The Republic of Kosovo Ombudsperson Institution* 18 August 2000) <https://oik-rks.org/en/2001/04/26/special-report-no-1/> accessed 25 March 2024. Emphasis added.

administrative and judicial branches of the host State,[472] and second, the mandate of the mission is not to govern as an interim State but to 'reconstruct a State or territory'.[473] On the former, this does not actually go against the analysis that if an organisation acts like a State it should be granted the immunities of one. And crucially, it does not go against what actually happened: in the Kosovo lead poisoning case, there was little to no involvement of Kosovo's administrative or judiciary branch. The UN was protecting itself against a possibility, which led to accusations of lack of accountability when the reality happened. This ties in with the second argument, that of the "real" mandate of the UN. There is little doubt that this was the overall goal. However, if the UN wants to lead by example and achieve its State-building function, it needs to model good governance. In that aspect, by failing to adapt to its current "State-like" situation, the UN is not a good model to follow.[474]

The section on the *gestionis*/*imperii* distinction in this chapter has of course shown that the application of State immunity rules requires some growing pains: debates on whether to consider the nature or the purpose of a given act are still ongoing. However, the UN has for years presented itself as a defender of human rights, impunity, and transparency. Allowing itself to be shielded by its absolute immunity even when acting as a State, or allowing a State to use the organisation as a shield/screen to execute the actions it would not be able to do as a State without being successfully sued, would be going against these principles.

Moreover, there is evidence in past and current court cases that the application of State immunity principles to IOs is not a new concept, even when the organisation is not acting as a State.

4.2.3. The legacy of case law and *Jam*

In order to support the argument that State immunity and IO immunity ought not be treated as differently as they have been so far, this section will develop a few court cases that have

[472] Eric de Brabandere, 'Immunity of International Organizations in Post-conflict International Administrations' (2010) 7 International Organizations Law Review 79, 111.
[473] ibid 110.
[474] Thomas Hammarberg, 'International Organisations acting as quasi-governments should be held accountable' (Council of Europe 8 June 2009) <https://www.coe.int/nl/web/commissioner/-/international-organisations-acting-as-quasi-governments-should-be-held-accountable> accessed 25 March 2024:'Lack of accountability may undermine public confidence in the international organisation and thereby its moral authority to govern. Such governing promotes a climate of impunity for acts committed by their staff and sets a negative model for domestic governments. Models of good governance, on the other hand, call for answerability which in turn enhances the credibility of the work of the organisation and acts as a dissuasive to future abuses of power and misconduct.'

shown the application of State immunity – with the *jure imperii*/*jure gestionis* implication – to an international organisation.

Firstly, a selection of cases in the Italian courts have shown that Italy is no stranger to use the *gestionis*/*imperii* distinction and apply it to international organisations. Examples include *Branno v. Ministry of War* (1955)[475], *Porru v. FAO* (1969)[476] and FAO v. INPDAI (1982)[477]. In FAO v. INPDAI, when discussing the actions of the FAO, the Court explained that:

> in a considerable number of decisions it had held that, irrespective of their public or private character, whenever they acted in the private law domain, they placed themselves on the same footing as private persons with whom they had entered into contracts, and thus forewent the right to act as sovereign bodies that were not subject to the sovereignty of others.[478]

While this line of jurisprudence was eventually dropped,[479] it went through a brief resurgence following the outcome of the ICJ case on *Jurisdictional Immunities* (Germany v Italy, 2012), where Italy lost despite arguing that Germany should not benefit from immunity as its acts could not be considered *acta jure imperii*.[480] While the case did not involve an international organisation, they have been mentioned in Italy's reaction following the ruling in favour of Germany. In a subsequent ruling by its Court of Cassation in 2014, Italy rejected the ruling and decided that:

> the absolute sacrifice of the right of judicial protection of fundamental rights – one of the supreme principles of the Italian legal order, enshrined in the combination of Articles 2 and 24 of the republican Constitution – resulting from the immunity from Italian jurisdiction granted to the foreign State, cannot be justified and accepted insofar as immunity protects the unlawful exercise of governmental powers of the foreign State, as in the case of acts considered war crimes and crimes against humanity, in breach of inviolable human rights.[481]

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[475] *Branno v. Ministry of War*, Corte di Cassazione, Riv. dir. int. (1955).
[476] *Porru v. FAO*, 25 June 1969, Rome Court of First Instance (Labor Section), [1969] UNJYB 238.
[477] *FAO v. INPDAI*, Corte di Cassazione, 18 October 1982, [1982] UNJYB 234.
[478] ibid 236.
[479] August Reinisch and Ulf Andreas Weber, 'In the shadow of Waite and Kennedy' (2004) 1 International Organisations Law Review 59, 62.
[480] Italy alleged that they constituted a violation of human rights and a *jus cogens* violation – both arguments rejected by the Court.
[481] *Simoncioni and others v. Germany and President of the Council of Ministers*, Corte *Costituzionale,* 22 October 2014, No. 238, para 5.1. The line of argument regarding article 24 of the Constitution can also be found in Italy's earlier line of jurisprudence that sought to apply the *gestionis*/*imperii* distinction to IOs. See *FAO v. INPDAI*, Corte di Cassazione, 18 October 1982, [1982] UNJYB 234, 236.

The court ruled that Article 3 of the Law No. 5 of 14 January 2013, as well as Article 1 of Law No. 848 of 17 August 1957 (Execution of the United Nations Charter) so far as it concerns the execution of Article 94 were considered to be unconstitutional. The case makes a mention of the UN, specifically, conceding that the ICJ's binding decisions 'constitutes one of the cases of limitation of sovereignty the Italian State agreed to in order to favour those international organisations, such as the UN' although 'always within the limits, however, of respect for the fundamental principles and inviolable rights protected by the Constitution (Judgment No. 73/2001)'.[482]

In other words, the Italian courts are particularly progressive on the issue of international organisations' absolute immunities, starting with their old line of jurisprudence all the way to 2014. Notably however, there have been no recent cases directly against the UN (as far as the author knows), and the human rights-based challenge to IO immunity has remained overall difficult to apply – there is little support in the ECtHR jurisprudence regarding the UN, for example.[483]

There are however other developments that do not rely on human rights, but more explicitly in relation to State immunity. One such example is the US Supreme Court decision on *Jam et al. v IFC*,[484] decided on 27 February 2019 and opposing the World Bank Group International Finance Corporation (IFC) and a group of petitioners made up of local fishing and farming communities. This case was significant in that it represented a move away from established precedents. Both the District Court[485] and the Court of Appeals[486] agreed with the IFC's argument that it benefited from absolute immunity under the International Organizations Immunities Act (IOIA, enacted in 1945). The act stated that international organisations that fell under its remit 'shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments'.[487] Since, **at the time the IOIA was enacted**, foreign governments enjoyed de facto absolute immunity, it was interpreted to apply to the aforementioned international organisations despite the evolution in the US from absolute to restrictive State immunity (see the Foreign Sovereign Immunities

[482] ibid para 4.1.
[483] See *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10, where the absence of an alternative mode of settlement was considered not to violate the proportionality requirement to determine whether the right of access to a court had been violated.
[484] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019).
[485] *Jam v. International Finance Corp.*, 172 F.Supp.3d 104 (2016).
[486] *Jam v. International Finance Corp.*, 860 F.3d 703 (2017).
[487] 22 U.S.C. §288a(b): 'international organizations, their property and their assets, wherever located and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments…'

Act, or FSIA enacted in 1976, mentioned in the section on restrictive State immunity).[488] This "static" interpretation of both acts remained in place until *Jam*, when the Supreme Court took hold of the case and decided to do a textual interpretation of the provision of the IOIA, ultimately choosing to interpret it dynamically with the FSIA. The court ruled that since there had been an evolution to State immunity, it should influence the way the IOIA disposition is to be interpreted, rather than the disposition being frozen in time in 1945. Consequently, any international organisations falling under the remit of the IOIA would therefore see the scope of their immunity go from absolute to restrictive,[489] in accordance with the FSIA.

There are however a couple of caveats to this development. The case of *Jam* certainly presents an enticing possibility: limiting the immunities of international organisations, putting them under the same rules as States. There are however a number of limitations with the case of *Jam*: it only applies domestically, and only for a few organisations – and, crucially, not the UN, protected as it is as the CPIUN is considered to be self-executing.[490] This is not a small difficulty in one jurisdiction. Much like the *Mothers of Srebrenica* ECtHR case, which directly involved the UN, there is an obvious and general unease in the courts to apply restrictive immunity to the UN even when it is applied to other international organisations. This is an example of the courts adopting the functional necessity narrative wholesale.

The potential low influence of *Jam* led to the change in the jurisprudence to be called a 'trickle' rather than a 'flood'.[491] So far, there is only one case decided based on the precedent set by *Jam*,[492] and it concerns a rather small organisation compared to the UN itself. More importantly, the domestic aspect of this decision means potential fragmentation of the rules on immunity if other States follow suite. While the *jure gestionis*/*jure imperii* distinction is generally recognised by most States, the first section of this chapter showed that classifying acts based on that dichotomy remains a difficult exercise.

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[488] 28 U.S.C. §1602: 'Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.'
[489] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019) 10.
[490] *Brzak v United Nations*, 597 F.3d 107 (2d Cir. 2010).
[491] Sachintha Dias, 'Jam v IFC before the D.C. District Court: Forget the Floodgates, there won't even be a Trickle' (EJIL:Talk!, 1 April 2020) <https://www.ejiltalk.org/jam-v-ifc-before-the-d-c-district-court-forget-the-floodgates-there-wont-even-be-a-trickle/> accessed 19 February 2024.
[492] *MATOS RODRIGUEZ et al v. PAN AMERICAN HEALTH ORGANIZATION*, 502 F. Supp. 3d 200 (D.D.C. 2020).

There is also a case to be made for the functionalist argument that lawsuits can hamper an organisation's functioning. While the decision in *Jam* ended up being in favour of the organisation, this was not the case for *Rodriguez v. Pan-American Health Organisation (PAHO)*. Here, PAHO acted as a financial intermediary between Cuba and Brazil as part of the Mais Médico programme. The programme was intended to bring doctors to regions in Brazil which lacked necessary medical aid for their populations.[493] The plaintiffs argued that they had been subjected to forced labour and human trafficking.[494] The courts decided to apply the *Jam* jurisprudence, to the detriment of the organisation as it was considered not immune from suit.

The courts in *Rodriguez* admitted that a wholesale application of the FSIA rules to international organisations was 'fraught with difficulty',[495] both in the case of *Jam* and in the case of *Rodriguez*. PAHO tried to argue that if a distinction must be made between commercial and non-commercial activity (following *Jam* and the FSIA), then this distinction should be 'between conduct that falls within an international organization's mission' (non-commercial, immune) and 'conduct in which the organization acts outside its mission' (commercial, non-immune).[496] These arguments are very similar (if not identical but using a slightly different vocabulary) to the one developed by Bekker in his 1994 book: instead of applying the restriction of State immunity wholesale, the focus should be on the nature of the act (similarly to how an act is considered *gestionis* or not for State immunity), and the distinction should be between "official" and "non official" acts of an organisation.[497] Thus, an act might be commercial for the sake of the *gestionis*/*imperii* distinction, but official for the sake of the official/non-official distinction, and thus require immunity. The court however rejected this solution as going against the 'existing doctrinal rule' that the court ought only to look at the differences and similarities between the 'outward form' of the organisation's conduct and that of private citizens.

The difficulties of *Rodriguez* show that while the *Jam* case does constitute a change in the doctrine, its use of FSIA rules applied to international organisations does not come without serious issues. Furthermore, in following their own distinction (answering the question of

[493] Federal Government of Brazil, 'Mais Médicos para o Brasil, mais saúde para você' <http://maismedicos.gov.br/conheca-programa> accessed 3 February 2024.
[494] *MATOS RODRIGUEZ et al v. PAN AMERICAN HEALTH ORGANIZATION*, 502 F. Supp. 3d 200 (D.D.C. 2020), 207.
[495] ibid 212.
[496] ibid 212-213.
[497] Peter H. F. Bekker *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers 1994) 163.

whether an organisation's conduct is similar to that of a private citizen's) the court also drew further criticisms. Gian Luca Burci states plainly that they 'failed to accurately capture the nature of the Mais Médicos program and PAHO's role in it'.[498] In that, the application of the new *Jam* jurisprudence faces difficulties in two ways: it treats PAHO as akin to a private citizen, while ignoring its special status as an organisation that is neither a State nor an individual.

The case of *Jam* therefore constitutes a good starting point – some international organisations can indeed be considered not absolutely immune, even if it is based on a strictly textual interpretation of a State-centred provision – but it is not a perfect solution. From the fragmentation aspect to the difficulties of applying State rules to international organisations, *Jam* shows what is possible, but also what is not.

Conclusion to Chapter 4

The case for the application of State immunity rules to an international organisation like the UN can certainly be made. There are similarities between the two actors, particularly when it comes to the activities of the UN in certain peacekeeping missions akin to territorial administrations. There are however two main caveats: there are still growing pains when it comes to defining exactly what the *acta jure gestionis*/*acta jure imperii* distinction entails; and there is the inherent difficulty that, while broadly similar, States and international organisations do function fundamentally differently. An international organisation has functions to fulfil, however broad, and is therefore *in theory* limited by them. A State, on the other hand, is sovereign and thus does not face such limits, in the sense that no one can determine a specific and unique function of a State. In short, there can be no simple application of State immunity rules to international organisations, as their mandates have to be taken into account. The case of *Jam* has however shown that it is possible to reduce the wide berth between the scope of State immunity and IO immunity, and use one for the other with some caution. Yet, the courts are already anticipating the difficulties in applying a regime tied to the specificities and history of one actor to another with a completely different development.

[498] Gian Luca Burci, 'Jam v IFC's complications: the Pan-American Health Organization' (*EJIL:Talk!*, 4 January 2021) <https://www.ejiltalk.org/jam-v-ifcs-complications-the-pan-american-health-organization/> accessed 19 February 2024.

The conclusion is rather obvious: taking an entire system wholesale to apply it to the UN would be very difficult. The UN does not quite fit the distinction between international organisations and States, and the challenge of that distinction also brings about a challenge for its immunities. Not quite a State but not quite an "ordinary" international organisation, any new system of immunity should be able to handle its specificities while at the same time rejecting the narrative of functional necessity.

Following this analysis, the final step is to examine the solutions to the perceived impunity of the UN proposed in the literature so far and establish what a reform of the organisation that abandons the functional necessity narrative could look like.

Chapter 5: A reform of the UN immunity system: restrictive immunity and a permanent judicial body

Introduction

At the outset of a chapter on a reform of the UN's immunity system, a couple of points need to be addressed first and foremost: why reform at all, and why arguing for a full reform of the system instead of the better implementation usually recommended by authors?[499] In the first section, the reasons why a reform is at all needed will be teased out. The second section will take a closer look at the reform ideas in the literature and show evidence of the pattern that limits the scope of what a reform of the UN's immunity system could look like due to the influence of the functional necessity narrative. Finally, the third section will attempt to map out what a radical reform of the UN's immunity system could look like, deconstructing the narrative of functional necessity and drawing on the previous chapters of this thesis. It will ultimately make the argument that the best way to ensure impartiality, transparency and accountability is the establishment of an independent international judicial body.

5.1. Why reform? An analysis of why the UN's current position is both untenable and dangerous for its mandate

This first section intends to show the reasons why the UN can no longer feasibly use its current immunity system to deal with third party claims. Indeed, in the words of Philip Alston in his scathing report on the Haiti cholera crisis and the role of the UN in it,

> In summary, what is at stakes is the Organization's overall credibility in many different areas. Its existing position on cholera in Haiti is at odds with the positions that it espouses so strongly in other key policy areas. ***It has a huge amount to gain by rethinking its position and a great deal to lose by stubbornly maintaining its current approach***.[500]

This section will be divided in two parts, (5.1.1) one showing that the UN's current position and method of dealing with third party claims such as the ones in Haiti is untenable on a reputational and legal basis, and (5.1.2) the second providing evidence that the UN's reluctance to accept accountability leads to choices much more likely to impact the UN's

[499] These recommendations will be discussed further down, but as a starting point one can cite Ian Hurd, 'End the UN's legal immunity' (*The Hill*, 22 July 2016) <https://thehill.com/blogs/congress-blog/judicial/288739-end-the-uns-legal-immunity/> accessed 19 February 2024, in which he discusses a better implementation of the caveats to the UN's absolute immunity, including the SOFA agreement, or Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, which sets out four ways of improving the UN's response to impunity concerns, none focusing on a full reform of a the system.

[500] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para 73. Emphasis added.

core mandate than a couple of lawsuits ever could. The section will conclude that, (5.1.3) faced with a growing danger to the UN's core mandate, reform is not only desirable, but it is also *necessary*.

5.1.1. An untenable legal position

The current UN "strategy" when it comes to dealing with third party claims is so far very entrenched. There is usually a period of either ignoring the issue or denial regarding its own participation in the problem – in the case of Haiti, this included denying scientific evidence that cholera came from the Nepalese peacekeepers, despite the evidence to the contrary and a second scientific report assessing the origin of the bacteria[501] – followed by a statement from the Office of Legal Affairs, usually obtained after months[502] or years of waiting, asserting that the claims are not receivable as 'consideration of these claims would necessarily include a review of political and policy matters'.[503] This allows the UN to deny the application of Section 29 of its General Convention, avoiding an exposure of its actions to an appropriate mode of settlement – and a possible decision in the favour of the claimants. The position that the claims are not receivable due to them addressing political and policy matters has been criticised by the former head of the UN legal office, particularly in the case of Haiti.[504] As seen above with the Alston quote, this position is not only questionable due to the manner in which it is decided – lack of transparency or impartiality, procedures being lengthy and confusing[505] – but also due to the actual legal standing.

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[501] ibid para 15-17. This period of denial even included a scientific panel of independent experts making legal decisions on fault and responsibility for the outbreak.

[502] Fifteen months for Haiti (see Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 173) and 'over five years' for Kosovo (Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 177) for the Office of Legal Affairs (OLA) of the UN to make a decision – negative in both cases.

[503] Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Brian Concannon (5 July 2013). The wording for the rejection of the Kosovo claims is almost exactly the same: they 'do not constitute claims of a private law character and, in essence, amount to a review of the performance of UNMIK's mandate as the interim administration in Kosovo' (Letter from Patricia O'Brien (Under-Secretary-General for Legal Affairs) to Dianne Post (25 July 2011)).

[504] Bruce C. Rashkow, 'Immunity of the United Nations : Practice and Challenges' (2013) 10 International Organisations Law Review 332, 344: 'It is much more difficult to understand the decision of the United Nations declining to review the claims of the Haitian cholera victims in light of the longstanding practice of the Organization to address claims of a private law character in connection with peacekeeping missions and the terms of the Organization's new peacekeeping liability regime'. See also ibid, footnote 27: 'It is difficult to understand the position of the United Nations that these claims "are not receivable". Indeed, as the head of the United Nations legal office that routinely handled claims against the Organization for some ten years, I did not recall any previous instance where such a formulation was utilized in regard to such claims.'

[505] See Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 175 and following on the Kosovo claims, describing a 'Kafquaesque system' that 'served only to re-victimize the claimants'.

As seen in Chapter 1, the concept of a dispute of a private law character has been kept very vague in the General Convention it is from. There is in fact no actual definition of what it means, or clear examples of what it encompasses. The UN has rather consistently recognised that it should be responsible for damage caused by members of United Nations forces,[506] but in the case of Haiti (and Kosovo), it has refused to compensate the alleged victims, citing policy concerns even though the demands most likely fall under the remit of Section 29.[507] This restriction of the ways in which alleged third-party victims can get reparations has been considered 'unjustifiable'[508] and 'at odds with the rationale of [Section 29]'.[509] The claims have strong similarities with analogous claims in the domestic sphere,[510] being described as 'classic third-party claims for damages for personal injury, illness and death, and they arise directly from action or inaction by, or attributable to, MINUSTAH'.[511] The Alston report also alleges that 'the duties owed by the United Nations are directly analogous to those owed by a company or private property owner to ensure adequate waste management and to take adequate precautions to prevent spreading diseases'.[512] This argument is similar to what ultimately led to the evolution of absolute State immunity to limited State immunity.[513] The growing involvement of States in private affairs, to the point that they would occasionally behave as if they were a private company, led directly to changes in how their immunity was to be attributed: there would be no immunity when the State acts akin to a private entity. This argument was for instance used by the Italian Supreme Court of Cassation in *FAO v. INPDAI* (1982).[514] Even without the analogous link with State immunity, the description of what the UN considers to be a private law claim[515] can be used for the Haitian claims, as the

[506] See U.N. Secretary-General '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 Headquarters: Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation—Financing of the United Nations Peacekeeping Operations: Rep. of the Secretary- General' (20 September 1996) U.N. Doc. A/51/389.
[507] See for instance Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du cholera' (2013) 46 Revue belge de droit international 161, 169.
[508] Yohei Okada, 'Interpretation of Article viii, Section 29 of the Convention on the Privileges and Immunities of the UN: Legal Basis and Limits of a Human Rights-based Approach to the Haiti Cholera Case' (2018) 15 International Organizations Law Review 39, 69.
[509] See Martina Buscemi, 'The non-justiciability of third-party claims before UN internal dispute settlement mechanisms: the 'politicization' of (financially) burdensome questions' (2020) 68 Questions of Law Zoom-in 23, 30.
[510] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para 34: 'First, the claims appear to have all the characteristics of a private law tort claim'.
[511] ibid.
[512] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (2016) UN Doc A/71/367, para 35.
[513] See Chapter 4.
[514] *FAO v. INPDAI*, Corte di Cassazione, 18 October 1982, [1982] UNJYB 234.
[515] U.N. Secretary-General 'Procedures in place for implementation of article 8, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, on 13 February 1946: report of the Secretary-General' (24 April 1995) UN Doc A/C.5/49/65, para 15.

main characteristics appear to be that the claim has to emanate from a private person who suffered damage from a UN mission.[516]

The lack of transparency and impartiality from the United Nations has, frustratingly, only added to the overall confusion. Authors point to the time between each response for the victims, but also relevant is the identity of the decision-makers. In the case of the UN in Haiti or Kosovo, the starting point of the issue was the lack of impartial standing claims commissions, routinely replaced by UN-led boards.[517] But even when a petition would make it to the UN, the decision of whether a claim fell under the remit of Section 29 was left to the UN itself. It is essentially a control of wrongdoing undertaken by the alleged perpetrators, in a process where the alleged victims are completely shut out.[518]

In short, the legal basis for the decision of the UN is shaky at best and has been heavily criticised in the doctrine, alongside the lack of transparency in the decision-making process. The courts have not followed suit in pointing out the discordance between domestic tort law and the UN's definition of "private law character" however. This leads to a conundrum: it is difficult to argue that the UN clearly has the law on its side, but the courts overwhelmingly decide in favour of the UN, based on the General Convention and the UN's own interpretation of it. This translates into a general uneasiness from the courts to attempt to interpret an international convention – doubly so in the case of the UN. This is where the functional immunity narrative is at play: while the decision made by the UN that those claims do not fall under the remit of Section 29 *could* be challenged, there is a general understanding that it should not be. This is supported by the *amicus curiae* submitted in the case of *George*: the US General Attorney clearly stated that the UN should keep its absolute immunity and that this assertion is consistent.[519]

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[516] Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du choléra' (2013) 46 Revue belge de droit international 161, 169: 'On le voit, la caractéristique première d'une réclamation en responsabilité extracontractuelle est le fait qu'elle émane de personnes privées ayant subi un dommage à cause d'une faute de l'organisation internationale.'

[517] The criticism levelled at these review boards sums up the overall criticism levelled at the entire UN immunity system. See Martina Buscemi, 'The non-justiciability of third-party claims before UN internal dispute settlement mechanisms: the 'politicization' of (financially) burdensome questions' (2020) 68 Questions of Law Zoom-in 23, 27: 'It is in fact doubtful whether the local boards, with their inherent deficiencies, lacking independence and transparency, constrained by financial and temporal limitations, do provide an effective remedy for the victims.'

[518] ibid 25: 'Strikingly, the decision to consider the claims 'not receivable' due to having a 'political nature' has not been assumed by impartial courts or quasi-judicial bodies, but by…the UN Secretariat itself.'

[519] Preet Bharara et al., 'Brief for the United States of America as amicus curiae in support of affirmance' (26 August 2015), 2: 'The United States has consistently asserted the absolute immunity of the UN to lawsuits filed against it in domestic courts, and courts, including the Second Circuit, have consistently upheld the UN's immunity.'

Beyond the potential legal challenges however, the UN is also facing more concrete consequences which could end up having an even greater impact than a lawsuit: a devastating blow to its reputation, and a rejection of its peacekeeping missions and its peace and security mandate.

5.1.2. Consequences for peacekeeping missions and the UN's mandate: a ticking time bomb

While there have so far only been three major scandals involving the UN's third-party mass claims as opposed to the many peacekeeping missions it is involved in, a couple of points need to be made.

Firstly, the UN is currently involved in 12 peacekeeping missions throughout the world,[520] and 71 in total (59 completed plus the 12 active ones). In that regard, 3 major scandals (on three different missions) represents 4.23% of the total of missions. However, all of these crises emerged during or after the 1990s and the shift in peacekeeping operations in what the UN itself calls a 'post-cold war surge'.[521] While the sheer number of peacekeeping missions increased, so did their scope, including elements such as assistance for the organisation of free and fair elections[522] or disarmament, demobilisation, and reintegration (DDR).[523] The missions became multifaceted, going well beyond the earlier missions centred on cease fire. This led to a growing involvement of not only military personnel but also administrators, electoral observers and human rights monitors, inter alia.[524] And while these "new" peacekeeping missions do not have the monopoly of lasting the longest – after all, the first two peacekeeping missions established by the UN, UNTSO and UNMOGIP, which started in May 1948 and January 1949 respectively, are still ongoing – they do tend to last for a significant number of years. The relevant missions here have all lasted for more than 3 years, with the shortest being UNPROFOR (Srebrenica) and the longest being UNMIK (still ongoing). MINUSTAH (Haiti) lasted "only" 13 years, but UN involvement in the State did not start nor end with this specific mission. The first UN mission established in Haiti started in June 1996 (UNSMIH), while MINUJUSTH took over from MINUSTAH

[520] See United Nations Peacekeeping, 'Where We Operate' (*United Nations Peacekeeping*) <https://peacekeeping.un.org/en/where-we-operate> accessed 19 February 2024. The Global South features extensively, and Africa is the most represented continent with half of the current peacekeeping missions taking place on the continent.
[521] See United Nations Peacekeeping, 'Our History' <https://peacekeeping.un.org/en/our-history> accessed 19 February 2024.
[522] See for instance UNSC Res 1159 (27 March 1998) UN Doc S/RES/1159, para. 10.
[523] See for instance UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100, para. 16.
[524] See United Nations Peacekeeping, 'Our History' <https://peacekeeping.un.org/en/our-history> accessed 19 February 2024.

immediately in October 2017 and stayed for an additional 2 years. These lengthy missions, coupled with the increasingly broad mandates of the missions, are 'raising new challenges', which 'are perhaps most clearly reflected in the decisions of the United Nations in invoking immunity in the face of claims by the Mothers of Srebrenica and the Haitian cholera victims'.[525] Kristen Boon adds that 'the recent development of so-called "robust" peacekeeping missions that give peacekeepers an offensive mandate, rather than a defensive one, increases the likelihood of claims against TCCs [troop contributing countries] or the U.N'.[526]

In short, while the number of affected peacekeeping missions might be low at first glance, there seems to be an increase in recent years – which could be in part linked to the UN changing its stance on the issue of immunity and third-party claims, possibly for financial reasons. After all, the recent cases of Srebrenica, Kosovo, and Haiti amount to thousands of claims, and thousands of dollars associated with it. Upholding all of them, even with an insurance in place, would constitute a significant cost for an international organisation already struggling financially.[527] However, another reason for the increase is those robust mandates and their consequences on the missions, with peacekeepers staying for longer in affected communities and therefore having greater opportunities to cause harm.[528] Compounded with the conditions of the States peacekeepers are stationed in, the likelihood of another epidemic such as the one in Haiti is worryingly high. On top of that, 'UN audits have also documented similar waste mismanagement on UN peacekeeping bases outside of Haiti that have continued to pose serious and persistent health risks to host communities

[525] Bruce C. Rashkow, 'Immunity of the United Nations: Practice and Challenges' (2013) 10 International Organisations Law Review 332, 342. Notably, Rashkow does not refer to Kosovo here, though it does get a mention in his footnote 27, detailing the similarity in reasoning behind the rejection of this claim and of the Haiti one. It seems that the comparative lack of mention of the Kosovo claims by Rashkow seems to have been influenced by his perception of which case was still 'active' – as the article was written in 2013, the last word had not yet been said on Haiti and the decision of the ECtHR on *Srebrenica* had just come out.

[526] Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 385.

[527] ibid 346: 'the UN is a notoriously cash-strapped organization'. Additionally, 'lesser immunities may affect the willingness of member states to contribute to peacekeeping'. This argument is supported by the allegation that the rejection of the Haiti claim 'was in fact not based on a legal determination, but rather driven by political pressure from the United States and others concerned with the financial and precedential implications' (see Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 174, citing Ralph Zacklin, 'Accountability and International Law', Address to the 21st Annual Conference of the Australian and New Zealand Society of International Law, Canberra, 5 July 2013).

[528] This leads Kristen Boon to assert that the UN 'routinely affects individuals in the contemporary execution of its mandate'. Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 347.

around the world'.[529] These include missions in Côte d'Ivoire and Somalia – communities that definitely cannot afford a health epidemic.

Moreover, though not directly linked to Haiti or Kosovo – but definitely linked to Srebrenica – there are already reputational consequences for the UN. Mégret warns of the 'catastrophic lack of legitimacy which could result from its refusal to respect the rules which it intends to impose on the States'.[530] Boon adds that 'the U.N.'s handling of large torts cases has affected the U.N.'s standing with member states',[531] citing the adoption of the 2014 Rights up Front Action plan, 'which states that the protection of peoples is central to the U.N.' s mission, while acknowledging that the failure to protect populations in Srebrenica, Rwanda, Sri Lanka, and Syria have a negative impact on the Organization.'[532] Young posits that '[b]etter public perception would clearly benefit organizational goals by providing increased influence, cooperation, and political support'.[533] More broadly, there is an increased focus on victim-centred processes in recent years,[534] making the calls for accountability in cases involving third parties particularly prevalent.

In other words, the UN is sitting on a ticking time bomb. The combination of long, multi-faceted missions with an increased proximity to vulnerable populations and overall poor health standards on missions even following Haiti could lead to several future crises in the poorest areas of the world. And it is not only a case of the human cost being high: the reputational damage would be immense. Following the first cases of cholera in Haiti, violent

[529] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 168.
[530] Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du choléra' (2013) 46 Revue belge de droit international 161, 189: 'La consécration du phénomène de l'organisation internationale, sa permanence et sa puissance, impliquent au contraire de repenser les dangers auxquels fait face une organisation comme l'ONU, dangers qui sont à certains égards moins ceux d'une interférence étatique indésirable que du manque de légitimité catastrophique qui pourrait résulter de son refus de respecter les règles auxquelles elle entend astreindre les États'.
[531] Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 384.
[532] ibid 384, footnote 205.
[533] Carson Young, 'The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity under the IOIA' (2017) 95 Texas Law Review 889, 907.
[534] Kristen E. Boon and Frédéric Mégret, 'New Approaches to the Accountability of International Organizations' (2019) 16 International Organizations Law Review 1, 7: 'The intensity of their demands [third-party claims such as Haiti] has been magnified by human rights discourse and innovations in international criminal law which emphasise the importance of a victim centered approach to proceedings and remedies, occasionally piercing the corporate veil and emphasizing the right to remedies.'

demonstrations erupted against the UN, and the MINUSTAH mission in particular.[535] Demonstrators did not wait for the UN to confirm its implication, and the delay would only further the anger. In such a volatile context, and with the UN very clearly responsible for the epidemic even though it took years to fully admit it, it is no wonder that the Haitians are reluctant to further international intervention.[536] If other crises are to occur, as the UN continues to neglect waste management for its peacekeeping missions and clings to its absolute immunity, the consequences could be a lot more serious than demonstrations. States could be driven to refuse intervention if the risks are too big and there is no guarantee of remedy. Even if peacekeeping missions get consent from a host State, their mandate cannot succeed without participation from the affected communities themselves, who may be less than inclined following the examples of Haiti and Kosovo. Of course, this delicate situation has to be compounded with reports of sexual abuse by peacekeepers,[537] further alienating the vulnerable populations they are here to help.

5.1.3. The necessity of reform

Peacekeeping missions are an integral part of the UN's mandate of maintaining international peace and security, despite their absence from the Charter. Increasing instances of both crises and the lack of accountability due to the absolute immunity that follows could impact the UN's reputation severely[538] – at it clearly already has in Haiti – and prevent future missions from occurring smoothly, or at all. This damage is already acknowledged by the UN itself: in two subsequent General Assembly resolutions, mention is made of 'the impact of the cholera epidemic on the reputation of the United Nations in Haiti and globally'.[539] In the

[535] See for instance Rory Carroll, 'Protesters in Haiti attack UN peacekeepers in cholera backlash' *The Guardian* (London, 16 Nov 2010) <https://www.theguardian.com/world/2010/nov/16/protestors-haiti-un-peacekeepers-cholera> accessed 19 February 2024; 'Haiti cholera protest turns violent' *Al Jazeera* (Doha, 16 Nov 2010) <https://www.aljazeera.com/news/2010/11/16/haiti-cholera-protest-turns-violent> accessed 19 February 2024; Ivan Watson, 'Protests over Haiti's cholera outbreak turn violent' *CNN* (Atlanta, 15 Nov 2010) <http://edition.cnn.com/2010/WORLD/americas/11/15/haiti.cholera/index.html> accessed 19 February 2024. These demonstrations happened very early in the crisis – some before the UN had even admitted that the scientific reports regarding the origins of the cholera epidemic were true.

[536] See 'Haitians protest government's cry for international troops to quell gang chaos as cholera outbreak grows' *CBS News* (New York, 11 Oct 2022) <https://www.cbsnews.com/news/haiti-news-protests-cholera-ariel-henry-international-military-intervention/> accessed 19 February 2024. While the reasons for the protests are multiple and not just linked to the UN having caused the cholera crisis, it will definitely not have helped matters.

[537] For more information, see UNGA, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' (24 March 2005) 59th Session (2005) UN Doc A/59/710.

[538] Kristina Daugirdas, 'Reputation and Accountability: Another Look at the United Nations' Response to the Cholera Epidemic in Haiti' (2019) 16 International Organizations Law Review 11, 13, on the attention brought by the cholera epidemic in Haiti by 'journalists, NGOs, epidemiologists, UN special rapporteurs, and scholars': 'This attention has been overwhelmingly negative: there is no doubt that the United Nations' handling of the cholera outbreak has seriously damaged the organization's reputation.'

[539] UNGA 161 (13 January 2017) UN Doc A/Res/ 71/161 ; UNGA 161B (13 July 2017) UN Doc A/Res/ 71/161B.

end, this is a snowballing effect: the UN believes that absolute immunity can ensure financial stability (both by not paying reparations and by avoiding establishing a precedent of doing so) but it actually sketches a pattern of impunity that could lead to a general rejection of both peacekeeping missions and its mandate overall. It is impossible to be certain about the inevitability of this rejection: so far, Haiti, Kosovo, Srebrenica, and the sexual abuse allegations remain the most high-profile cases, due both to the extent of the violations and the number of people affected. However, the fact that all of these cases were clustered in the last few years, that they coincide with the increase of robust, multifaceted, and lengthy mandates for peacekeeping missions, and the tendency from the UN to cling to its absolute immunity in sharp contrast with other major international actors (namely States) paint the picture of a ticking time bomb, one that the UN is currently unable to face.

In light of these elements, the UN finds itself in a very difficult position. While the actual number of scandals involving peacekeeping missions and third-party claims remains relatively low – limited so far to Haiti, Kosovo, Srebrenica, and the sexual abuse allegations – these cases have had an impact on the collective perception of the UN, if not in the rest of the world, then at least in the very communities affected by those crises. While there is yet to be a general rejection of peacekeeping missions, the understandable reactions in Haiti are not promising for the future acceptance of peacekeeping missions. If they come to be associated with death, disease, and sexual abuse, their robust mandates and lengthy stays in vulnerable States will attract even more criticism. In addition to this, the UN's actual concrete promises to the refugees in Kosovo and the affected persons in Haiti have not even reached a fraction of their monetary goals[540] – mostly because the UN established funds to be entirely funded through voluntary contributions instead of assessed contributions by the member States. This only adds insult to injury, and leaves the already vulnerable States and communities to shoulder the cost of medical care and the loss of breadwinners in already impoverished families all on their own. All in all, the peacekeeping missions are not only not improving the overall situation; there are producing a net negative impact. In time, the growing criticism and realisation of this negative impact could lead to a general rejection that the UN seems entirely unprepared for: the rejection of the Haiti and Kosovo claims might help it short term, but the consequences will be felt long term and have a lasting impact on the very mandate the UN attempted to protect via its absolute immunity. In other words,

[540] See Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 181: the trust fund set up for contributions to help Haiti fight cholera has raised 'only 5% of the total amount needed' and 183: 'as of September 2020, the UN trust fund had raised only one meager donation of $10.000'.

the UN fears a lawsuit and financial loss while it should instead fear the impact on its global reputation and on its mandate. In order to salvage its mandate, a reform of its immunity system then becomes necessary. This is globally accepted in the doctrine, with multiple instances of calls for reform taking on multiple forms and taking on different logics. These will be detailed in the next section.

These concerns are shared in the literature and even amongst some UN officials. Mentions of a 'credibility crisis'[541] for the UN following Haiti, Kosovo, Srebrenica, and the sexual abuse allegations are compounded with the assertion by former U.N. Special Envoy for AIDS in Africa Stephen Lewis that 'immunity should not be blanket; it should not be wholesale. There are instances where immunity should be lifted, and what happened in Haiti is one of those instances', adding that 'it would do the UN a lot of good to be seen as principled in the face of having caused so much devastation.'[542]

5.2. A survey of proposed reforms

The issue of a reform of the UN's immunity has inspired the literature greatly, particularly following the events in Haiti and Kosovo – and to a certain extent Srebrenica. These two examples (three with Srebrenica) have been at times presented as exceptions for an Organisation that 'consistently and, for the most part, successfully seeks to amicably resolve all third-party claims – both contractual and tort'[543] and as showing emerging 'accountability gaps'[544] in the UN's third-party claims process. Nonetheless, all push forward arguments for reform, though they may take different forms and rely on different logics – economic, procedural, functional, or legal. These logics and their consequences on the idea of reform pushed by those who adopt them will be looked at in turns, though they first require some clarifications. Firstly, these categories are not set in stone, and multiple arguments pertaining to multiple logics can be used by the same author in the same publication. The goal is to show that there is a pattern, though it might not be identified as such by the authors using it, and that this pattern blocks any other attempt at systemic reform by reducing the scope of the discourse on immunity. Secondly, the definition of these categories are specific to this

[541] Beatrice Lindstrom, Shannon Jonsson and Gillian Stoddard Leatherberry, 'Access to Justice for Victims of Cholera in Haiti: Accountability for U.N. Torts in U.S. Court' (Boston University School of Law International Law Journal, 3 November 2014) <https://www.bu.edu/ilj/2014/11/03/access-to-justice-for-victims-of-cholera-in-haiti-accountability-for-u-n-torts-in-u-s-court/> accessed 24 March 2024.
[542] ibid.
[543] Bruce C. Rashkow, 'Immunity of the United Nations: Practice and Challenges' (2013) 10 International Organisations Law Review 332, 337.
[544] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 189.

thesis, based on observations of what the literature has to offer. The "economic" logic focuses on the consequences of the liability cases for the UN's financial and political situation. The resulting proposals tend to therefore focus on improving the UN's financial response to the claims while at the same time acknowledging the political pressure by some member States not to pay. The idea is to attempt to reconcile the various interests of all the shareholders – for instance through insurance claims. The legal argument, on the other hand, looks at human rights-based challenges and the concept of a dispute of private law character, and is as such rather straight forward. Its main feature is its over reliance on courts. The functional argument rests on a trend in the literature of arguing for a "return" to functions as a limit to absolute immunity – something that this thesis argues is a misreading of the role of the concept of "function" and of functional necessity in general for international organisations immunity. Finally, the "procedural" logic is named as such as it identifies the root of the problem in the UN's immunity system in procedural issues leading to a lack of transparency, publicity, and participation. Borrowing from administrative law terms and ideas, reforms presented by authors following this logic will focus on improving what they have identified as key elements in the third-party claims process – for instance the SOFA and its non-existent but treaty-bound standing claims commissions.

While all of these add to the idea of a reform, the end result is a patchwork of ideas that do not seem to want to address the very existence of absolute immunity as a concept. Though the UN goes against a trend followed by most major international actors in not adopting a limited immunity,[545] authors tend to accept that the UN is special amongst these, and that the question of the validity of absolute immunity in the context of the 21st century ought not to be asked. In other words, they tend to focus on the effects of absolute immunity – impunity, accountability gaps – and find solutions to these issues rather than question the rationale *for* absolute immunity, thus exemplifying the presence of a narrative of functional necessity that permeates the attempts at reforming the system. In the end, the question of "reform" in the general discourse on immunity finds itself limited in scope from the very beginning. It is this gap in the literature that this chapter – and more broadly, this thesis – attempts to address.

[545] See address by Kristen Boon, UN Accountability and International Law Experts Workshop, https://www.youtube.com/watch?v=pDNxTBKM0bw at 3.00, pointing out that the UN's attitude to immunity (claiming broader immunity by blurring the lines between public and private dispute) is 'in contrast' with all other fields of immunity, including State immunity, diplomatic immunity, and charitable organisations immunity – they are 'shrinking', rather than expanding.

5.2.1. The functional logic – a misguided "return" to the basis of functional necessity

There are proponents of a "soft" reform of the UN, based on the idea that functional necessity can be seen as a restriction on immunities rather than the amplifier it really is.[546] At its core, this idea does seem to make sense. If functional necessity is seen only as the justification of the scope of immunities, it stands that the "necessity" part should act as a natural limit: only what is necessary will be covered by immunity. This reasoning can be found even in the UN apparatus. The General Assembly, for instance, indicated that while UN immunities 'should be regarded, as a general rule, as a maximum', the specialised agencies should not ask for 'privileges and immunities which are not really necessary'.[547] The ICJ supports this assertion, stating that the purposes of the organisation 'are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited'.[548]

Faced with this limiting factor of functional necessity, it should not come as a surprise that some in the literature have argued for a "return" to a bridled form of UN immunity.[549] Such proposals rest on a particular understanding of the General Convention as expanding the immunities planned for in the Charter – the Charter says functional necessity, the General Convention says absolute immunity. But these two documents are not incompatible,[550] and the functional necessity narrative plays a big part in that. The ICJ may have said in 1962 that the purposes of the UN are not limitless, but in practice the UN is able to claim all kinds of activities as being part of its "functions"[551]. This argument was also put forward following the case of *Jam*, to assuage Justice Breyer's fears: the functions of an international organisation would help delimit what an organisation actually does, and thus if these

[546] See Carson Young, 'The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity under the IOIA' (2017) 95 Texas Law Review 889, 901: 'In fact, the doctrine of functional necessity, when properly applied, precludes absolute immunity'.
[547] UNGA 22(I)A-F (13 February 1946) UN Doc A/RES/22(I)A-F, 33, para D.
[548] Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion) [1962] ICJ Rep 151, 168.
[549] See for instance Ian Hurd, 'End the UN's legal immunity' (*The Hill*, 22 July 2016) <https://thehill.com/blogs/congress-blog/judicial/288739-end-the-uns-legal-immunity/> accessed 19 February 2024
[550] See Rosalyn Higgins and others, *Oppenheim's International Law: United Nations* (1st edition Oxford University Press, Oxford 2017) 558: the CPIUN 'is to be seen as an elaboration of the immunities that the General Assembly deemed to be necessary by the UN for the performance of its functions; and since it constitutes a fleshing out of the provisions of the UN, it is not to be regarded as inconsistent with it'. The built-in vagueness – on purpose – of the Charter and the General Convention served as a way for the subsequent convention on privileges and immunities to expand the scope of functional immunity as it saw fit. Finally, the fact that the two conventions were established less than a year apart from each other helps support the argument that one was not expressly incompatible with the other. For the drafters of each convention, they were clearly meant to be complementary, as specified by Article 105 of the UN Charter.
[551] In this part regarding the ICJ's arguments, "purposes" and "functions" are to be understood as synonyms.

functions include commercial matters, these should be covered by immunity regardless of their nature (this would "catch" awkward cases such as *Rodriguez*).[552]

Going back makes little sense: if the General Convention were to cease to exist and the task was given to the States and the UN to work on a new convention with regards to article 105 of the Charter, there is no guarantee that the new convention will not be exactly as the General Convention was. It would have a provision for absolute immunity, because this decision is narrative-driven.

Indeed, the immunities of international organisations are not there to bridle the organisation as much as they are here to bridle the influence of States over their creation.[553] Immunities were not created – at least for the United Nations – as a way to limit the UN, but as a way to limit interference by States. They are the helpers in the narrative against the State-enemy, *not* the ones imposing limits on their protagonists. As such, any reform based on a "return" to functional necessity fundamentally ignores that functional necessity is the main amplifier of absolute immunity. Absolute immunity did not develop *despite* functional necessity; it developed *because* of functional necessity, because it was allowed to use functional necessity as a justification.

Beyond this fundamental difficulty of the influence of the functional necessity narrative, other reform proposals have relied on more practical means of reform.

5.2.2. The economic logic – a gateway to insurance policies not equipped to deal with the UN's special position on the world stage

When looking at the claims brought on by Haiti, some authors have chosen to focus on the argument of cost for the UN – not in terms of reputation or moral standing, but purely in terms of numbers. The financial situation of the UN is at times quite worrying, with good years being quickly overtaken by bad years. In the most recent report on the UN's financial situation, the Secretary-General pointed out that 'the cash situation with regard to the regular budget remains a source of grave concern'[554] and that despite 'large inflows' in 2021 and

[552] Julian Arato, 'Equivalence and Translation: Further Thoughts on IO immunities in Jam v. IFC' (EJIL:Talk!, 11 March 2019) <https://www.ejiltalk.org/equivalence-and-translation-further-thoughts-on-io-immunities-in-jam-v-ifc/> accessed 24 March 2024.
[553] Wilfred Jenks, *International Immunities* (London: Stevens, 1961) 167: 'The basic function of international immunities is to bridle the sovereignty of States in their treatment of international organisations.'
[554] UNGA, 'Financial situation of the United Nations: Report of the Secretary-General' (9 May 2022) UN Doc A/76/435/add.1, Summary.

controlled spending allowing the UN to 'end 2021 with a surplus of $307 million', the Organisation 'is not in a better financial situation in 2022, owing to a lag of collection through the end of April'.[555] Even the surplus at the beginning of 2022 – which did not last long – is described as a 'welcome change'.[556] In short, the UN finds itself in a difficult financial situation most years, in the most part due to late contributions from member States. In this situation, where the organisation and its members both struggle with financing its activities, saving money as much as possible is incredibly important. Reputation does carry the UN far, but nothing can be done without money.

In that regard, the claims by the Haitians would have constituted a large amount of money for the UN to pay – and therefore for its member States to have to contribute to, not necessarily directly but by paying in more to compensate for the loss.[557] Kristen Boon's analysis of the amount asked and expected to be received by the IJDH for the Haitians was estimated to 'constitute the equivalent of a year of the UN's budget', placing 'an extraordinary burden on the Organization'.[558] Notably, these calculations only concern Haiti. And while the number of affected people was very high, it is not the only case where remedies were asked for: dozens of people were affected in the Kosovo lead poisoning case for example, adding more financial pressure. It is not surprising then that financial considerations, coupled with States' desire not to pour too much money into the UN, feature in some reform proposals.

Indeed, the aim here is to ensure that all shareholders are satisfied with the resolution. These include the UN itself and its member States, while the Haitians themselves are more "right-holders" than shareholders. Proposals based on this logic tend therefore to gravitate towards the idea of an insurance policy. Concerns regarding the UN going bankrupt in order to pay for all the claims 'could be abated if either the UN gets commercial insurance against torts claims or is required by member states to maintain a larger contingency fund',[559] though the

[555] ibid.
[556] ibid.
[557] See Martina Buscemi, 'The non-justiciability of third-party claims before UN internal dispute settlement mechanisms: the 'politicization' of (financially) burdensome questions' (2020) 68 Questions of Law Zoom-in 23, 50. Devika Hovell, 'Due Process in the United Nations' (2016) 110 American Journal of International Law 1, 42, estimates the total cost of the Haitian claim to reach between US$15 billion and US$36.5 billion.
[558] Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 372. See 371-72 for an excellent and detailed breakdown of the figures of the Haiti claims. The overall result – the equivalent of a year of the UN's budget – is presented as a conservative figure.
[559] Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 372.

UN 'must waive its immunity to enter into insurance contracts'.[560] This is echoed by Beatrice Lindstrom, who points out that 'reports suggest that the UN rejected the Haiti claims and request for a clams commission precisely because certain member states did not want to have to pay for compensation'.[561] One of the alternative that is proposed in order to reduce this possibility and assuage the members' fear is a liability insurance, using the examples of the insurances already used by the UN for 'automobile and plane accidents' as well as past 'insurance for third party liabilities arising at UN headquarters'.[562] Though the problem of the UN having to have to waive its immunity for an insurance contract to be established remains – and renders this reform proposal less promising than expected – it does seem to address all three major shareholders, with a particular insistence on this being a solution for the States that do not want – or cannot – pay for the remedy. The UN would not go bankrupt, and the Haitians and anyone else in a similar situation would receive the money that they ask for.

There are however some issues with this proposal. Firstly, neither Lindstrom nor Boon address the issue of the cost of such an insurance policy, both indicating that estimating the cost or the financial viability of such a claim is outside the remit of their articles. This omission is disappointing, though understandable: as Lindstrom points out, 'information pertaining to the UN's claims payouts […] is not publicly available'.[563] It is however highly unlikely that this payment would be less than what has been estimated would have been needed to avoid the cholera epidemic in Haiti: $2000 in 'pre-deployment screening and prophylactic treatment for the peacekeepers'.[564] And the cost of the insurance policy would have to be shouldered by the member States, presumably through an increase in their assessed contributions. This only brings the issue of money further down the road and, as it would require the UN to waive its immunity, it does not actually have an impact on the UN's attitude to the absolute scope of it. While cost is a big part as to why the UN rejected the Haitian claims, there is no guarantee that an insurance policy will reassure the UN or bring

[560] ibid 373.
[561] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 187. See also Martina Buscemi, 'The non-justiciability of third-party claims before UN internal dispute settlement mechanisms: the 'politicization' of (financially) burdensome questions' (2020) 68 Questions of Law Zoom-in 23, 40: 'it is likely that the decision concerning the "admissibility" of the Haiti and Kosovo claims was taken under a great deal of (financial) pressure.'
[562] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 188.
[563] ibid.
[564] ibid quoting Joseph Lewnard et al, 'Strategies to Prevent Cholera Introduction During International Personnel Deployments: A Computational Modelling Analysis Based on the 2010 Haiti Outbreak', *PLOS Medicine*, 26 January 2016, DOI: 10.1371/journal.pmed.1001947, <https://pubmed.ncbi.nlm.nih.gov/26812236/>.

about any changes to its immunity system. There would presumably need to be court cases, or at least involvement from the Office of Legal Affairs, to determine whether or not a certain claim fits within the insurance policy. This does not assuage the UN's fears that such claims could be used to hamper its activities by locking the organisation in an endless cycle of court cases. Money is not the only reason why the UN clings to its absolute immunity – a proposal centred on the idea of saving money only addresses part of the problem.

In conclusion, while the insurance policy reform does seem to tick all the boxes at first glance, particularly with regards to shareholders, some glaring problems remain. The actual cost of such an insurance policy has not been determined but will certainly be high enough for it to be a problem for member States already struggling with their usual assessed contributions. The necessary waiver of the UN's immunity would also not be possible if there are no additional guarantee that this method would not only save money but also prevent abusive use of the claims system to hamper the UN's activities. One possible solution could be to couple it with the standing claims commissions, but as discussed below, they themselves are not a guarantee of impartiality.

5.2.3. The procedural logic – a focus on standing claims commissions and 'better implementation' of existing procedures more broadly

Despite the multiple articles written about the UN's immunity, particularly in the wake of high profile cases such as Haiti, authors tend to focus on the idea of effective remedies and procedural changes, as a way to improve the UN's reaction to a mass tort claim instead of interrogating why absolute immunity remains in the first place. It is particularly prescient in Lindstrom's article, written fairly recently in 2020: '[i]n both cases [Haiti and Kosovo], the victims were denied compensation through murky and dubious legal processes that raise serious questions about the viability of alternative remedies in the face of immunities'.[565] While this does not in itself indicate a refusal to look at the issue of the UN's immunity, the rest of the article follows the same predictable trend of looking at procedural changes.[566] Through focusing on a better implementation, these surface level reform proposals do not address the UN's reliance on absolute immunity and instead attempt to find ways to work around absolute immunity without confronting the continued existence of the concept head-on. Once again, the force of the functional necessity narrative can be seen in the literature:

[565] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 165.
[566] ibid: 'these experiences reveal procedural problems with the UN's third party claims system that must be reformed in order to ensure that the UN's immunity does not amount to impunity.'

as the "fact" that the UN needs absolute immunity to function is so completely engrained, any considerations of reform will take it as *ipso facto* evident and unmoveable.

This procedural logic followed by many authors sees a focus on the SOFA's standing claims commissions, which have been present in the SOFA model since its creation, and remain included in every version signed between the UN and a host State despite one glaring defect: they have never been established in practice (5.2.3.1). Furthermore, the broader "better implication" reform ideas focus on improving issues such as transparency and publicity when it comes to remedies, once again without addressing the very existence of absolute immunity (5.2.3.2).

5.2.3.1. The standing claims commissions: a not so perfect solution

The description and composition of the standing claims commissions can be found at article 51 of the model status-of-forces agreement for peacekeeping operations (and subsequently in all other SOFA signed since then, as they are all based on this model).[567]

As these standing claims commissions were to handle disputes of a private law character, it is reasonable that their first course of action would have been to determine whether or not the claims they were considering were indeed of a private law character. However, apart from this conjecture, there is no way to know this for certain, as these commissions were never put in place.[568] Therefore, 'no acquired operational experience against which the effectiveness or ineffectiveness of such a procedure can be judged'.[569] The local claim review boards set up in their place faced criticism due to the lack of impartiality and transparency[570] – also acknowledged by the Secretary-General himself.[571] And while he

[567] UNGA 'Comprehensive Review of the Whole Question of Peace-Keeping Operations in all their Aspects: Model status-of-forces agreement for peace-keeping operations' (9 October 1990) UN Doc A/45/594 para 51.
[568] UNGA 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations' (21 May 1997) UN Doc A/51/903 para 8.
[569] ibid.
[570] Martina Buscemi, 'The non-justiciability of third-party claims before UN internal dispute settlement mechanisms: the 'politicization' of (financially) burdensome questions' (2020) 68 Questions of Law Zoom-in 23, 27: 'The rules applied … and the cases dealt with, are still rather uncertain and remain undisclosed'.
[571] UNGA 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations' (21 May 1997) UN Doc A/51/903 para 10. Although see ibid para. 8, on the absence of the standing claims commissions, the Secretary-General adopts a baffling "no news is good news" approach: if they do not hear about issues regarding third party claims, it must mean that the boards are doing a good job: 'this may have been the result of a lack of political interest on the part of the host States, or because the claimants themselves may have found the existing procedure of local claims review board expeditious, impartial and generally satisfactory'.

called for the disposition on standing claims commissions to be maintained in the SOFA model, particularly as it 'provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par',[572] they remain absent on the ground.

It is therefore not surprising, considering the apparent impartiality offered by these standing claims commissions and their complete absence, that some authors argue that their establishment – as part of the "better implementation" logic – would help resolve some of the issues linked with UN immunity. Examples include Ian Hurd's argument that a 'pathway for private claims should be mandatory for all missions'[573] or Frédéric Mégret's assertion that 'there is little doubt that such a commission [a standing claims commissions] would satisfy the letter of the agreements reached with the host States and, compared to a purely unilateral administrative remedy, would also constitute an improvement in the field of human rights'.[574] He goes on to add that this commission would be more independent than the current local claims committees.[575] Other authors proponents of the standing claims commissions idea include Bruce Rashkow, indicating that one option opened to the Haitian victims if the UN were to refuse to review their claim (written before the UN did exactly that) is to 'urge the Haitian Government to intervene on their behalf with the United Nations to seek to establish a standing claims commission under the SOFA'.[576]

There are however concerns regarding the standing claims commissions. While their non-existence is concerning as they are planned for in all SOFAs, there is no proof that their existence would lead to a better and easier access to remedies for potential claimants.

Firstly, while the standing claims commissions do indeed boast an appearance of impartiality with the involvement of the host State in the nomination of two of the members, that involvement does not mean a guaranteed good outcome for the claimants. Indeed, Mégret

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[572] ibid.
[573] Ian Hurd, 'End the UN's legal immunity' (*The Hill*, 22 July 2016) <https://thehill.com/blogs/congress-blog/judicial/288739-end-the-uns-legal-immunity/> accessed 19 February 2024. He does mention the standing claims commissions and states that 'not a single one has actually been brought on line by the UN', then directly calls for the creation of a 'pathway'. While not an outright demand for the standing claims commissions to be established, it is difficult to think of another mandatory pathway to private claims.
[574] Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du choléra' (2013) 46 Revue belge de droit international 161, 187: 'Il fait peu de doute qu'une telle commission satisferait à la lettre des accords conclu avec les Etats hôtes et, par rapport à un pur remède administratif unilatéral, constituerait également une amélioration en matière de des droits de l'homme.'
[575] ibid.
[576] Bruce C. Rashkow, 'Immunity of the United Nations: Practice and Challenges' (2013) 10 International Organisations Law Review 332, 345.

talks of the 'sensitive link' in the process being the Haitian government.[577] The very establishment of the standing claims commissions, which is technically made possible with just the host State and the President of the ICJ and without the UN per article 55 of the SOFA, is unlikely due to 'the institutional strength of the Haitian government, its close dependence on the UN for its security'.[578] The Haitian government is also heavily dependent on foreign aid, to the point that the IJDH has stated that 'Haiti's dependency on aid "has contributed to the government's reluctance to assert the rights of its people vis-à-vis the UN."'[579] This is more than just conjecture: according to Lindstrom, 'in Haiti, the government has shown little interest in advocating on behalf of victims'.[580] Adding to this the influence by certain members of the UN in pushing for a rejection of their claim by the OLA, and there is little to no chance of the Haitian government standing up for them, even if it wanted to.

Finally, the establishment of the commissions also means the endorsement of the absolute immunity of the UN, as it recognises private claims as just a caveat of this absoluteness. It is a physical representation for peacekeeping missions of the interaction between Section 2 and Section 29 of the CPIUN, an interaction which, due to the influence of the functional necessity narrative, is problematic in terms of radical reform.

In summary, that the establishment of the standing claims commissions attracts many authors is not surprising, due to its availability (they are already present in the text of the SOFA, there is no need to come up with anything original) and potential for impartiality. However, due the inherent power imbalances between the UN and the host State, these commissions are not the *deus ex machina* of the UN's immunity problem. There is also no indication that their decisions would have been any different than the UN's with regards to the definition of dispute of a private law character – it simply would have resulted in them

[577] Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du choléra' (2013) 46 Revue belge de droit international 161, 187: 'De toute évidence, le maillon sensible de ce processus est le gouvernement haïtien'.
[578] Kate Nancy Taylor, 'Shifting Demands in International Institutional Law: Securing the United Nations' Accountability for the Haitian Cholera Outbreak' in Mónika Ambrus and Ramses A. Wessel (eds), *Netherlands Yearbook of International Law 2014* (1st edn, T.M.C. Asser Press The Hague 2015) 170. See also José Alvarez, 'The United Nations in the Time of Cholera', (*American Journal of International Law Unbound*, 4 April 2014) <http://www.asil.org/blogs/united-nations-time-cholera> accessed 6 February 2024, 28, on whether Haiti as a State is truly independent from the UN's presence and demands.
[579] Kate Nancy Taylor, 'Shifting Demands in International Institutional Law: Securing the United Nations' Accountability for the Haitian Cholera Outbreak' in Mónika Ambrus and Ramses A. Wessel (eds), *Netherlands Yearbook of International Law 2014* (1st edn, T.M.C. Asser Press The Hague 2015) 170, citing Institute for Justice and Democracy in Haiti and The John Marshall Law School, Cholera as a grave violation of the right to water in Haiti, Submission to Catarina de Albuquerque, Special Rapporteur on the human right to safe drinking water and sanitation, 2014, at 5.
[580] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 186.

not taking on the case. Furthermore, endorsing these commissions is endorsing the functional necessity narrative.

5.2.3.2. A reliance on better implementation – promising proposals without addressing the root cause?

Doctrine has also focused on other ways of ensuring a faster and more efficient way of getting remedies. These are usually presented under the umbrella of the "better implementation"[581] and are mostly procedural changes aiming at more transparency and publicity for a better outcome of the claims. However, none of these changes address the fact that the lack of remedy is not just the result of the procedural issues of the third-party claims system; it is first and foremost the consequence of the UN's absolute immunity and the narrative of functional necessity underpinning it.

Beatrice Lindstrom writes that 'well-functioning legal liability framework have the distinct benefit of overcoming political preferences and power imbalances to deliver justice in an accessible, impartial and predictable manner'.[582] The implication here is that the UN's third party claims mechanisms are not 'well-functioning', and she goes on to propose four 'areas of reform'[583] in order to achieve that goal.

The first of those areas is an increase in transparency in the claims process, through 'publishing legal opinions [of the OLA] in at least some cases' and 'subjecting the reasoning to public scrutiny'.[584] The goal would be both to 'reduce subjectivity in the process' and to increase access to information.[585] She even proposes 'outreach efforts to host communities'[586] to strengthen accountability. Though this seems like a good idea, the reasoning in the case of Haiti was allegedly political (and financial) and could therefore constitute sensitive information. Moreover, the reasoning did end up being communicated to members of the American Congress,[587] with an obvious outcome: as long as the UN is in

[581] Term taken from Niels Blokker, 'International Organizations: the Untouchables?' (2013) 10 International Organizations Law Review 259, 275: 'The conclusion of this introductory contribution therefore is that the exist- ing standard immunity rules should remain as they are. **It is the implementation of these rules that sometimes should be improved**, particularly in cases in which the activities of international organizations directly harm or may harm individuals, and directly violate or may violate their human rights.' Emphasis added.
[582] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 184.
[583] ibid.
[584] ibid.
[585] ibid.
[586] ibid.
[587] See Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 360.

control of what a dispute of a private character means, nothing will change in that regard. The second area of reform would be to improve access to independent adjudication of claims, focusing on the process for the establishment of the standing claims commissions which should be 'equalize[d]' and 'depoliticize[d]'.[588] Ideas such as private claimants being able to trigger the commissions or making them standing from the start[589] are certainly interesting, but they still do not guarantee that the rulebook these commissions will use will not be the UN's, with the UN's interpretation of the character of the dispute. Ultimately, the issue circles back to the vagueness of the General Convention, hampering any attempt at better implementation, itself based on the functional necessity narrative.[590] Ensuring adequate financing of remedies, the fourth area of reform identified by Lindstrom, runs into the same issues as detailed above regarding the insurance claims. The third area of reform, that of making liability determinations binding, is interesting in that it draws from the experience of Kosovo, where at least one body, the Human Rights Advisory Panel in Kosovo, made a finding in favour of the claimants.[591] This idea crumbles however if the institutions in place – such as the standing claims commissions – make decisions in favour of the UN instead. Relying on a body set up by the UN, with participation from the host State that is usually not on the side of its own citizens (if there is even a host State to speak of, as was the situation – and the problem – in Kosovo), is problematic. Locking a decision made by such a body behind a binding standard does render the process quicker, but it is much more likely to be in favour of the UN rather than the claimants. Any institution set up with adjudicative power would have to be independent from the UN, but it would also have to work on a new rule book, one that does not pre-suppose that the UN needs absolute immunity.

A subset of the "better implementation" idea also refers to the UN focusing on policy-based enterprises as a form of reparations for the Haitians.[592] There are a number of issues with this solution. First, it does not address the perceived injustice suffered by the Haitians, and

[588] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 184.
[589] ibid 186.
[590] See Footnote 550 on the vagueness of the dispute of a private law character disposition in the General Convention.
[591] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 186.
[592] Thomas G. Bode, 'Cholera in Haiti: United Nations Immunity and Accountability' (2016) 47 Georgetown Journal of International Law 759, 785, arguing that the Haitians are 'no better off' than before they started their court case in the US. While this is true, it is very cynical to then present the policy reforms the UN can do to help (such as 'improvements in cholera treatment', 'an apology', 'developing the clean water and sanitation infrastructure necessary to ultimately end cholera in Haiti') knowing that cholera would not be there in the first place without the intervention of the UN.

the subsequent hits to the UN's reputation. Second, it only deals with the issue after the scandal has already happened – while a better water system in Haiti will certainly help with the current cholera epidemic, other operations will remain at risk of a health crisis. Third, and most importantly, this argument is entirely based on functionalism, that is the idea that the UN does good things and that its immunities should therefore be as protective as possible[593] – once again, the narrative is at play.

5.2.4. The legal logic – a gateway to a real, systemic reform never brought to its full potential

The legal argument here is actually twofold: (5.2.4.1) one focuses on human rights, more specifically the right of access to court, while (5.2.4.2) the other focuses on the letter of Section 29 of the General Convention and the definition of 'disputes of a private law character'.

5.2.4.1. A human rights-based approach to immunity – the right of access to justice

The right of access to justice is recognised throughout the international legal system. Found in the European Convention of Human Rights,[594] the American Convention on Human Rights,[595] and the International Covenant for Civil and Political Rights,[596] its place amongst the globally recognised human rights is firmly established. It is also found in national constitutions – such as the Italian constitution[597] – and has been the subject of various court cases, including those regarding international organisations and their immunities. But while there have been promising decisions by national and regional courts, such the *Ashingdane v.*

[593] ibid, 782: '… the UN, unlike a private party, is already in the business of providing benefits to needy people through its humanitarian and peacekeeping work'. See also UNGA 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations' (21 May 1997) UN Doc A/51/903, 5, para 12: 'The limitation on the liability of the Organization as a means of allocating the risks of peacekeeping operations between the United Nations and host States is premised on the assumption that consensual peacekeeping operations are conducted for the benefit of the country in whose territory they are deployed'.
[594] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, as amended) art 6.
[595] American Convention on Human Rights "Pact of San José, Costa Rica" (adopted on 22 November 1969, entered into force on 18 July 1978) 1144 UNTS 123, art 8.
[596] International Covenant for Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171, art 14.
[597] Constitution of the Italian Republic, Article 24.

United Kingdom decision by the ECtHR[598] establishing a three-pronged test[599] in order to establish if a particular action constituted a violation of the right of access to justice, the overall picture regarding the effect of a human rights based challenge for the UN's absolute immunity is rather bleak.

Instances concerning the UN have invariably found no violation of the right of access to justice, even in the absence of what the court usually considers a proportional mean – an alternative remedy, such as the case of an internal tribunal in *Waite* and *Beer*.[600] There is also the aforementioned case of *Stichting Mothers of Srebrenica and others v. Netherlands*,[601] where an association of relatives of the Srebrenica massacre of 1995 brought a suit in front of the ECtHR alleging a denial of their right of access to justice by the Dutch courts that upheld the UN's absolute immunity. Though the ECtHR did recognise the absence of an alternative remedy[602] (a feature also present in the Haiti and Kosovo cases, as the SOFA's standing claims commissions were also never established), this was not enough for it to consider that the right of access to justice of the claimants had been violated.[603] In other words, while the right of access to justice was recognised in the ECtHR system and expressly held up as a defence against absolute immunity, the result was more often than not in favour of the international organisation – or rather, in favour of the UN. The reason for this is quite simple: other than the confusing threshold for the proportional means "prong", the legitimate aim "prong" doubles as the basis for the establishment for immunities in the first place. Immunities, in as much as they are recognised by the Court as 'an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments'[604] will always be considered a legitimate aim to deny the right of access to justice. Inevitably, once again, the functional necessity narrative underpins these types of decision.

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[598] *Ashingdane v United Kingdom* (1985) 7 EHRR 528.
[599] ibid para 57. The three "prongs" were the following: there must be a legitimate aim to the action taken, using proportional means, and the action should not impair the right to the point that its very essence is compromised. This test was used in multiple other cases following *Ashingdane*; examples include the famous cases of *Waite and Kennedy* v Germany (1999) 30 EHRR 261 para 59 and *Beer and Reagan v Germany* (1999) 33 EHRR 19 para 49.
[600] *Waite and Kennedy* v Germany (1999) 30 EHRR 261 and *Beer and Reagan v Germany* (1999) 33 EHRR 19.
[601] *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10
[602] ibid para 162.
[603] ibid para 164, referring to both *Waite* and *Beer* but rejecting the notion that 'in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right to access to a court'.
[604] *Waite and Kennedy* v Germany (1999) 30 EHRR 261, para 63 and *Beer and Reagan v Germany* (1999) 33 EHRR 19, para 53.

In short, the idea of a human rights-based challenge might be appealing. However, such a challenge can only be resolved – or at least has always presented as having to be resolved – in front of a court, preferably one specialising in human rights. Despite some progress before the Inter-American Court of Human Rights,[605] the reality of the matter is that, in the absence of a decision involving the UN in front of a court that has the willingness to confront its absolute immunity and the right of access to justice, the human rights based challenge is and will remain a moot point.

5.2.4.2. The definition of a 'dispute of a private law character' – an important focal point entirely determined by the UN

The main legal argument then cannot rely on a human right-based challenge. First, as seen above, that challenge faces many weaknesses – including an over reliance on courts that does not seem willing to question the UN's absolute immunity in light of the protection it affords. Second, even if it were to succeed, it would not guarantee remedy for the claimants. In the case of Srebrenica for instance, had the ECtHR recognised that the lack of claims commissions meant that there had been a violation of Article 6, the UN might have worked to put them in place. However, as seen above, these claims commissions do not guarantee by themselves a resolution in favour of the claimants, and their composition does not inspire confidence in a truly transparent and equal process. While certainly much more independent than UN-led committees, they can easily be influenced by both the UN and the host State.

The other legal recourse would then be to rely on the wording of Section 29 of the General Convention. As seen above, the idea that the Haiti claims at least do not fall under the remit of a dispute of a private law character is highly questionable. However, the definition of what exactly is a dispute of a private law character is entirely in the hand of the UN. Faced with this difficulty, courts tend to either favour the UN's interpretation or avoid the issue altogether. This is the case in *Georges*, where the court of appeals stated that 'we need not reach the merits of this argument [that UN breached its obligations contained in Section 29], however, because plaintiffs lack standing to raise it'.[606] The court explained that the plaintiffs could not raise the issue themselves as 'absent protest or objection by the offended

[605] Which has recognised the right of access to justice as a *jus cogens* norm. See *Case of Goiburú et al v. Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 153 (22 September 2006) and *Case of La Cantuta v. Peru*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 162 (29 November 2006). But see also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgement) [2012] ICJ Rep 99, para 93: albeit about two States, the ICJ has shown its reluctance to consider the violation of a *jus cogens* norm as a credible opposition to immunity.
[606] *Delama Georges v. United Nations* 834 F 3d 88 (2nd Cir. 2016) 19.

sovereign, [an individual] has no standing to raise the violation of international law as an issue'.[607] As seen above in the discussion on standing claims commissions, there is little chance of the Haitian government to act on behalf of their citizens on this issue. This is not limited to Haiti: the inherent power and financial imbalance between host States and the UN makes such an intervention from the host State highly unlikely.

The court has also showed a reluctance to examine the application of Section 2 in connection with Section 29, that is, assessing that the application of Section 2 rests on the correct application of Section 29. In other words, the court rejects the argument that there is a condition precedent, citing the lack of language such as 'on condition that' or 'provided that' linking the two dispositions.[608] Notably, the court also cites the fact that the executive branch of the United States agrees with their interpretation of the CPIUN, and that interpretation by the executive branch is 'entitled to great weight'.[609]

Ultimately, while the argument that the Haitian claims contained claims of a private law character has found a certain echo in the literature and has been repeated by Philip Alston in his report as Special Rapporteur, the courts have not followed suit. No case was ever made regarding the situation in Kosovo, which leaves us with two court cases, Haiti and Mothers of Srebrenica, each using arguments relating to the right of access to justice, Section 29, or both (the argument of the right of access to justice in *Georges* 'failed to convince' the court as the argument 'does little more "than question why immunities in general should exist"').[610] In both cases, all of these arguments have failed, sometimes even dead on arrival like the argument regarding the material breach of Section 29. Relying on courts to bring about change in how the UN deals with its absolute immunity seems therefore ill-advised: so far, the UN has benefited from an immense amount of protection, even in cases where other IOs might not have gotten away with it (such as the case of not having alternative modes of settlement in place). National and regional courts are also not functioning in a vacuum, as seen through the example of the influence of the executive branch's interpretation for the case of *Georges*. There is waiting for a future court case involving the UN and its immunity, and there is waiting for a future court case involving the UN and its immunity *which is most likely going to give the exact same decision as the previous ones*. In

[607] ibid, citing *United States v. Garavito-Garcia*, F 3d, WL 3568164 (2nd Cir. July 1 2016) para. 3
[608] *Delama Georges v. United Nations* 834 F 3d 88 (2nd Cir. 2016) 13.
[609] ibid, citing *Lozano*, 697 F 3d, 50.
[610] *Delama Georges v. United Nations* 834 F 3d 88 (2nd Cir. 2016) 21, citing *Brzak v United Nations*, 597 F 3d, 114. This case, regarding allegations of unjustified firing and non-promotion of two UN employees following their accusations of sexual misconducts, sets out that the General Convention is self-executing in the domestic legal order, closing the door so far on the US distancing itself from absolute immunity for the UN.

that regard, relying on a legal challenge as a driver for change is a mistake. Courts, much like the literature, are influenced by the functional necessity narrative. If the starting point of any decision is that the UN needs immunities to function properly, it will stand as a quasi-insurmountable obstacle for any claimants. Ultimately, their arguments would have to be strong enough to derail the court from this natural assumption. This is compounded by the fact that the conventions the courts have at their disposition all follow the narrative, and are built with the same assumption: absolute immunity is the default, any exception are caveats and their establishment is both vague and heavily dependent on the interpretation of the organisations itself.

In conclusion, in light of the patchwork of ideas in the literature, a couple of observations can be made. Firstly, this patchwork follows a pattern, tracing back to either a legal, procedural, functional, or economic logic. Secondly, this patterns limits the discourse on immunity and does not address the issue of the continued existence of absolute immunity, instead dealing with the *consequences* of it (impunity, either perceived or real, chiefly amongst them) or pointing the finger at seemingly key elements of the procedural process (an idea summed up by the concept of "better implementation", another patchwork of ideas that paint a confusing picture).

5.3. Credible pathways to a systemic reform

While the reform proposals discussed above show a real willingness in the literature for a change in how the UN addresses third party claims – and even in some cases how it views and handles its own immunity – few go as far as rejecting the UN's immunity system, and more importantly its absolute immunity, altogether. Proponents of a "return" to functional immunity as apparently described in the UN Charter (article 105) do exist, but it ignores the fact that absolute immunity as stated in the General Convention stems from article 105, and that the two dispositions are not considered to be incompatible. In that, they are the most entrenched in the functional necessity narrative. Throughout the analysis of the Haiti and Kosovo cases, the functional necessity narrative jumps out: the UN absolutely believes, and it transpires through its actions, that getting rid of its absolute immunity (and therefore opening itself up to potential lawsuits) would be more detrimental than the continued use of absolute immunity – despite the already mentioned devastating impact on its reputation as a result.

This functional necessity narrative colours the debate on immunity in the literature. As seen above, reform ideas will focus on better implementation of existing mechanisms or even certain-to-fail court cases, as a way to "make it work" even as absolute immunity seems increasingly obsolete in an age of accountability and transparency (even for international organisations). The absolute immunity of the UN could make sense at its infancy, where the risk of States interfering was very much a possibility,[611] but the decisions in Haiti and Kosovo are not based on fear of State interference. They are claims involving third parties, which are either not supported by their State (Haiti) or have no State to support them in the first place (Kosovo).[612]

The fact that the UN is extremely unlikely to want to get rid of its absolute immunity orients reform ideas towards a more realistic path – that of comparatively gentle, procedural reforms – rather than towards a complete overhaul of the system. Yet, since Haiti, there has been no trace of improvement regarding the establishment of standing claim commissions. The cases of Haiti, Kosovo, and Srebrenica were not enough of a wake-up call to trigger a reaction at the UN. Regarding the court cases, the decisions given so far, either on the basis of the right of access to justice or on the application of Section 29 have not been successful. Regional and national courts alike have all decided in favour of the UN, protecting its absolute immunity. The recourse to the ICJ barely deserves a mention, as it would require action taken by a State – as seen in the Haiti example, political and financial considerations make such an appeal a pipe dream. In the literature, most contributions follow the patterns of reform exposed above.

A reform of the UN immunity system thus should not rely on "soft" changes. This section will tease out reform ideas, all based on a very basic principle: any new proposal should seek to deconstruct the functional necessity narrative. This would involve deconstructing the State-centric and function-centric conceptions associated with the narrative.

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[611] Preparatory Commission of the United Nations on Privileges and Immunities, Committee 5: Privileges and Immunities, U.N. DOC. PC/LEG/22 (Dec. 2, 1945) : 'But if there is one certain principle it is that no member state may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens financial or other.'

[612] See Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 347: The 1945 decision of member states to accord the U.N. immunity involved a judgment about the U.N.'s relationship with individuals—one that assumed the U.N.'s primary beneficiaries were states. To contemporary eyes, however, this assumption appears outdated.'

5.3.1. Deconstructing the functional necessity narrative

Throughout this thesis, and in Chapter 2 in particular, it has been shown that the idea that the UN should benefit from absolute immunity is deeply entrenched in the literature, the courts, and even with the organisation itself. This narrative of functional necessity expands even to other international organisations, and renders any reform proposal incomplete. Absolute immunity is seen as a given, as necessary to protect the organisation against harm. However, this narrative ought to be deconstructed, as the argument that the UN has to fear States and is a functionalist organisation is anachronistic and dangerous for the UN's own goals and purposes.

5.3.1.1. Deconstructing the State-centric conception of UN immunity

One the main components of functionalism is the idea that international organisations are a good alternative to either a super-State or total anarchy. Leading into immunities and functional necessity, the narrative presents States not as benevolent creators of organisations, but as enemies (or at least, entities not to be trusted). In this tale, privileges and especially immunities are "helpers" to the protagonist, acting a security blanket against potential interference. State interference is thus almost always mentioned by defenders of absolute immunity as the main reason why international organisations should be granted immunities.[613]

However, this conception of the UN's absolute immunity and its use as a defence against States that seek to hinder its activities can now be considered obsolete. Mégret writes about it in the following terms:

> Despite everything, the maintenance of the principle of immunities, the limited and opaque nature of the obligation to provide an appropriate remedy seem largely dependent on a conception of the role of the international organization deeply embedded in a very "20th century" vision. of an international legal order where the phenomenon of international organization must still fight hard against States at the mercy of which it risks finding itself.[614]

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[613] For an example in the doctrine, see Eric de Brabandere, 'Immunity of International Organizations in Post-Conflicts International Administrations' (2010) 7 International Organizations Law Review 79, 81 :'Through its immunity, the international organization's independence seeks to be protected against interference from the state in which it operates, or in which it has an office or its headquarters'. For an example in the courts, see *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10, para 139(c): 'The attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.'

[614] Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du choléra' (2013) 46 Revue belge de droit international 161, 189.

The UN is now a global, multifaceted, and multi-mandated international organisation, to the point that it can be considered to be part of the emerging forms of global governance and as such, ought to have its activities scrutinised.[615] Its direct interactions are also becoming multi-faceted. While at its creation the concept of peacekeeping missions was not yet established (hence its absence in the Charter), the United Nations now finds itself in close and extended contact with vulnerable populations.[616]

In the 21st century vision, to use Mégret's expression, the UN is not facing litigations from States, or even baseless litigations from individuals supported by States with the express goal to hinder the organisation. Instead, it is facing claims from individuals supported by NGOs, who were victims of the organisation's direct actions or lack thereof. Its "adversaries" are no longer States, at least in the Haiti and Kosovo cases. There are individuals, and with the growing trend of individual-centric international law rules and obligations, the reaction from the UN regarding these cases is completely backwards. The UN is still behaving as if it was a brand-new organisation always at risk, instead of the Leviathan it is now.

The lack of State presence in the Haiti case can be seen literally, as there is little mention of the State of Haiti. Apart from the specific situation of Kosovo and other instances of territorial administrations, there is no better example of this "new normal". And if the victims are individuals no longer represented by States (either by choice or simply because there is no State to represent them), then the standard of UN immunity, which was conceived with a State-centric conception in mind, has to change.

5.3.1.2. Deconstructing the function-centric conception of UN immunity

With the State-centric conception comes the function-centric conception in the general functional necessity narrative. Indeed, the concept of functions, given by a State to an international organisation, is what still separates the UN from States, even in cases where the UN takes on the role and common activities of a State. But the blurring of these lines

[615] ibid.

[616] Marten Zwanenburg, 'UN Peace Operations Between Independence and Accountability' (2008) 5 International Organizations Law Review 23, 24: '[t]he increased interaction with the local population means increased chances that individuals in the host state will suffer damage or injury from the operation's conduct'. See also Frédéric Mégret, 'La responsabilité des Nations Unies aux temps du choléra' (2013) 46 Revue belge de droit international 161, 179: 'La configuration globale de ces opérations, notamment lorsqu'elles sont de troisième generation, fait que l'ONU est de plus en plus face à face directement avec les populations'.

shows that the UN is now (and perhaps was from the beginning) no longer a "classic" international organisation. The move away from function would allow for situations such as the Kosovo case to no longer awkwardly sit on the side line of the State/UN dichotomy, as it would no longer be as stark. If an entity behaves as a State would, it should only benefit from the immunities a State would. It is much easier to accept this state of affairs without the concept of function anchoring the absolute immunity of the UN.

If the concept of functional necessity seems perfectly suitable for an organisation with a specific function, such as the early international organisations at the end of the 19th century, it no longer applies to the UN. Its functions are so broad so as to encompass every possible activity. When proposing for a way to limit international organisation immunity (still in the context of functional necessity), Bekker proposed a distinction between 'official' and 'non-official' acts. The official acts would include 'those relating to the achievement of the aims of the organisations'.[617] However, this distinction suffers from two major issues.

First, as shown in Chapter 2 of this thesis, such a limitation would never work on the UN.[618] Beyond even the doctrine of implied powers, the aims of the UN as stated in the UN Charter are far too broad not to include everything. The very creation of peacekeeping missions fits within the aims and goals of the UN (such as guaranteeing international peace and security). From then, it is only a step to consider that every action taken in the context of the mission also fits within this goal, because every decision taken in the context of a peacekeeping mission is there to help with its establishment and eventual completion. Cholera in Haiti is deplorable to be sure, but as long as it can be linked to a function of the UN, the functionalist argument will conclude that absolute immunity is the only applicable rule every time.[619] This is where the intersection between functional necessity and functionalism can be seen most clearly. These lofty goals that allow the UN to evade any limitations are here because the UN presents itself and its mission as indispensable for the common good.

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[617] Peter H. F. Bekker *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers 1994) 165.

[618] It would not be difficult to apply it to other international organisations as well. Much like the UN, any official act can be traced back to an organisation's function. See Pierfrancesco Rossi, 'The International Law Significance of "Jam v. IFC": Some Implications for the Immunity of International Organisations' 13 Diritti umani e diritto internazionale 305, 312.

[619] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 The European Journal of International Law 9, 69: '…functionalism is incapable of distinguishing between negligent and other behaviour. All that matters to functionalism is that the act can somehow be linked to the function of the organization. Hence, as soon as it can be established that the UN can justify being active in Haiti, anything it does falls within the scope of the justification.'

Second, even if it could be considered that the UN commits official and non-official acts, there is the issue of identifying what is and what is not an official act. In that, Bekker asserts that the official activity of the organisation should be determined by the organisation itself. This reasoning certainly avoids concerns of fragmentation if the courts were to shoulder on this determination, but the issue is immediately obvious: the UN, and other international organisations like the IFC,[620] are not known to accept what could potentially be a limitation on their immunities freely.

As such, despite the fact that the notion of function is often seen as a limit on international organisation immunity, it becomes an amplifier following the global adoption of the functional necessity narrative. If any action can be linked to a function, and thus justifiably benefit from absolute immunity that way, then the very concept of function needs re-thinking. This does not mean that the concept of function itself should disappear; rather, that it should no longer be the main determinant of immunity.

The deconstruction of the functional necessity narrative automatically implies the question of what would replace it if the immunity of the UN can no longer reasonably rely on the idea that it has functions to fulfil that are constantly under threat from States.

5.3.2. Beyond the narrative

If the concept of functions is to no longer determine what should and should not be covered by immunities, consideration should be given to determining, based on the act in and of itself, whether it should be covered by immunity.

Two things should be noted here. First, and obviously, a move away from the functional necessity narrative quasi-automatically implies a move towards restrictive immunity. Second, as seen in the chapter on State immunity and particularly through the cases of *Jam* and *Rodriguez*, a wholesale application of one system to another (while the "original" system is still undergoing some growing pains) is not appropriate. However, that does not mean that it cannot offer a source of inspiration. State immunity is restricted based on the qualification of the act: if it is considered to be the act of a sovereign, it should benefit from immunity, and if it is considered to be the act of the State acting as a private entity, it should not benefit from immunity.

[620] Despite what their constituent instruments say, see Chapter 3.

From that point, two main questions emerge: first, how do we identify what type of acts should remain covered by immunity? Second, who guards the guardians, in other words, who should be the judicial checks and balances for the UN? Third, how should situations of territorial administrations like in Kosovo be handled?

5.3.2.1. The identification of the acts covered by immunity

Even without the narrative of functional necessity and its function-centric elements, this thesis posits that the UN should still benefit from some sort of immunity. Despite the restriction, States still benefit from immunity, and despite the functionalism sheen of good-doing, international organisations, and the UN in particular, are still an important force on the international stage.

Once again there are two things to take into considerations: the acts that would automatically *not* be covered by immunity, and where the presumption of an uncovered act should fall.

5.3.2.1.1. Acts not covered by immunity

While this section intends to propose a reform of the UN's immunity system, it does not mean that everything should be thrown out. With regards to acts that should automatically trigger a possibility of legal action, Section 29 of the CPIUN is a useful source of inspiration. As such, contracts, due to their inherent private nature, are not to be covered by immunity.

Similarly, any act that, in domestic settings, would be akin to a tort, should also not be covered. This type of acts would cover a situation like Haiti, where negligence played a big part in how the cholera crisis started. Unlike the final decision in the Haiti case, 'disputes of the type that arise between two private parties'[621] would therefore fulfil the requirement of qualifying an act as tort-like. No matter the connection to the policy matters of the peacekeeping mission, the basis of the qualification would be the nature of the act.[622] If for instance the allegation is one of negligence which led to physical injury and death, and if the claim is analogous to a claim that can arise between two private parties, the presumption would be that the act is not covered by immunity.

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[621] Letter from Pedro Medrano (Assistant Secretary-General and Senior Coordinator for Cholera Response) to Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque (24 November 2014), para 87.

[622] In that sense, this is an adoption of the (generally recognised, although not entirely) concept of the "nature of the act" to distinguish an *acta jure gestionis* from an *acta jure imperii* in restrictive State immunity. See Chapter 4.

Thirdly, inspired by the report of Sub-Committee I on the Convention on the Privileges and Immunities of the Specialised Agencies, a distinction should be made between the acts incidental to the organisation' functions and those related to the 'the actual performance of its constitutional functions'.[623] Of course, this statement pre-supposes the functional necessity narrative, however any mention of a function of an organisation should not automatically be rejected. The fact that an organisation has functions, however broad, can be separated from the place given to said functions in the functional necessity narrative. For this category, as well as for the tort category to an extent, careful consideration should be placed on how the determining factor should be ascertained.

5.3.2.1.2. The presumption of non-immunity

In the case of Haiti, the claimants were put in the nearly impossible position of attempting to prove that their demands were of a private law character without knowing what it actually encompassed. Predictably, the UN did not make things any easier by changing what it had so far considered – though through a non-binding report – to fit in that category. This change has been harshly criticised as going against the doctrine of legitimate expectations.[624]

One way of avoiding such a situation – which automatically puts any claimants on the losing side – would be to put the burden of proof that the act in question ought to be covered by immunity on the UN itself. Thus, the claimants would not have to satisfy themselves with a justification given months or years later, but would be able to demand that the UN be completely transparent in how it has made its decision. Any subsequent court cases would then be on much more solid ground, as both parties would be speaking the same language.

Putting the burden of proof on the UN may be seen as an unnecessary procedural charge. However, this would force the organisation to settle on a set of rules to determine which act is or is not covered by immunity, making any decision much easier and much clearer for the claimants and the OLA alike. This would also allow the UN to have a role to play in determining what its functions actually are – a call back to Bekker's proposal of the organisation being in sole control over what is considered an official act. Bekker's argument, heavily resting on functional necessity and functionalism (the international organisation as

[623] UNGA, 'Final Report of Sub-Committee I of the Sixth Committee, Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies', UN Doc A/C.6/191 (15 November 1947) 12–13, [32].
[624] Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal of International Law 341, 361.

a good-doer, as needing independence and autonomy from the courts) is as we saw untenable. However, shutting it out of the process completely is not useful either, as consideration needs to be had of the position of the UN as an international organisation with, overall, desirable goals.

The determination of an act as covered by immunity or not, and the requirement of the burden of proof being placed on the UN, have to be determined by an external actor. Unlike what Section 29 proposes, this next section puts forward the idea of relying on courts, either domestic (pushing past the mistrust for national courts by international organisations) or international (an ad hoc creation).

5.3.2.2. The necessity for an independent judicial body

The idea of involving courts with third-party claims is not new: authors were writing about it before even the creation of the UN. Back in 1943, Wilfried Jenks posited that:

> In the postwar world there should be a single World Administrative Tribunal which should exercise jurisdiction over such complaints [employment issues]. It should also be competent in cases in which some official act performed on behalf of an international institution is alleged to violate a private right; in cases in which international institutions are involved in legal relationships governed by municipal law, such as disputes relating to real estate, building contracts, printing contracts, and such matters; ... in the interest of a proper integration of the world judicial institutions of the future, the World Administrative Tribunal should have an organic relationship with the Permanent Court of International Justice.[625]

The idea of an independent institution extended to arbitral tribunals, with Arthur Kuhn advocating for 'some systems of local arbitral tribunals in which protection may be accorded to private as well as public interests'.[626]

Shortly after the establishment of the UN, the discussion around claims continued, with a comment in the Yale Law Journal arguing that 'the United States should insist on provision of specific machinery to protect the interests of individuals and corporations dealing with

[625] Wilfred Jenks, 'Some Problems of the International Civil Service' (1943) 3 Public Administrative Review 104.
[626] A. K. Kuhn, 'Status of International Organizations' (1944) 38 American Journal of International Law 658, 667.

the U.N.',[627] such as 'a claims court or arbitral machinery for civil actions by aggrieved private parties'.[628]

In short, the idea of establishing an independent mechanism – a court, or an arbitration tribunal – is not new. Even in the 1940s, the possibility of third-party claims was there, as was the pressure to deal with them. Now, in the 21st century, following the high profile crises (with high human cost) of Haiti and Kosovo during multifaceted peacekeeping missions,[629] the case for an independent court is more prescient than ever.[630] While recent jurisprudence seem to show a more prominent role for domestic courts (5.3.2.2.1), this thesis makes the argument that nothing less than a truly independent court, to be seized directly by individuals, is the only way to implement a new restrictive immunity of the UN (5.3.2.2.2).

5.3.2.2.1. The role of domestic, 'non-expert' judges

An alternative to creating an entire new body to deal with third-party claims – as it is an ambitious and possibly costly reform – would be for the "guarding" to be done by domestic judges:

> Assuming that domestic courts normally adjudicate claims brought against international organizations in a 'correct and proper way', i.e. according to the applicable substantive law, it is hard to see where the harm to the independence and functioning of an international organization might lie.[631]

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[627] "The United Nations under American Municipal Law: a Preliminary Assessment" (1946) 55 Yale Law Journal 778, 785.
[628] ibid 786.
[629] Even defenders of the UN's absolute immunity admitted that an evolution of claims against the UN could justify the establishment of a judicial body. Alice Ehrenfeld, 'Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969): United Nations Immunity Distinguished From Sovereign Immunity' (1958) 52 International Law and the Political Process 88, 94: 'Experience to date does not yet indicate the need - which many authorities writing in the 1940's did envisage - for a specially established forum for hearing claims against the United Nations and the Specialized Agencies' but then adding 'Of course, the justice afforded claimants against the United Nations should be judged by a higher standard than the practice of any particular sovereign, whether it be a domestic sovereign or foreign sovereign; and if the operations of the Organization should in the future give rise to more diversified and more numerous private claims, it may become necessary seriously to consider establishing a special tribunal or increasing the jurisdiction of existing bodies.'
[630] Carla Ferstman, 'Reparations for Mass Torts Involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations' (2019) 16 International Organizations Law Review 42, 46: '… it is the job of the judge to see beyond self-interested embellishments or (mis)framings of the law. However, where there is no independent court with the mandate to adjudicate claims, the UN's (mis)framings of the law are incapable of challenge. The more these (mis)framings are asserted without challenge, the more credence they receive-in this sense the "fake" law progressively becomes "real". But this does not make those framings legally correct, just or appropriate.'
[631] August Reinisch, *International Organisations before National Courts* (Cambridge University Press 2000) 388-389.

While the role of domestic judges is usually decried in the literature as inappropriate,[632] there is evidence that the idea that judges should never have anything to do regarding the determination of an organisation's functions might be less set in stone than it appears. In a time where 'it is clear that there is increasing pressure in the international legal community for local suits against the UN to compensate for shortfalls in international measures',[633] asking the question of whether that is indeed a possible solution is necessary.

The mention of 'non-expert judges'[634] in Justice Breyer's dissent for *Jam*[635] asks the question of the role of national judges if a future reform were to be made of the UN's immunity system granting them more powers than what they currently have. While a coherent criticism about an expansive role of non-expert national judges in cases regarding the immunity of international organisations could certainly be made,[636] it would be worth taking a look at Court of Appeals Judge Pillard's[637] arguments regarding *Mendaro*[638] and *Atkinson*[639], the precedents overturned by the Supreme Court's majority decision in *Jam*. Indeed, the standards set by those cases called for a far greater involvement by national judges in assessing an international organisation's – here in a very broad sense – functions. In *Mendaro* in particular, the court established the doctrine of 'holding [an] organization's facially broad waiver of immunity effective only as to types of plaintiffs and claims that "would benefit the organization over the long term"'.[640]

Judge Pillard criticised the uncertainty of where the line was drawn between suits that would "benefit" IOs and those that would not. Interestingly, the choice was always made in those cases at the discretion of the (*national, non-expert*) judge on the case, a situation that was

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[632] See for example Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 63-64.
[633] Dorothea Anthony, 'Resolving UN torts in US courts: Georges v United Nations' (2018) 19 Melbourne Journal of International Law 1, 31.
[634] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019), Justice Breyer's dissent, 13-14: '…international organizations, unlike foreign nations, are multilateral, with members from many different nations … That multilateralism is threatened if one nation alone, through application of its own liability rules (by nonexpert judges), can shape the policy choices or actions that an international organization believes it must take or refrain from taking.'
[635] *Jam v. International Finance Corp.*, 586 U.S. ___ (2019), Justice Breyer's dissent.
[636] For instance, by pointing out that decisions by domestic judges would almost inevitably lead to a fragmentation of the law on UN immunity if no clear legal standard is established, or by heeding the warning of Dorothea Anthony that the US legal system (which took on the Haiti case) has 'mixed interests at heart'. Dorothea Anthony, 'Resolving UN torts in US courts: Georges v United Nations' (2018) 19 Melbourne Journal of International Law 1, 31.
[637] *Jam v. International Finance Corp.*, 860 F.3d 703 (2017), Judge Pillard's Concurring Opinion.
[638] *Mendaro v World Bank*, US Court of Appeals (DC Cir) (27 September 1983) 717 F.2d 610 (about a case of unfair dismissal).
[639] *Atkinson v Inter-American Development Bank*, US Court of Appeals (DC Cir) (9 October 1998) 156 F.3d 1335 (regarding garnishment following a divorce involving an employee of the Bank).
[640] *Jam v. International Finance Corp.*, 860 F.3d 703 (2017), Judge Pillard's Concurring Opinion, 7.

called out multiple times in Judge Pillard's reluctant concurring opinion.[641] If this thesis is to argue for restrictive immunity, even one not necessarily based on States' restrictive immunity, and if that immunity system would require national judges to make a decision on an international organisation's activities and functions, it is relevant to point out that similar accusations can be made, at least in the US system, with the "corresponding benefit" doctrine. If we trust judges to assess whether or not an apparent waiver would bring a benefit or not to an international organisation, and to **decide accordingly**, then why cannot we trust them with assessing whether something is a commercial activity or not, or even weeding out the petty lawsuits from the "real" ones?

Thus, the role given to domestic judges in *Atkinson* and *Mendaro* seems just as much an outreach of a national judge's competence as would be looking into liability for international organisations that have caused harm. It is true that *Atkinson* and *Mendaro* would not necessarily have influenced an organisation's changes in policy,[642] though it could have influenced them to clarify their policies on employee suits to fill out the "gaps" of their waver policy. Nonetheless, the analysis made by the judges of the 'interrelationship between the functions' and the 'underlying purposes of international immunities'[643] seems very far from what started as fairly banal cases of unfair dismissal (*Mendaro*) and garnishment procedure (*Atkinson*). The strangely wide role given to the judges under both of these precedents may anticipate criticism related to a possibly extended role of judges under a new system of immunity for the UN. In other words, if non-expert judges are trusted when it comes to determining whether or not a lawsuit would be beneficial to an organisation's functions/aims, why would it be a problem for a judge to be trusted to determine whether or not a lawsuit would hamper an organisation's functions/aims? Or, going a step further, why would a judge not be able to determine the qualification of an act according to the categories set out in 5.3.2.1, assuming a clear legal standard has emerged?

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[641] ibid: 'The "corresponding benefit" doctrine calls on courts to second-guess international organizations' own waiver decisions and to treat a waiver as inapplicable unless it would bring the organization a "corresponding benefit"—presumably one offsetting the burden of amenability to suit. The majority acknowledges that "it is a bit strange" that *Mendaro* calls on the judiciary to re-determine an international organization's own waiver calculus. Slip Op. at 8. I agree that the organization itself is in a better position than we are to know what is in its institutional interests.'

[642] There is even the argument that this cost-benefit analysis would have been worse for claimants. See Pierfrancesco Rossi, 'The International Law Significance of "Jam v. IFC": Some Implications for the Immunity of International Organisations' 13 Diritti umani e diritto internazionale 305, 313 : 'By applying the 'corresponding benefit' standard, there is only one type of suits that may reasonably be deemed beneficial to an international finance institution, i.e. those brought by private parties lending money to the IO.' The door to claimants that are most likely to be severely affected by an IO's actions would be even more firmly shut – they tend not to be the ones being able to give the organisation money.

[643] *Jam v. International Finance Corp.*, 860 F.3d 703 (2017), Judge Pillard's Concurring Opinion, 6, quoting in part *Mendaro v World Bank*, US Court of Appeals (DC Cir) (27 September 1983) 717 F.2d 610, 615.

There are however arguments against the reliance on domestic judges. While in the case of torts some have argued that they may actually be the best placed to decide,[644] a number of issues arise. First, there is the issue of harmonisation of court decisions,[645] as different domestic courts will have different opinions on restrictive immunity. For instance, the case of *Jam* relied on a textual reading of an existing domestic legislation, and applied the concept of restrictive State immunity to international organisations. There is no guarantee that another court, in another State, might follow the same idea, particularly as the very distinction between *acta jure gestionis* and *acta jure imperii* is not quite set in general practice yet. This would be applying a fragile concept to an entity not quite designed for it – it is entirely reasonable that other jurisdictions might choose a different system. Second, following from the first argument, this could create instances of forum shopping, particularly for the individuals affected.[646] It could not only create inequality between the victims and what they could be entitled to, but also between member States, as this will allow the States whose courts are solicited to have power over the organisation while others do not.[647]

While domestic courts might be more capable than previously envisaged, the issues of harmonisation and equality between victims are important limitations to their involvement in UN immunity decisions.

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[644] Patrick J. Lewis, 'Who Pays for the United Nations' Torts: Immunity, Attribution, and Appropriate Modes of Settlement' (2014) 39 North Carolina Journal of International Law and Commercial Regulation 259, 325.

[645] ibid, 327: 'the negative effect of inconsistent judgments by various domestic courts and the lack of any harmonization mechanism also support the grant of immunity from domestic lawsuits.'

[646] Heike Krieger, 'Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts As a Way to Avoid UN Reform?' (2015) 62 Netherlands International Law Review 259, 275, on the trend to turn to member States for compensation: 'Individuals being violated by peacekeeping troops from certain democratic States under the rule of law with solid budgetary means and strong human rights-oriented courts might gain compensation while others will face practical and legal obstacles… From the perspective of troop-contributing States it seems highly problematic if as a consequence of forum shopping cases against peacekeeping missions would only be brought before the courts in those States which apply a progressive interpretation of the law.'

[647] This issue was pointed out by the United Nations in its *amicus curiae* brief for the in the Broadbent v. OAS case: 'If individual members could then exert additional influence on those organizations, largely through the fortuitous circumstances of where their headquarters, or other offices or officials or assets, happen to be located this could drastically change the constitutionally agreed sharing of power within the organizations. Thus the immunity granted by States to an intergovernmental organization is really their reciprocal pledge that none will attempt to garner unilaterally an undue share of influence over its affairs.' Brief for the United Nations as Amicus Curiae, *Broadbent v. Organization of Am. States*, 628 F.2d 27 (D.C. Cir. 1980). See also Alice Ehrenfeld, 'Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969): United Nations Immunity Distinguished From Sovereign Immunity' (1958) 52 International Law and the Political Process 88, 90: 'Certainly a Member State ought not to be able to exercise power, through its national courts, over the execution of the Organization's functions or the disposition of its funds, which have, in the first instance, been determined and contributed collectively.'

5.3.2.2.2. The only guarantee of impartiality, transparency, and true change: a new independent judicial body to deal with third-party claims

From the earlier literature on the topic, the conception of an independent body to deal with third-party claims is not new. This section intends to take this idea and adapt it to the present day demands and issues that the UN faces. Some key characteristics need to be present. First, impartiality and accessibility will be major concerns for the claimants. Second, the common fear of a "flood of complaints" and cost concerns interrogates the very existence of international organisations in their current form, ultimately making the case for an institutional reform.

Impartiality and accessibility: a victim-centred process

In situations like Haiti or Kosovo, victims are usually shut out by the usual process of claims due to lack of clear access to any entity for this purpose.[648] Access is therefore a key issue for the alleged victims. In the current system, they already face difficulties by not having the "impartial" standing claims commissions that were supposed to be set up for every peacekeeping operations. In the absence of such bodies, the Haitians had to turn to courts, supported in this process by an NGO. Even though the courts decided in favour of the UN, the fact that they had access to them and were able to publicise their fight against the UN is a huge plus for the Haitians. But the downside is that if a victim, or a group of victims, is unable to get either NGO or media support, it will not be able to go as far as the Haitians did. This goes to very core of the principles of law, justice, and equality: ideally, no one should face the possibility of not being heard because of a lack of means, financial or otherwise. Thus, the body proposed in this section should have accessibility as its main component. Individuals should be able to reach the entity directly, without having to first exhaust all other possibilities or having to rely on their governments. Indeed, when a government either supported the UN activity that caused harm, relied entirely on UN presence, or simply *was* the UN in situations of territorial administration, they only constitute an extra obstacle for the victims.[649]

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[648] Beatrice Lindstrom, 'When Immunity Becomes Impunity' (2020) 24 Journal of International Peacekeeping 164, 173 and following.

[649] Daniel D. Bradlow, 'Using a Shield as a Sword : Are International Organizations Abusing Their Immunity' (2017) 31 Temple International & Comparative Law Journal 45, 63-64 : 'Non-state actors' own governments are unlikely to take up their case because, in most cases, they have either actively or passively supported the operation that has caused the problem… The lack of effective remedial forums available to these individuals and communities means that, ironically, the one group of stakeholders that does not have access to an effective remedy are those IO stakeholders who are the intended beneficiaries of most IO operations'.

The composition of the court should also aim at promoting true impartiality. In the standing claims commissions, the members of the committee were in part nominated by the UN itself. This participation of the organisation in the process should be unacceptable. The UN has for far too long been its own judge, jury, and executioner. A victim-centred process would therefore advocate for the total independence of the judges. In that sense, this thesis disagrees with the idea of involving the ICJ.[650] While there is no doubt that it can be impartial, the general perception of the process matters almost as much as the process itself. A UN institution cannot be seen evaluating the needs of the UN. Furthermore, under the current rules of the ICJ, individuals would not be able to seize it directly. Reinisch's proposal that an international organisation can make the request for an advisory opinion 'as soon as a case relating to its immunity is pending before a national court'[651] still puts the power in the hands of the organisation.

The volume of complaints and cost: a misplaced concern

In practical terms, the main reasons put forward as to why international organisations do not want to see their immunities restricted is twofold: the idea that a flood of complaints will appear,[652] and that the costs associated with handling the reparations will cripple the organisation.[653]

There are two types of responses to these fears. The first is to react by providing caveats that would allow the organisation to still function. The second is to interrogate those fears and what they say about the general practice of the organisation.

First, there is no guarantee that an independent body, much more so than a domestic court with non-expert judges, will not be able to handle complaints (including frivolous ones). Unlike the proposal of the ICJ in fact, an independent body created just for this purpose would have more time and space to dedicate to filtering the claims. On cost, this where the

[650] See for instance August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"'? (2013) 10 International Organizations Law Review 572, 585, proposing that the ICJ delivers a "preliminary ruling" or an advisory opinion.
[651] ibid 587.
[652] See UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) 71st session (1996) UN Doc A/71/367, para 55: 'Some officials and diplomats have suggested that although they would favour providing an appropriate remedy in this case, nothing can be done until the shadow of litigation has been lifted. To take action before then would only encourage many more suits designed to achieve the same result: the proverbial "floodgates" would be opened.'
[653] See the section on economic reform proposals in this chapter (5.2.2).

insurance proposals – or even the creation of something akin to a common relief account[654] – would enter into play. The UN is certainly cash-strapped, but as argued earlier, this continued head-in-the-sand approach to third-party claims would end up costing more than the value of the claims itself.

This is where the second argument comes in. The UN, the IFC, and other international organisations in general fear a flood of complaints and the huge costs associated with it. However, this raises the question of why the organisations fear that there will suddenly be an enormous amount of complaints from affected third parties if the option is offered to them. Special Rapporteur Philip Alston sums it up best when he writes that this fear 'augur very badly indeed for the United Nations since it would imply that there are actually many cases in which the Organization has unfairly refused to provide a remedy and that the United Nations will not budge unless litigation is initiated.'[655] If an organisation could be targeted by so many claims that it worries for its efficient functioning, then maybe the option of litigation should have been opened from the start. Furthermore, the question of the maintenance of the organisation in and of itself can also be put on the table. Should it still exist if its operations cause so much harm? After all, the justification that an organisation can "do good" and should therefore be maintained is harder to defend if the tangible result of its activities can be accounted for in millions of dollars in reparations to harmed and deceased third parties.[656] Additionally, while the cost argument has more legs, the avoidance of litigation – or of any other form of accountability – by international organisations does not stand in the face of their mandates and goals.[657] Furthermore, one could also argue that, similar to its mandate, if an organisation cannot function because of the cost associated with the harm it has caused via its activities, a global reform is needed. This is where States can

[654] See the suggestion by Phillip Zunshine to create a common relief account based on the model of the Tobacco Master Settlement Agreement, which would entail the organisations 'deposit[ing] a corresponding amount in an escrow-like account' for every financed project. This is very IFC-, and MDBs in general-coded, but it is a possible basis for a suggestion of a 'pot' of money exclusively for these claims. Philip Zunshine, 'Improving International Organization Accountability: A Proposal Based on the Tobacco Master Settlement Agreement' (2020) 50 California Western International Law Journal 459, 480.

[655] UNGA 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) UN Doc A/71/367, para 56.

[656] This thesis does not argue for an end to all international organisations, or for an end to the UN in particular. Rather, the conclusion of this rather provocative line of argument is to show the absurdity of the "good-doer" image as justification for absolute immunity when there is real, tangible harm being caused by an organisation's activities. It is this contrast that needs to be addressed.

[657] Brief of Amicus Curiae of Dr. Erica R. Gould in Support of Plaintiffs- Appellants and Reversal, Jam v. Int'l Fin. Corp., 860 F.3d 703 (D.C. Cir. 2017) 27: 'What's ironic about the Respondent's flood-of-litigation argument is that it seems to be worried about lawsuits from the very individuals and communities whom it is intended to benefit. As the IFC states, its mission is "to further economic development" and "fight poverty" around the world with the "intent to 'do no harm' to people and the environment." … Addressing concerns voiced by individuals and communities and redressing their harms, whether through the CAO or in the courts, will help the IFC fulfill its mission.'

come into play, as they too can be affected by an organisation's reputation.[658] This goes beyond cost and into reputational damage, but the financial concerns alone might be the push needed for States to enact an institutional-level reform of the organisation's activities.

5.3.2.3. Restrictive immunity and situations of territorial administrations: a wholesale application of restrictive State immunity

This final section will be brief, as it is a continuation of the arguments developed in Chapter 4.[659] The cases of Kosovo and Haiti, while dealt with very similarly by the UN, are different in that one was a peacekeeping mission in a State where – in theory at least – there was a government, and the other was a situation of territorial administration where the UN acted as the governing power. If the UN is to show a good model of global governance, and if it is to restrict its immunity for tort claims and contracts cases (in tangible ways, not as part of Section 29), then the changes for the territorial administrations should be more significant.

As the narrative of functional necessity is deconstructed, the distinctions between a State and an international organisation are not completely void. A State still has a territory and sovereignty, which an organisation does not have. However, in Kosovo, the UN acted like a State, with very similar power and activities. It does not stand that the distinction should continue to apply in those cases. There are no more functions to "limit" the action of the UN, either real or decided by the narrative. In other words, if the UN immunity system is to no longer be based on functional necessity, and if the very notion of a function is to be deconstructed, this opens the door for a direct comparison to States, and for a direct application of restrictive immunity. This is different than the issues faced by PAHO in *Rodriguez*. Rather than advocating for a wholesale application of a concept to an organisation *not acting as a State*, this is advocating for the restriction of the immunities of a State-like entity. Of course, there would need to be careful delimitations – temporal for a start, as the UN acting like a State would presumably stop as soon as the mission is over – which is where the independent body would come in.

While there is no guarantee that the actions that led to the Kosovo lead poisoning scandal would not have been covered by immunity even under the restrictive immunity paradigm, this will at least guarantee that any future actions in UN territorial administrations would at

[658] Heike Krieger, 'Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts As a Way to Avoid UN Reform?' (2015) 62 Netherlands International Law Review 259, 275-276, on State influence on international organisations: '[i]n the long run the public image of the UN as an organisation which cannot change where public opinion perceives change as necessary is detrimental to its member States as well'.
[659] See 4.2.2.

least be open to scrutiny. In that regard, 'justice should not only be done, but also seen to be done'.[660]

Conclusion to Chapter 5

The functional necessity narrative has been shown to permeate the decisions, discussions, and actions of and about the United Nations. Any reform in the literature, no matter how extensive, is therefore founded on the idea that immunities are necessary, sometimes to the absolute, and cannot be removed without grave consequences for the organisation. For a more radical reform to be put forward, the State- and function-centric functional necessity narrative needs to be deconstructed. Following this necessary step, the acts of the UN need to be assessed not with reference to the functions of the organisation, but with reference to their nature. And in that process, the establishment of an independent body is the only guarantee of impartiality, accessibility, and accountability.

[660] UNGA 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations' (21 May 1997) UN Doc A/51/903, para 10.

Conclusion

The issue of the UN's absolute immunity is a recurrent topic anytime a peacekeeping mission leads to the death or injury of a third-party person. While the case of Nepalese peacekeepers bringing cholera in Haiti certainly presents the most recent and most thorough instance, the question of the range of immunity that the UN is entitled to was also raised following the Srebrenica massacre and the allegations of lead poisoning in Kosovo. As these cases made their respective ways through various justice systems, an unflattering picture of the UN and of its way of dealing with third-party injury and death emerged. The Haiti case went the furthest, each step uncovering grave failures of the UN immunity system. After a period of denial of the facts of the case, the organisation relied on its absolute immunity to reject any judicial responsibility, including the monetary reparations the parties were asking for. Despite the lack of internal means of dispute settlement expressly planned for in the Statute of Armed Forces Agreement signed with the Haitian government, the UN was able to claim that its absolute immunity should still stand. It argued that the case was not a dispute of private law character and therefore did not meet the requirement for the provision of an alternative means of settlement according to its own Convention on the Privileges and Immunities of the United Nations. The domestic courts that took the case agreed, ending any possibilities for the claimants to receive reparations. The UN waited until the decision was made to admit to a moral responsibility, announcing the setting up of an aid programme for Haiti in order to combat the spread of the disease.

This situation, described by many as an example of an accountability gap in the UN system, is however mostly in line with the conventions setting up the organisation itself. The UN Charter sets up that the immunity of the organisation should be functional, and the General Convention describes that immunity as absolute, while only enacting three caveats: a waiver by the organisation of its immunity, and alternative settlements in the case of either a contractual situation or a dispute of private law character. The mention of a function – or rather, *functions* – that the UN is bound to fulfil is a representation of the rationale behind the UN's absolute immunity: the concept of functional necessity, understood here to be derived from the theory of functionalism. Supported by both the literature and the organisation itself, this rationale has become a narrative, a fiction the UN tells itself where it takes the role of the protagonist running the risk of serious attacks from States that will prevent it from fulfilling its functions. It is this belief, held across the organisation, that is underpinning its decision-making when faced with a case brought by a third party. Under

this narrative, the UN requires the broadest extent possible of its immunities in order to fulfil its functions, which are considered both extremely broad and extremely important, reflecting its prominent place not only amongst other international organisations but on the international stage in general. This reliance on the narrative of functional necessity and the conviction that the UN is at its core a "good-doer" leads to the unavoidable conclusion that the Haitians were always against an insurmountable wall, even when accounting for the non-establishment of the treaty-ordered means of settlement for every peacekeeping missions. While this wall certainly protects the UN on a short term basis, the reputational damage it took from the Haiti scandal as well as the Kosovo and Srebrenica cases leads to the conclusion that clinging onto functional necessity as a shield for the organisation to allow it to fulfil what it considers to be essential functions is increasingly the bigger risk for that goal.

An overview of other international organisations' immunity practice leads to the same overall conclusion. While some organisations (namely financial organisations) may seem different from the UN with regards to their immunity provisions as they are "less absolute", the conclusion taken for this overview is that despite an explicit widening of possibilities, these organisations run into the same criticisms levelled at the UN. These are centred on a growing proximity to right-holders, a confusion around corporate-like and tort-like acts, and a risk of serious reputational damage. In other words, even a "light-weight" absoluteness fails to account for multiple difficulties, all of which are already present for the UN. Following this analysis, it becomes apparent that it is the rationale of functional necessity itself that represents the biggest obstacle to accountability and, consequently, the biggest challenge for the UN if it aims to fulfil its functions. If even a lighter version cannot adequately address the most salient criticisms aimed at international organisations, and the UN in its unique position in particular, then the focus should turn to an entity that did manage to reduce the scope of its immunity: States.

While the rationale behind State immunity is reciprocity, as opposed to functional necessity, there are still similarities between States and the UN in particular. Though it used to be absolute, State immunity went through a transformation in the second half of the 20th century, due in large part to the growing involvement of States on the economic plane. Soon, States generally accepted a restriction of their immunity on the basic dichotomy of *acta jure gestionis* and *acta jure imperii*. This distinction is not as easily made as it appears however, as plenty of activities could reasonably fit into both categories. Nonetheless, the example of another entity having managed to restrict its immunity cannot be ignored when it comes to

the UN. In fact, States represent an important comparison point not just because they are the other major actor on the international stage. Indeed, the UN has acted in a manner similar to a State before in instances of territorial administration, and there are examples in case law of courts applying the rules of State immunity to international organisations. In short, the distinction between States and international organisations – one that drives the continued commitment to absolute immunity for international organisations, as a contrast to States – is not a clear cut as it may appear. Yet, there are some growing pains: the US court case of *Jam*, where the US law on restrictive immunity was applied to an international organisation, exemplifies some of the difficulties of making a direct analogy between States and international organisations. A State's commercial dealings can be an organisation's *raison d'être*, causing the entirety of its activities to be under the remit of a domestic court. The immunity of the international organisation would therefore be essentially non-existent. However, this tentative first step showed that there is potential in refusing to accept that States and international organisations are completely separate on the grounds of immunity. Furthermore, a few growing pains do not make a complete failure, as evidenced by the restriction of State immunity itself. It does not follow that what the US courts did in *Jam* cannot be in theory expanded to other international organisations.

From these observations, a picture appears of a system in desperate need of reform, coupled with an organisation that is extremely specific even amongst other international organisations and yet still fundamentally distinct from a State. Authors have generally tended to shy away from radical reform and have instead focused on changes to be made while keeping intact the core idea that the UN needs absolute immunity to function. These proposals have relied on the human right of access to justice, the alternative means of settlement, or even insurance policies for the UN. However, as this thesis has shown, the real issue does not lie in monetary means or a better implementation of existing rules: it lies in the reliance on a narrative that does not hold as much weight now, particularly after the scandals in Haiti and Kosovo. A lighter absolutism will not do, as seen when looking towards other international organisations. This thesis argues that a full deconstruction of the narrative is needed, and as a result the immunity of the UN should evolve from being absolute to being restrictive. This evolution would be in some ways similar to State immunity (in very broad terms) but with special considerations for the UN's special position on the international plane and for its nature as an international organisation. The move away from the functional necessity narrative, and its State- and function- centric tendencies, would necessitate a focus on how to categorise the various acts an international organisation – and the UN in particular – can undergo in the course of its existence. A corresponding judicial body would also need

to be put in place, and the presumption that an act is covered by immunity should be reversed. Considerations of transparency, impartiality, and access would also have to be taken into account, answering the criticisms levelled at the current United Nations immunity system. For this reason, the thesis presents the establishment of a fully independent judicial body that follows the earlier distinctions of acts as its basis to establish competence as the only viable solution to the UN's immunity problem.

In insisting on keeping its absolute immunity, the United Nations stands against the tide of the general evolution of immunities in international law. States have seen the scope of their immunities change from absolute to restrictive based (primarily) on the nature of a given act, and domestic courts have started to implement jurisprudence affirming a limited scope for certain organisations as well. While the UN remains protected and in a privileged situation amongst other international organisations,[661] its position is increasingly untenable. Its enemies are no longer – or not primarily – States wanting to hinder the activities of a small, fledging organisation, but individuals harmed by the acts of an organisation that can, through its peacekeeping missions, have a direct and severe impact on their lives. Yet, despite the risk that another crisis such as the one in Haiti occurs,[662] it continues to ignore the calls for reform and doubles down on its exceptionalism. Its immunity system hinges on the narrative that it is an organisation under risk of State influence, yet it is currently facing challenges from the third party it has a tremendous amount of influence on. This contrast becomes increasingly difficult to justify as the UN cements itself as a model of global governance.[663] Changing its immunity system is no longer simply welcomed, but required.

Several questions flow from this analysis. Firstly, it would be interesting to see if the UN decides to change strategy if another case like Haiti were to happen due to the backlash from the media, NGOs, journalists, its own special rapporteur, and the academic literature on immunity as a whole. All could agree that the way the UN handled the crisis was absolutely

[661] In the US for instance, the General Convention is self-executing, see *Brzak v United Nations*, 597 F.3d 107 (2d Cir. 2010). See also the clear reluctance of the ECtHR to recognise that the lack of alternative dispute settlement options could mean that the absolute immunity of the UN violates the right of access to justice, *Stichting Mothers of Srebrenica and Others v Netherlands* (2013) 57 EHRR SE10.

[662] A crisis here is to be understood in two ways: sanitary, in that another epidemic could occur, and reputational, in that the UN's way of dealing with these cases (deny, refuse reparations, install a non-mandatory trust fund) has been heavily criticised.

[663] Not only towards States, but also towards other international organisations. Farhana Choudhury, ''The United Nations Immunity Regime: Seeking a Balance between Unfettered Protection and Accountability' (2016) 104 Georgetown Law Journal 725, 739, on the lack of alternative dispute settlements: 'The U.N. can play a pivotal and positive role, or it can choose to thwart responsibility for its actions and become a negative exemplar… The U.N.'s emerging role as the paragon of IOs insists upon a moral obligation to act diligently in protecting the rights of victims injured by the organization's actions.'

abysmal, even if most are still in favour of absolute immunity. This is where the UN's lack of transparency could become an asset, as it allows for more flexibility. If the UN is not ready to interrogate the narrative of its immunities, it could at least reformulate what a dispute of private law character is to include in a future case.

The financial implication of such a change would also be put to the test. It is a worry that is often found in the literature: the financial ability for the UN to be solvent if a third-party case demanding reparation were to succeed. The UN is famously cash-strapped, and while there is an argument that less immunity could also mean less possibility of another Haiti crisis as the UN would adapt to the lack of protection, this is a gamble that the organisation might not want to make.

Finally, while the US has so far closed the door on any change for the UN's immunity in its domestic system, the trend towards restricting immunities for both States and other international organisations could lead to another legislation deciding to take this step. If such a thing were to happen, it would be interesting to see the rationale behind this "new" UN immunity. Would it take State immunity as a direct inspiration like *Jam* did? Or would it perhaps try a "light" absoluteness akin to the multi-development banks? Or would it rely on human rights considerations? Nonetheless, if a court is willing and able to look beyond the functional necessity narrative, its choice of restriction might be highly influential, and open up the topic of immunity to new opportunities for further research.