The United Nations as Good Samaritan: Immunity and Responsibility

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Abstract

Since the U.N.'s founding, its need for immunity from the jurisdiction of member states courts has been understood as necessary to achieve its purposes. Immunities, however, conflict with an individual's right to a remedy and the law's ordinary principles of responsibility for causing harm. This inherent conflict at the center of the immunity doctrine has evolved into a very public rift in the Haiti Cholera*,* Kosovo Lead Poisoning*, and* Mothers of Srebrenica *cases against the U.N.*

In these three cases alleging mass torts by the U.N., the independence of the organization is perceived by some to have trumped the dignity of affected individuals. Due to a combination of factors, including the U.N.'s broad immunities, the limited jurisdiction rationae personae of courts over international organizations (IOs), and the nascent state of the U.N.'s own internal review mechanisms, not to mention continuing debate over whether human rights obligations bind the U.N. directly under international law, these cases of human tragedy have resulted in neither compensation by the U.N. to the victims nor access to domestic courts.

This article argues that the threshold problem with the position that the U.N. is absolutely immune is that it severs ordinary legal principles: an organization is responsible for the harm it causes by its negligence. Absolute immunity also stands in contrast to the U.N.'s programmatic promotion of the Rule of Law and to the standards expected of member states. While partial immunity is justified under certain circumstances, the categorical assertion of absolute U.N. immunity does not survive an assessment of accountability, distributive justice, or economics. U.N. Member States should join the conversation about what immunities mean to the U.N. today given its contemporary mandate and impact on

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individuals. If they do not, there may be consequences for the U.N. that are disadvantageous for its future work.

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I. INTRODUCTION

Since the creation of the U.N. (or the Organization) in 1945, its need for immunity from the jurisdiction of member state courts has been understood as necessary to achieve its purposes. These immunities extend to its premises, property, archives, communications, and the different categories of persons connected with it.[1] Immunities, however, conflict with an individual's right to a remedy and the law's ordinary principles of assigning responsibility for causing harm. This inherent conflict at the center of the immunity doctrine has evolved into a very public rift in the case of three recent mass torts cases against the U.N., where the independence of the Organization is perceived by some to have trumped the dignity of affected individuals.

In the *Haiti Cholera*,[2] *Kosovo Lead Poisoning*,[3] and *Mothers of Srebrenica*[4] cases, individuals have alleged that the U.N. committed a wrong in the course of peacekeeping operations, sought a forum to hear their claims, and asked for a remedy.[5] Due to a combination of factors, including the U.N.'s broad immunities, the limited jurisdiction rationae personae of courts over international organizations (IOs), the nascent state of the U.N.'s own internal review mechanisms, not to mention continuing debate over what obligations bind the U.N. directly under international law, these cases of human tragedy have resulted in neither compensation by the U.N. to the victims, nor access to domestic courts.

At the heart of the U.N.'s immunity is the notion that it is an organization created to save future generations from the scourge of war by maintaining

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1 Convention on the Privileges and Immunities of the United Nations arts. I–VI, Feb. 13, 1946, 1 U.N.T.S. 15.

2 Georges v. United Nations, 84 F. Supp. 3d 246 (S.D.N.Y. 2015); *see also* Complaint, Laventure v. United Nations, No. 14-CV-1611 (E.D.N.Y. filed Mar. 11, 2014), *available at* https://www.documentcloud.org/documents/1073738-140311-laventure-v-un-filed-complaint-2.html.

3 Letter from Patricia O'Brien, U.N. Under-Secretary-General for Legal Affairs, to Dianne Post (Jul. 25, 2011) [hereinafter O'Brien Letter to Post].

4 Stichting Mothers of Srebrenica v. Netherlands (Admissibility), App. No. 65542/12, 57 Eur. Ct. H.R. 114 (2013), *available at* http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122255#{"itemid":["001-122255"]}.

5 The same situation may arise for states. It has been made public that in 1996, the Government of Rwanda requested the establishment of a claims commission for the purpose of considering claims by fourteen Rwandan nationals arising out of the U.N.'s alleged failure to prevent the genocide in Rwanda. The U.N. declined the request on the grounds that the claims were not of a private- law nature. Letter from Pedro Medrano, Assistant U.N. Secretary-General, Senior Coordinator for Cholera Response, to Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque ¶ 91 (Nov. 25, 2014) (on file with author) [hereinafter Pedro Medrano Letter].

international peace and security.[6] The U.N.'s immunities are linked to this mandate and are limited to those necessary to fulfill its functions.[7] Like the Good Samaritan who in good faith assists injured parties is granted some immunity from liability in most domestic jurisdictions,[8] the U.N.'s immunities protect it from vexatious litigation and interference.[9] In many jurisdictions, similar principles limit the ability of individuals to make claims against federal governments[10] and charitable organizations.[11]

From a fairness standpoint, however, injury or loss of life for the victims of U.N. action is no less grievous when caused by the U.N. than by any other tortfeasor. Even though the U.N. provides public goods such as a forum for world dialogue, negotiations, and peacekeeping, the theoretical basis for granting the U.N. absolute immunity is curiously thin.[12] At the time the

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6 U.N. Charter preamble; *see also* Jan Klabbers, *The Transformation of International Organizations Law*, 26 EUR. J. INT'L L. 9, 11 (2015) (describing functionalist theorists and noting the shared adherence to the notion 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").

7 "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter art. 105, ¶ 1. This limited immunity is justified by the functional necessity doctrine, which predicates immunity on what is a necessity for the organization. *See* ICJ Reparation for Injuries Case, Advisory Opinion, 1949 I.C.J. 174, 183–85 (Apr. 11); *see also* Stichting Mothers of Srebrenica v. Netherlands (Admissibility), *supra* note 4 (finding that bringing military operations under Chapter VII of the Charter of the U.N. within the scope of national jurisdiction would mean allowing States to interfere with the key mission of the U.N. to secure international peace and security; that a civil claim did not override immunity for the sole reason that it was based on an allegation of a particularly grave violation of international law, even genocide; and that in the circumstances the absence of alternative access to a jurisdiction did not oblige the national courts to intervene).

8 *See, for example*, Victoria Sutton, *Is There a Doctor (and a Lawyer) in the House? Why our Good Samaritans Laws Are Doing More Harm than Good for a National Public Health Security Strategy: A Fifty-State Survey*, 6 J. HEALTH & BIOMED. L. 261, 272–76 (2010). It should be noted that the question of whether Good Samaritan immunity does actually encourage assistance in emergency situations is a highly contested proposition. Dov Waisman, *Negligence, Responsibility, and the Clumsy Samaritan: Is There a Fairness Rationale for the Good Samaritan Immunity?*, 29 GA. ST. U. L. REV. 609, 612 (2013).

9 *See* Bruce C. Rashkow, *Immunity of the United Nations Practice and Challenges*, 10 INT'L ORG. L. REV. 332, 335 (2014).

10 *See, for example*, Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2402, 2411(b), 2412, 2671–2680 (2012) (United States); Crown Proceedings Act of 1947, 10 & 11 Geo. 6, c. 44 (United Kingdom); D.P. III 1873, 20 Case Blanco (France); Bürgerliches Gesetzbuch [BGB][Civil Code], Aug. 18, 1896, *as amended*, § 839 (Germany).

11 *See, for example*, Note, *The Quality of Mercy: " Charitable Torts" and Their Continuing Immunity*, 100 HARV. L. REV. 1382, 1385–86 (1987) [hereinafter Quality of Mercy].

12 Jan Klabbers, *Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation*, 14 MELB. J. INT'L L. 149, 153 (2013) ("The net result is that organisations are pictured as innately good, socially beneficial creatures, which should be given the room and

Convention on Privileges and Immunities of the U.N. (CPIUN) was drafted, the whole field of privileges and immunities of IOs was largely "uncharted territory,"[13] and founding states projected what immunities they thought the U.N. would need with little information from practice. The legislative history of the CPIUN confirms that the biggest fear of U.N. founding states was the threat of a member state trying to control the U.N., not classes of private plaintiffs bringing torts cases against the Organization.[14]

The projections, made in the U.N.'s infancy, about what immunities the U.N. would require do not stand up to scrutiny today. In this Article, I argue that while the U.N.'s immunities are extremely broad, there is no principled justification for absolute U.N. immunity. Yet, almost without exception, national courts continue to uphold it on the basis of the CPIUN.[15] I then distinguish between the U.N.'s external and internal immunities, and propose three criteria for evaluating the scope of internal and external immunities: whether the UN has provided alternate means of settlement, whether the question involves

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facilities to perform and perhaps even expand. Many have held that organisations can remedy the defects of the global legal order and Nagendra Singh [later President of the International Court of Justice] even went so far, in the late 1950s, as to hold that organisations contribute to the 'salvation of mankind.'") (internal citations omitted).

13 AUGUST REINISCH, CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS: CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES 1 (2009), *available at* http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf ("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."); *see also* Report of the Preparatory Commission of the United Nations, *Chapter VII: Privileges, immunities and facilities of the United Nations*, chap. VII, § 1, ¶ 4, U.N. Doc. PC/20 (Dec. 23, 1945), a legislative history in which the constitutions of Specialized Agencies were examined (explaining that "a number of specialized agencies are already in existence. Their constitutions, or the agreements under which they are set up, have for the most part detailed provisions with regard to privileges and immunities are to a large extent on the arrangements made between the League of Nations and the Swiss Government. These specialized agencies include the following: The International Monetary Fund (Article IX), the International Bank for Reconstruction and Development: (Article VII), United Nations Relief and Rehabilitation Administration (Resolutions Nos. 32, 34 and 36 of the first session of the Council), Food and Agriculture Organization (articles VIII and XV), European Central Inland Transport Organization (Article VIII, paragraphs 13, 14, 15, 16, 17). These provisions are on the same lines in each case, though in some instances they have been worked out 'in more detail than in others'").

14 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.") [hereinafter Proceedings of Committee 5].

15 *See* study by Jan Wouters & Pierre Schmitt, *Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials*, 22–30 (Leuven Ctr. for Global Governance Studies, Working Paper No. 49, 2010).

a core constitutional matter; and in borderline cases, whether the UN has exercised a waiver. I conclude by suggesting that a more robust internal dispute resolution mechanism within the UN, rather than review by national courts, is the optimal outcome, and that UN member states should join the conversation about how private law disputes should be resolved today given the evolution of the UN's mandate.

The normative position against absolute U.N. immunity might be objectionable in light of two considerations: the U.N. is a notoriously cash-strapped organization and lesser immunities may affect the willingness of member states to contribute to peacekeeping. After all, at present, any sums paid out for the settlement of mass torts claims must come from existing budgets because the U.N. is self-insured. Moreover, member states may object to using Organizational funds to compensate victims of mass torts as against their intent. The same reasoning has been used to argue in favor of charitable immunity: "the financial strains of liability would reduce—perhaps even destroy—a charity's capacity to provide a valuable public benefit."[16] A second objection is that if the U.N. settles with private claimants or enters into dispute resolution processes that result in a finding that compensation is owed, it may have a chilling effect on the Organization. It is feared that acknowledging liability for harms in peacekeeping operations may set a precedent that will frighten off potential troop contributing countries (TCC) from future peacekeeping missions and hamper the U.N.'s ability to provide assistance in future emergency situations.

The point made in this Article is that the present justification for absolute U.N. immunity, itself an exception to ordinary principles of responsibility, does not survive arguments from accountability, distribution, or economic efficiency. It is also questionable in light of existing doctrine: despite the broad wording of the CPIUN, Article 105 of the U.N. Charter limits the Organization's external immunities before national courts to those functionally necessary. In case of conflict between the obligations of members under the U.N. Charter and other international instruments, Article 103 of the Charter takes precedence.[17]

The U.N.'s present legal strategy of making overbroad determinations that mass torts are "not receivable" because they are public claims that involve questions of policy may have unintended consequences for the Organization. Dissatisfied with the U.N.'s response, claimants are moving to national courts with greater frequency, inviting them to deconstruct existing categories of law and carve out exceptions from the existing immunity framework. It may only be a matter of time before a case with the right facts prompts a sympathetic judge to read down the U.N.'s immunity, undermining the Organization's

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16 Quality of Mercy, *supra* note 11, at 1388 (internal citations omitted).

17 U.N. Charter art. 103.

independence altogether. Such an eventuality would pose great risk to the future work of the United Nations.

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. Absolute U.N. immunity stands in contrast to the U.N.'s programmatic promotion of the Rule of Law and to the standards expected of nation states.[18] Moreover, it is indicative of a significant asymmetry between U.N. responsibility and immunity. That is, while the U.N. routinely affects individuals in the contemporary execution of its mandate and accepts absolute responsibility for torts that occur during peacekeeping operations as a matter of longstanding institutional policy,[19] its immunities have shielded it from any outside review of how those claims are addressed. Immunity protects the U.N. from national jurisdictions, but it should not protect it from responsibility.

In Section I, I will describe the U.N.'s current structure of immunities and distinguish between its external and internal immunities. I will also analyze the strategy of categorizing torts as public law claims, which led the U.N. to reject the *Kosovo Lead Poisoning* and *Haiti Cholera* cases under the CPIUN. In Section II, I will set out the philosophical case against absolute U.N. immunity from accountability, distributive justice and economics perspectives. In Section III, I will argue that a broad but functional reading of immunities is sufficient for the U.N., while introducing the *Mothers of Srebrenica* case as a problematic example of operational necessity and, in contrast, the Congo case from 1964 as an early example of how the U.N. chose to responsibly settle a mass torts claim. Finally, I will conclude with a discussion of the evolution of the U.N.'s mandate and contemporary standards of accountability, and argue that U.N. member states should join the conversation about what standards of liability and judicial process should be expected of the U.N. today given its contemporary relationship with and impact on individuals.

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[18] *See, for example*, G.A. Res. 67/1, U.N. Doc. A/RES/67/1 (Nov. 30, 2012); *see also* The 2013 Rights Up Front Action Plan, written in response to the U.N.'s systematic failure in Sri Lanka, in which the U.N. plans to "put [] the imperative to protect people, wherever they may be, at the heart of U.N. strategies and operational activities." Action 3 further states: "On the ground, when people are at risk we will have actionable strategies that leverage our political, human rights, humanitarian and development capacities in a concerted manner." RIGHTS UP FRONT: A PLAN OF ACTION TO STRENGTHEN THE U.N.'S ROLE IN PROTECTING PEOPLE IN CRISES, *Follow-Up to the Report of the Secretary-General's Internal Review Panel on U.N. Action in Sri Lanka*, (July 9, 2013) *available at* http://www.innercitypress.com/sriban1rightsupfronticp.pdf.

[19] *See* the discussion in Section II.A, *infra.*

II. THE DOCTRINAL FRAMEWORK OF U.N. IMMUNITIES

This Article addresses U.N. immunities in the context of large torts claims. However, U.N. immunities may be implicated in a variety of other contexts as well. For example, the U.N. is routinely faced with contract and employment disputes and has developed alternative fora for these types of third-party claims. An arbitration procedure is in place for contract disputes,[20] and labor disputes are resolved through an internal administrative tribunal.[21] When national authorities seek to investigate or prosecute U.N. staff or officials at the request of the Organization for criminal acts, the U.N. has developed a procedure whereby it waives its immunity for the purpose of assisting national authorities, while reserving the right to assert immunity at the trial stage if a prosecution is pursued.[22] It is also important to acknowledge that the U.N. regularly addresses private third-party claims against it, including simple torts claims.[23] Most are handled by a nascent system of local claims review boards that are established within individual missions for torts claims under $50,000.[24] What is missing, however, is a system for dealing with large torts claims by classes of private individuals against the U.N. who are not represented by a state. This is the subject of this Article, although its recommendations have implications for U.N. immunity in general.

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20 U.N. Secretary-General, *Review of the Efficiency of the Administrative and Financial Functioning of the United Nations*: *Rep. of the Secretary-General,* ¶ 8, U.N. Doc. A/C.5/49/65 (Apr. 24, 1995) (discussing procedures in place for implementation of Art. VIII, sec. 29 of the CPIUN).

21 *See generally* Cedric Ryngaert, *The Immunity of International Organizations before Domestic Courts: Recent Trends,* 7 INT'L ORG. L. REV. 121, 143 (2010).

22 For example, the problem of sexual assault by peacekeepers resulted in a 2005 comprehensive strategy with implications for both accountability and immunities. *See* U.N. Secretary-General, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, U.N. Doc. A/59/710 (Mar. 24, 2005) [hereinafter Zeid Report], *available at* https://cdu.unlb.org/Portals/0/Documents/KeyDoc5.pdf.

23 Report of the Secretary-General commends these boards for being able to settle cases without having to "resort to the establishment of . . . a standing claims commission." U.N. Secretary-General, *supra* note 20, ¶ 17. An increasing number of complaints against the U.N. have made this system backlogged and delayed.

24 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*, ¶ 22, U.N. Doc. A/51/389 (Sept. 20, 1996) [hereinafter U.N. Secretary-General Financing Report 1996].

A. Rights, Remedies, and Reasons for U.N. Immunity

Under ordinary principles of torts law the maxim ubi jus, ibi remedium applies: "Where there is a right, there is a remedy." This principle holds true when an individual or entity causes harm, even when acting with the best of intentions. The general proposition can be stated thus: a rescuer who negligently causes harm to a victim owes the victim a duty to repair the harm.[25] The implementation of this principle is affected by the doctrine of immunity. Immunity does not alter the standard of legal liability. Rather it nullifies the consequences of liability in domestic courts for the tortfeasor.[26]

This right is recognized by the U.N.'s own policies and practices, which permit individuals to bring claims against the Organization. The legal basis for third-party claims against the Organization comes from a 1996 report on the financing of U.N. forces in Croatia, where the Secretary General acknowledged that the U.N.'s responsibility for its torts derives from its international legal personality:

> The international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations . . . . The undertaking to settle disputes of a private law nature submitted against it and the practice of actual settlement of such third-party claims—although not necessarily according to the procedure provided for under the status-of-forces agreement—evidence the recognition on the part of the United Nations that liability for damage caused by members of United Nations forces is attributable to the Organization.[27]

This right was subsequently integrated into the rules of the Organization by a comprehensive liability scheme in recognition of the U.N.'s responsibility to compensate for mission-related deaths and injuries.[28] In a detailed General Assembly resolution, U.N. member states set out limits to the U.N.'s liability, but never disputed the premise that the U.N. has a duty to third parties for damage caused during peacekeeping operations.[29] This

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25 Waisman, *supra* note 8, at 644.

26 Quality of Mercy, *supra* note 11, at 1387 (internal citations omitted).

27 *See generally* U.N. Secretary-General Financing Report 1996, *supra* note 24, ¶¶ 6 & 8, 16–25; *see also* Rep. of the Int'l Law Comm'n, April 26–June 3, July 4–Aug. 12, 2011, U.N. Doc. A/CN.4/637/Add.1, 63d Sess. (explaining that according to U.N. practice the U.N. assumes responsibility for the command and control missions, but not for UN-authorized peacekeeping).

28 Pierre Bodeau-Livinec, *Faux-Semblants de la Lex Specialis: L'Exemple de la Resolution 52/547 de L'Assemblée Generale des Nations Unies Sur Les Limitations Temporelles et Financières de la responsibility de L'ONU*, 46 Revue Belge de Droit International 117 (2013) [hereinafter Faux-Semblants].

29 *See* the discussion *infra* at notes 66, 68; *see also* Paul Szasz, *The* U.N. *Legislates to Limit its Liability*, 81 AM. J. INT'L L. 739 (1987) (noting that by enacting this scheme, U.N. member states

resolution forms the basis of a lex specialis, through which third parties can bring claims against the Organization.[30] It also informs the internal system of immunities established under the CPIUN, which are discussed below.[31]

To bring a claim in national courts, in contrast, individuals must overcome the U.N.'s very broad external immunities.[32] A universal organization with a comprehensive mandate for peace, security, human rights, environmental, cultural, social, and economic affairs, the U.N. was, as Sabine von Schorlemer discusses, one of the most ambitious regulatory undertakings in international relations.[33] Immunities were regarded as an inherent quality of the U.N.'s international legal personality and as a way of safeguarding the Organization from member states.[34] Three rationales support the grant of extensive immunities to the U.N.: (i) safeguarding the U.N.'s independence and unique function, (ii) its voluntary role as a Good Samaritan, and (iii) to absolve national courts of the need to judge issues of international diplomacy and policy. These arguments flow from the U.N.'s unique position in the international architecture, its

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have prevented the U.N. from hiding behind its immunity for avoiding tort-related damages).

30 *Cf. Faux-Semblants*, *supra* note 28, at 132 (arguing that the resolution clearly operates within the realm of international legal rules, but arguing the resolution may not be sufficiently precise to create a lex specialis). For commentary, see Kristen E. Boon, *The Role of Lex Specialis in the Articles on the Responsibility of International Organisations*; Arnold Pronto, *Reflections on the Scope of Application of the Articles on the Responsibility of International Organisations*, in RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN 135, 147 (Maurizio Ragazzi ed. 2013).

31 See U.N. Secretary-General Financing Report 1996, *supra* note 24, ¶ 20. As discussed in more detail below, however, the U.N. is immune under its internal procedures from public law claims.

32 Proceedings of Committee 5, s*upra* note 14, at 4. For example, the legislative history of the U.N. Charter art. 1, para. 2 provides:

> The General Assembly may make recommendations with a view to determining the details of the application of the forgoing provisions or may propose conventions to the members of the Organization for this purpose." The committee noted that "the draft article proposed . . . does not specify the privileges and immunities respect for which it imposes on the member states. This has been thought superfluous. The terms . . . indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials . . . . It would moreover have been impossible to establish a list valid for all the member states and taking account of the special situation in which some of them might find themselves by reason of the activities of the Organization or of its organs in their territory. *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.* (emphasis added).

33 SABINE VON SCHORLEMER, RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 466 (2011).

34 ICJ Reparation for Injuries Case, Advisory Opinion, *supra* note 7, at 183.

mandate to protect member states against threats to peace and security and provide assistance, and the inherently political context within which it works.

The principal reason for granting the U.N. immunity from the administrative, adjudicatory and executive powers of member states is its unique function as a universal, multi-lateral organization with a mandate to maintain international peace and security. Without immunity, the U.N. would be subject to pesky lawsuits, retaliatory acts by member states against its representatives and organs, and suits that could drain its resources.[35] Indeed, cases have arisen in which member states attempted to impede the performance of U.N. staff or experts in the performance of their duties. In two such cases, the International Court of Justice was asked to render advisory opinions that resulted in findings that the immunity of the Organization should be upheld and the governments involved should refrain from interfering with U.N. officials performing their official duties.[36] Because the U.N. is a creature of its member states, immunities also ensure that individual members do not exercise extra-constitutional influence on the Organization.[37]

The U.N.'s humanitarian mandate constitutes a second justification for granting it immunity from suit. The U.N. is a major provider of emergency assistance and peacekeeping, and it has intervened in some way in 95% of armed conflicts since the Cold War.[38] It provides these services by consent and without charge.[39] Moreover, it is the only universal organization

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35 McKinnon Wood cautions against "cranks, fanatics or cantankerous people" who may believe either that they have a duty to compel the organization to adopt a particular course of action, or that they have suffered a wrong at its hands. HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 1034 (2011) (citing McKinnon Wood, *Legal Relations Between Individuals and A World Organization of States*, 30 TRANSACTIONS GROTIUS SOC'Y 143–44 (1944).

36 Applicability of Article VI, § 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177 (Dec. 15); Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29). *See also Immunity from Process of U.N. Officials, Memorandum to the Deputy Chief de Cabinet*, 1963 U.N. JURID. Y.B. 188, 189 (noting that U.N. officials may require immunity against their own states).

37 August Reinisch, *Introduction*, *in* PRIVILEGES AND IMMUNITIES, INTERNATIONAL ORGANIZATIONS RESEARCH HANDBOOK 134 (Jan Klabbers & Asa Wallendahl eds. 2011) (noting that forcing the U.N. to litigate in domestic courts might, for example, constitute an effort at indirect control).

38 Results of a recent study entitled "The Multilateralization of Armed Conduct" conducted by Kristen Boon & Greg Fox (draft on file with author).

39 *See* Chairman of the Panel on United Nations Peace Operations, Report of the Panel on United Nations Peace Operations "Brahimi Report", ¶ 48 U.N. Doc. A/55/305-S/2000/809 (August 21, 2000).

that can provide peacekeeping functions on a global basis.[40] Just as Good Samaritans[41] are often granted some immunities in national jurisdictions to incentivize their altruistic behavior,[42] the U.N. is granted reprieve from national courts. The U.N.'s purpose is to maintain international peace and security, but it is not required by any rule of international law to intervene in crisis situations. Indeed, efforts to attach a positive obligation for the U.N. to act in humanitarian crises, or, for example, to restrict the use of the veto, have been met with serious contestation.[43] Immunity, therefore, might be justified as incentivizing the U.N.'s work.

Third, and most significantly, given the U.N.'s international structure, national courts may not be well placed to judge its affairs. From the perspective of the integrity of international law, national courts may render divergent decisions on questions of public international law.[44] Alternatively, national courts may either display bias against the Organization, whether due to simple differences in experience or culture, or prejudice against the international.[45] Just as courts may refrain from taking jurisdiction over political questions in a national context on the basis that the issue is non-justiciable, claims involving the U.N.'s internal policies or constitutional questions may be similarly inappropriate for national adjudication.[46] Political grievances with the U.N. should not be resolved in domestic courts, and indeed, would seriously hamper the independence of the Organization. As Sir John Donaldson wrote: "*it can rarely, if ever, be for judges to intervene where diplomats fear to tread.*"[47]

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40 Some regional organizations have peacekeeping functions, however they are limited by mandate, geography, and funds. Despite the growth of companies providing private military contractors, there is no serious case for a for-profit company that would take over peacekeeping operations.

41 Luke 10:30–37 (reciting the parable of the Good Samaritan, the citizen of Samaria who helped a victim of robbery by taking him to a lodge and paying for his care).

42 *See generally* Waisman, *supra* note 8.

43 Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 N.W. J. INT'L HUM. RTS. 24, 38 (2007) ("Amongst the international legal community, it is widely accepted that a Council determination or inaction under Article 39 . . . is nonjusticiable.").

44 SCHERMERS, *supra* note 3 5 , at 1034 (citing McKinnon Wood, *Legal Relations Between Individuals and A World Organization of States*, 30 TRANSACTIONS GROTIUS SOC'Y (for 1944) at 143–44).

45 *Id.*

46 *See, for example*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

47 R. v. Sec'y of State for Foreign and Commw. Affairs. ex p. Pirbhai (1985) 107 I.L.R. 461, MR at 479 (Statement by Sir John Donaldson) (emphasis added).

B. The Doctrine of U.N. Immunity

In order to balance conflicting interests between the UN, its member states, and third parties, Article 105 of the U.N. Charter limited immunities to those that were functionally necessary.[48] This statement of principle on U.N. immunities was implemented by a general convention a few years later, whereby "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."[49] It is on the basis of this article of the CPIUN that courts have understood the U.N.'s immunity to be absolute. As Wouters and Schmitt write,

> although national jurisdictions have hinted at the possibility that they could decide on the case if they had to apply the limited immunity based on Article 105 of the U.N. Charter, they appear unanimously to fall back on Article II, Section 2 of the General Convention and accept the absolute immunity of the UN.[50]

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48 Bruno Simma, et al., *Introduction*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 2161 (Bruno Simma et al. eds, 3d ed. 2012) (explaining that this is a principle found in all major status conventions and which was to become a fundamental rule of the entire system of international privileges and immunities). Fox and Webb contend that in order to determine the question whether jurisdictional immunity is applicable to an activity of an international organization, the question should be whether the activity was necessary for the effective functioning of the organization. HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 575 (3d ed. 2013) [hereinafter FOX & WEBB]. *See* Klabbers, *supra* note 6, at 22–23 (discussing functionalism, and describing it as a theory that addressed the relationship between the Organization and its members).

49 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS art. II, § 2, Feb. 13, 1946, 1 U.N.T.S. 15 (emphasis added).

50 See generally Wouters & Schmitt, *supra* note 15, at 14. *See also Manderlier v. United Nations and Belgian State*, 45 I.L.R. 446 (Belg. Trib. of First Instance 1966):

> Article 105 of the San Francisco Charter . . . [a]ccords the United Nations only those privileges and immunities that are necessary to it for the fulfillment of its purposes. Those purposes, as enumerated in Article 1 of the Charter, do not include acts against private citizens such as are the subjects of the Plaintiff's complaints. The provisions of Section 2 of the Convention are wider than those of Article 105 of the Charter. They grant a general immunity from jurisdiction and do not limit it to what necessity strictly demands for the fulfillment of the defendant's purposes. These two international conventions have equal force, and the less widely drawn one cannot restrict the application of the more widely drawn one.

Id. at 453. Other cases that address the relationship between domestic law, Article 105 of the UN Charter and the CPIUN include: Brzak v. United Nations, 597 F.3d 107 (2d Cir. 2010) (determining domestic U.S. law was inapplicable to the question of whether the UN should be have absolute or restrictive immunity because that issue was governed by the CPIUN); Atkinson v. Inter-American Dev. Bank, 156 F.3d 1335 (D.C. Cir. 1998); Consortium X v. Switzerland Bundesgericht [BGer] [Swiss Federal Supreme Court] July 2, 2004, ILDC 344; Firma

Although the U.N. Charter gave the General Assembly the power to make recommendations to implement Article 105 of the U.N. Charter, Article 2 is overbroad: it expands very broad *functional* immunity to *absolute* immunity from process.[51] The U.N. Charter has a constitution-like function, which is relevant to the interpretation of all other treaties,[52] and as a matter of interpretation, the Charter's reference to functional immunities must take precedence over inconsistent implementing treaties.[53]

However, because immunity was not intended to shield the U.N. from responsibility as a "good citizen" on the world stage, the CPIUN also required that the Organization respond to justifiable claims by third parties resulting from its activities or operations.[54] As a result, the CPIUN creates external immunities from process before national courts under Article 2, while also setting up a more limited *internal* system of immunity that distinguishes between public and private claims under Article 29. In this internal system, the U.N. is immune from public law claims. Article 29 provides: "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."[55]

Identical terminology is included in the Convention on Privileges and Immunities for Specialized Agencies[56] and in other instruments on IO privileges

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Baumeister Ing. Richard L. v. O, Oberster Gerichtshof [OGH] [Austrian Supreme Court], Dec. 14, 2004, ILDC 362; Mothers of Srebrenica v. State of the Netherlands, Case No. 200.022.151/01 (Neth.) (Dutch Court of Appeals in The Hague Mar. 30, 2010) (determining that Article 105 of the UN Charter did not take precedence over the CPIUN because it was within the scope of Article 105). The *Mothers of Srebrenica* March 2010 decision is available at http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf.

51 The U.N. Charter states that the

> [o]rganization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. . . . 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.

U.N. Charter art. 105.

52 Stefan Kadelbach, *Interpretation of the* U.N. *Charter*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 71–99, 87 (Bruno Simma et al. eds., 3d ed. 2012).

53 *Cf.* Klabbers, *supra* note 6, at 14 (noting that functionalism can justify a near absolute reading of immunity if the survival of the organization is considered a functional necessity).

54 Rashkow, *supra* note 9, at 333.

55 Convention on the Privileges and Immunities of the United Nations art. 8, § 29, Feb. 13, 1946, 1 U.N.T.S. 15.

56 Convention on the Privileges and Immunities of the Specialized Agencies art. 9, § 31, Nov. 21,

and immunities.[57]

Indeed, it has been argued that the distinction between public and private law claims is relevant to the whole structure of the CPIUN in that the absolute immunity granted by Article 2 of the General Convention can be viewed as contingent on the Organization's compliance with Article 29, which requires the U.N. to make available "appropriate modes of settlement" for private law claims.[58] If the U.N. does not provide it, it has been argued that the U.N. is in material breach of the Convention, which would suspend its operation for the duration of the breach and hence lift immunities altogether.[59]

Given the centrality of the public/private distinction in Article 29 to the U.N.'s internal system of immunity, it is significant that there is no definition of either term in the CPIUN.[60] Frédéric Mégret has noted that the criteria used by the U.N. to distinguish between public and private claims have been lodged in the "internal jurisprudence of the UN" and hence inaccessible to outsiders.[61] Despite this, there is some practice that is relevant. For example, one category of cases considered to be public law are those that implicate the operational

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1947, 33 U.N.T.S. 261.

57 *See, for example*, Headquarters Agreement between the Government of Canada and the ICAO art. 7, § 30, Apr. 14, 1951, 96 U.N.T.S. 155; *see also* C. WILFRED JENKS, INTERNATIONAL IMMUNITIES 41–45 (1961) (commenting on the issue of international organizations' immunity).

58 Convention on the Privileges and Immunities of the United Nations arts. 2, 8, Feb. 13, 1946, 1 U.N.T.S. 15.

59 Transcript of Oral Argument at 16–17, Georges v. United Nations, 84 F. Supp.3d 246, No. 13-CV-7146 (JPO), *available at* http://www.ijdh.org/wp-content/uploads/2014/10/Oral-Argument_Cholera-Case-10.23.pdf. I surmise that the reason this argument has not been availing is that suspension is a remedy to be invoked by a party to a treaty, rather than by individual claimants. Thanks to Larry Johnson and Pierre Hughes Verdier for stimulating discussions on this point.

60 That same treaty's drafting history sheds no further light on the matter, and the only dispute recorded with regards to the scope of the provision involved whether the U.N. should be obliged to purchase insurance in the event of traffic accidents by its staff. Proceedings of Committee 5, *supra* note 14. It is not clear that state practice would be of much help either: the definitions of public and private law disputes applicable in the state immunity context are not easily transposable to IOs. *See, for example*, ROSALYN HIGGINS, PROBLEMS AND PROCESS—INTERNATIONAL LAW AND HOW WE USE IT 93 (1994) ("[T]o suggest that this distinction has any relevance to organizations is to assimilate them to states, which is not correct. Their basis of immunity is different. The relevant test under general international law is whether an immunity from jurisdiction to prescribe is necessary for the fulfillment of the organization's purposes. That question cannot be answered by reference to whether it was, in respect of the matter under litigation, acting 'in sovereign authority' or 'as a private person.'"). *See also* FOX & WEBB, *supra* note 48, at 574.

61 Frédéric Mégret, *La responsabilite des Nations Unies aux temps du cholera*, 47(1) BELGIAN REV. INT'L L. 161 (2013); *see also Fault-Lines: Haiti in a Time of Cholera*, AL JAZEERA (Mar. 2, 2015), *available at* http://www.aljazeera.com/programmes/faultlines/2013/08/2013828102630903134.html.

functioning of the UN, which go to the public heart of the organization.[62] A second category of public law claims are those that are "based on political or policy-related grievances against the U.N.," such as those related to actions or decisions of the Security Council or General Assembly.[63]

The definition of disputes of a private law nature, in contrast, were clarified by a 1995 report of the Secretary-General to the General Assembly, which identified two categories: (i) commercial agreements that the U.N. has entered into[64]; and (ii) claims by third parties for personal injury, death, or property loss or damage, specifically as caused by actions of U.N. peacekeepers.[65] The definition of private law claims clearly encompassed third-party claims against the Organization for death or personal injury occurring during peacekeeping missions. Although the U.N. limits its liability financially and temporally, including by carving out injuries that occur as a result of operational necessity, the right of individuals to a remedy for injuries has been acknowledged by the U.N. for decades.[66] To put it otherwise, the U.N. has a duty of care towards third parties that is grounded in the internal rules of the Organization, as per Article 5 of the 1969 Vienna Convention on the Law of Treaties (and the 1986 Convention on Treaties Concluded between States and International Organizations that is not yet in force). These internal rules have developed into subsequent practices of the Organization.

C. Cases Deemed "[N]ot [R]eceivable" Under the CPIUN

The possibility that the U.N. committed torts against large numbers of peoples has been raised in two recent cases: the *Kosovo Lead Poisoning* and *Haiti Cholera* cases. Both received a similar response from the UN: that the claims were not of a private law nature and hence "not receivable" under the CPIUN. In the next section, I will outline the circumstances of these cases and argue these were in fact private law matters, and not claims involving public law as decided by the U.N. As a result, within the U.N.'s internal system, there was no immunity.

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62 U.N. Secretary-General Financing Report 1996, *supra* note 24, ¶ 13 (defining the term "operational necessity" as "necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates") (internal citation omitted).

63 U.N. Secretary-General, *Review of the Efficiency of the Administrative and Financial Functioning of the United Nations: Report of the Secretary-General*, ¶ 23, U.N. Doc. A/C.5/49/65 (Apr. 24, 1995) [hereinafter 1995 Secretary-General Report].

64 U.N. Secretary-General Financing Report 1996, *supra* note 24, ¶ 16; *see also* 1995 Secretary-General Report, *supra* note 63, ¶¶ 15–16.

65 U.N. Secretary-General Financing Report 1996, *supra* note 24, ¶ 16; *see also* 1995 Secretary-General Report, *supra* note 63, ¶¶ 15–16.

66 See discussion of G.A. Res. 52/247, U.N. Doc. A/RES/52/247 (Jul. 17, 1998), *infra* note 68 and accompanying text.

1. Kosovo.

In the *Kosovo Lead Poisoning* case, three temporary camps created to house internally displaced Roma peoples after the 1999 NATO intervention were determined to be contaminated with very high levels of lead. The camps, set up near the Trepča mines, a sprawling complex of forty mining facilities that had notoriously lax environmental standards, hosted toxic slag heaps that filled the air with toxic lead dust and contaminated the soil in which local crops were grown. The camps were operational for over five years, despite repeated statements by U.N. officials that the camps would be closed, and random World Health Organization testing indicated that all children under the age of six had life-threatening levels of lead in their blood.[67]

This claim was brought by private claimants to the U.N. under a procedure established by General Assembly Resolution 52/247[68] within six months from the time of the injury, asking for compensation and remedies for economic losses. The U.N. rejected the claim on July 25, 2011, stating by letter 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 . . . therefore, the claims are not receivable."[69] The U.N.'s response gave no explanation for why these were deemed to be public law claims, other than to note that the claims "alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo."[70] In a more recent communication addressing the U.N.'s position on private torts claims generally, the U.N. added the following justification for its rejection of the Kosovo claim:

> The claims were considered by the Organization not to be of a private law character since they amounted to a review of the performance of UNMIK's mandate as an interim administration, as UNMIK retained the discretion to determine the modalities for the implementation of its interim administration mandate, including the establishment of IDP camps.[71]

The U.N.'s letter suggests that the matter involved public health and common goods, responsibilities typically carried out by states in their sovereign functions. Furthermore, the precariousness of the security situation created an emergency-like situation, which implicated the U.N.'s mandate over international

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67 ALEKSANDAR MOMIROV, ACCOUNTABILITY OF THE INTERNATIONAL TERRITORIAL ADMINISTRATIONS: A PUBLIC LAW APPROACH 3 (2011).

68 G.A. Res. 52/247, ¶ 9 U.N. Doc. A/RES/52/247 (Jul. 17, 1998). The Resolution limits the amount of compensation payable per individual to 50,000 USD save for "exceptional circumstances." *Id.*

69 O'Brien Letter to Post, *supra* note 3.

70 *Id.*

71 Pedro Medrano Letter, *supra* note 5, ¶ 93.

peace and security. The U.N.'s role in Kosovo at the time is relevant: since 1999 the U.N. has acted as temporary administrator in Kosovo and, at the time of events, was operating in an exceptional, quasi-governmental position with control over territory and peoples. By choosing to put the camp in that particular location, however, the U.N. introduced the harm to that population. While the camps might, in the short term, have fallen within the scope of operational necessity, it is not clear why they continued to be categorized as such, given the widespread knowledge of the problem and the five year delay in moving the population.[72]

2. Haiti.

A second example of a claim deemed "not receivable" by the U.N. involves the introduction of cholera into Haiti after the 2010 earthquake, which led to over 7,500 deaths.[73] As the New York Times reported in a front page article in May 2012:

> Lightning fast and virulent, it spread from here through every Haitian state, erupting into the world's largest cholera epidemic despite a huge international mobilization still dealing with the effects of the Jan. 12, 2010, earthquake . . . . Epidemiologic and microbiologic evidence strongly suggests that United Nations peacekeeping troops from Nepal imported cholera to Haiti, contaminated the river tributary next to their base through a faulty sanitation system and caused a second disaster.[74]

The cause of the cholera outbreak in Haiti was almost certainly linked to the system of black-water disposal from latrines at a base of the U.N. Mission in Haiti (MINUSTAH), where Nepali peacekeepers were stationed.[75] Human waste was issued directly into one of the main water sources of the country, which then affected the water and food supply of a large segment of the Haitian population. Pursuant to U.N. screening guidelines, peacekeepers need not

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72 *See, for example*, Report to the United Nations Secretary-General by Kai Eide, *A Comprehensive Review of the Situation in Kosovo*, 11, ¶ 54 U.N. Doc. S/2005/635 (Oct. 7, 2005) (describing the situation as an "emergency").

73 Georges v. United Nations, No. 13-CV-07146 (JPO); Laventure v. United Nations, No. 14-CV-1611 (E.D.N.Y. filed Mar. 11, 2014), *available at* https://www.documentcloud.org/documents/1073738-140311-laventure-v-un-filed-complaint-2.html.

74 Deborah Sontag, *In Haiti, Global Failures on a Cholera Epidemic*, N.Y. TIMES, Mar. 31, 2012, *available at* http://www.nytimes.com/2012/04/01/world/americas/haitis-cholera-outraced-the-experts-and-tainted-the-un.html.

75 ALEJANDRO CRAVIOTO, CLAUDIO F. LANATA, DANIELE S. LANTAGNE, & G. BALAKRISH NAIR, FINAL REPORT OF THE INDEPENDENT PANEL OF EXPERTS ON THE CHOLERA OUTBREAK IN HAITI 3 (2012), *available at* http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf; DANIELE LANTAGNE, G. BALAKRISH NAIR, CLAUDIO F. LANATA, & ALEJANDRO CRAVIOTO, THE CHOLERA OUTBREAK IN HAITI: WHERE AND HOW DID IT BEGIN? (2013), *available at* http://www.ncbi.nlm.nih.gov/pubmed/23695726.

be screened for cholera, even if they come from regions in which the disease is present.[76] Since the outbreak, Haiti has had the highest number of cases of cholera in the world for three years in a row, and cholera has since spread to parts of the Dominican Republic and Mexico.[77]

In 2012, a Boston based group called the Institute for Justice and Democracy in Haiti (IJDH) filed a trail-blazing class action against the U.N. on behalf of over 5,000 plaintiffs. The petition asks for compensation for the victims ($50,000 for injured and $100,000 for deceased), better water sanitation, and a public acknowledgement of responsibility.[78] IJDH alleged that the cholera outbreak violated Haitian law and certain international obligations, such as the right to life.[79] The U.N. took the position that the claims in the *Haiti* case were of a public or policy law nature, writing:

> With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946.[80]

The letter did not provide reasons for why the claim should be considered a public or policy matter, as opposed to a private matter, which, pursuant to Section 29 of the CPIUN, would trigger an obligation for the U.N. to "make provisions for appropriate modes of settlement of . . . disputes of a private law character to which the United Nations is a party."[81]

In 2013, the *Haiti Cholera* case moved to U.S. courts, with the plaintiffs filing the case *Georges et al v. U.N.* in the SDNY. The U.S. filed a Statement of Interest at the invitation of the Court upholding the U.N.'s absolute immunity under Article 2 of the CPIUN.[82] In the spring of 2014, two new class

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76 UNITED NATIONS, MEDICAL SUPPORT MANUAL FOR UNITED NATIONS OPERATIONS (2d ed. 1999) *available at* http://www.who.int/cholera/technical/prevention/choleratravelandtradeadvice231110.pdf. The U.N. follows World Health Organization guidelines, which does not advise routine screening of travelers from cholera-affected areas. *Id.*

77 *Id.*

78 *See* Randal C. Archibold & Somini Sengupta, *U.N. Struggles to Stem Haiti Cholera Epidemic*, N.Y. TIMES (Apr. 19, 2014), *available at* http://www.nytimes.com/2014/04/20/world/americas/un-struggles-to-stem-haiti-cholera-epidemic.html.

79 *See* Submission for the 112th Session of the United Nations Human Rights Committee, October 8 & 9, 2014, ¶ 2 (Sept. 12, 2014), *available at* http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HTI/INT_CCPR_CSS_HTI_18250_E.pdf.

80 O'Brien Letter to Post, *supra* note 3.

81 Convention on the Privileges and Immunities of the United Nations art. 8, § 29, Feb. 13, 1946, 1 U.N.T.S. 15.

82 Georges v. United Nations, No. 13-CV-7146 (JPO), (S.D.N.Y. filed Mar. 7, 2014) (Statement of Interest for the U.S. Government), *available at* http://personal.crocodoc.com/J4lRXpi.

actions were filed in the EDNY and the SDNY, respectively, with similar legal theories and overlapping class members.[83] In a January 2015 decision, the SDNY upheld the U.N.'s absolute immunity in *Georges et al* on the basis that the U.N. is absolutely immune under the CPIUN absent express waiver.[84] No alternative mode of settlement was provided.

In a February 19, 2015 letter to members of the U.S. Congress, however, the Secretary General has further attempted to justify this designation, and in so doing, redefined the scope of private law claims. The Secretary General explained:

> In 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 . . . . [T]he claims in question were not receivable pursuant to Section 29(a) of the General Convention [as they] 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 . . . . For the same reason, it was determined that these claims were not of the type for which a claims commission is provided under the SOFA, since the relevant provision of the SOFA also relates to claims of a private law character.[85]

A November 2014 letter from the U.N.'s Senior Cholera Coordinator reinforces the U.N.'s restrictive new interpretation of private law claims:

> In the Practice of the Organization, disputes of a private law character have been understood to be disputes of the type that arise between two private parties. Section 29(a) has most frequently been applied to claims arising under contracts between the United Nations and a private party, to those relating to the use of property in the context of a mission away from Headquarters, and to claims arising from vehicle accidents.[86]

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83 Complaint, Laventure v. United Nations, No. 14-CV-1611 (E.D.N.Y. filed Mar. 11, 2014), *available at* https://www.documentcloud.org/documents/1073738-140311-laventure-v-un-filed-complaint-2.html; Complaint, Jean-Robert v. United Nations, No. CV-01-545, (S.D.N.Y. filed Mar. 6, 2014).

84 Georges v. United Nations, 84 F. Supp.3d 246, 2015 WL 129657, at *4 (S.D.N.Y. 2015) (finding the U.N. is immune from suit absent express waiver, and waiver is not an issue in this case; to the contrary, the U.N. has repeatedly asserted its immunity). This decision has been appealed by the plaintiffs. At the time of writing, the decision had not been handed down.

85 Letter from U.N. Secretary-General Ban Ki-moon to Members of United States Congress (Feb. 19, 2015), *available at* personal.crocodoc.com/9R2WJG8.

86 Pedro Medrano Letter, *supra* note 5, ¶ 87. Also of interest in this letter are suggested criteria for evaluating claims:

> [W]hen assessing a claim under Section 29(a), the Organization does not rely solely on the allegations of the claim itself, but also assesses the character of the claim in the context of all its circumstances. The mere allegation of tortious conduct does not make a claim one of a private law character. The

What is striking about these documents is that torts—other than those arising from motor vehicle accidents—have been eliminated from the scope of the U.N.'s duty to compensate for private injury. The Secretary General's decision was taken without explanation or public consultation, and has resulted in a vastly curtailed definition of private law claims. This categorical elimination of torts other than those arising from motor vehicle accidents is significant: injuries are predictable aspects of any peacekeeping operation, and they should not be designated as public or policy law claims simply because they affect the U.N.'s potential liability. This curtailment of the private law category is in tension with the doctrine of legitimate expectations. Had the UN settled the three torts cases at issue and then announced a change of policy, it would be less remarkable. As it stands, these jurisdiction-stripping measures rub up against the legitimate expectations of individuals affected by its mandates.

In parallel, the Secretary General suggested an enlarged category of public law claims for which the U.N. would be internally immune. The 2014 letter to the Human Rights Special Rapporteurs on the *Haiti Cholera* case states, "Claims under Section 29(a) are distinct from public law claims, which are understood as claims that would arise between an individual and a public authority such as a State."[87] The letter goes on to suggest that "[o]n the international level, these claims may be addressed in various ways, such as through political, diplomatic or other means, including a body established for that specific purpose."[88]

Despite the U.N.'s position that the Haiti and Kosovo claims are public or policy matters, and therefore "not receivable" within the U.N.'s internal system, each appears to involve elements of a private law dispute from which the U.N. would not be immune. The plaintiffs were represented by NGOs, not states, and asked for compensation for personal injury and the death of the petitioners' next-of-kin. The claims were based on allegations involving the U.N.'s negligence and "grounded liability, at least in part, in domestic civil law."[89] Both the Kosovo and the Haiti claims appear to fall explicitly within the category of torts claims

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> nature of the duty allegedly owed by the Organization, the nature of the conduct or activity at issue, and other relevant circumstances are all pertinent to determining whether the claim involves a dispute of a private law character."

Id. ¶ 90.

87 *Id.* ¶ 88.

88 *Id.*

89 KATERINA LUNDAHL, THE REMEDY GAP: A REMEDIAL PERSPECTIVE TO THIRD-PARTY CLAIMS IN UNITED NATIONS PEACEKEEPING OPERATIONS FROM SREBRENICA TO HAITI 30 (2014).

recognized by the U.N. in other contexts as claims of a private law character related to peacekeeping operations.[90]

In conclusion, what is currently lacking within the U.N. system is a mechanism for addressing high-value torts cases brought by classes of private law claimants. In theory, a mechanism exists under the U.N. Status of Forces Agreements (SOFAs), signed by the U.N. and the recipients of peacekeeping forces. SOFAs contain a standard clause that provides for a third-party claims procedure before a standing claims commission for disputes of a private-law character.[91] Despite a 1997 Secretary-General Report praising this model because the "UN should not act as its own judge," [92] no such commission has ever been established in any context,[93] although a local review board has processed other requests for compensation in Haiti.[94] Regardless, it is not clear that claimants in mass torts cases would view this model as fair, as the interests of the host state who requests its establishment may conflict with the interests of individual claimants.[95]

III. THE CASE AGAINST ABSOLUTE IMMUNITY

There are two main types of immunity: immunity rationae persona and immunity rationae materiae. According to the first model of immunity, everything the actor does is by definition public, and therefore immune. Immunity rationae materiae, in contrast, is based on functionalism and distinguishes between the actor and subject matter (or conduct). In the case of

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90 *See* Convention on the Privileges and Immunities of the United Nations art. 8, § 29, *supra* note 55 and accompanying text.

91 *See for example*, Agreement Concerning the Status of the United Nations Operation in Haiti, U.N.-Haiti, ¶ 55, Jul. 9, 2004, 2271 U.N.T.S. 235 ("Except as provided in paragraph 57, any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement shall be settled by a standing claims commission to be established for that purpose."). The language is taken from the Model Status-of-Forces Agreement for Peace-keeping Operations, G.A. Res. 45/594, ¶ 51, U.N. Doc. A/45/594, (Oct. 9, 1990).

92 G.A. Res. 51/903, U.N. Doc. A/51/903 (May 21, 1997), at 4.

93 Rashkow, *supra* note 9, at 340.

94 In 2009, the U.N. provided compensation for a torts claim in Haiti on an ex gratia basis. *Interoffice memorandum to the Controller, Assistant Secretary- General, Office of Programme Planning, Budgets and Accounts, regarding ex gratia payment to an injured civilian Haitian,* 2009 U.N. Jurid. Y.B. 428–30 (2009).

95 Patrick J. Lewis, *Who Pays for the United Nations' Torts?: Immunity, Attribution, and "Appropriate Modes of Settlement"*, 39 N.C. J. INT'L L. & COM. REG. 259, 272–273 (2014). The local boards have also been criticized for a lack of transparency and incompatibility with fair process, given that one party to the dispute also acts as the adjudicator.

U.N. immunities, functionalism is explicitly advanced by Article 105 of the U.N. Charter, inherent in the relationship between Articles 2 and 29 of the CPIUN, and relevant to the obligation to settle disputes of a private law nature in Article 29. As argued above, the U.N.'s immunities are properly understood as very broad but functional and hence subject to limitation, although national courts have appeared to conclude that the U.N. is immune because it is the U.N. (rationae personae).[96]

Despite the U.N.'s unique status in the international architecture, the presumption that the U.N. should be immune from all forms of suit before domestic courts was always problematic. Faced with few precedents to draw from, the drafters of the CPIUN imported the concept of absolute immunity of states.[97] Even IO charters that did not contain express provisions providing immunity for every form of suit benefited from the analogy to state immunity: courts reasoned either that immunity should be granted on the basis that IOs are composed of sovereign states, each of which is immune from local jurisdiction, or that customary international law grants immunity to all IOs.[98]

Today, it appears that the absolute immunity of the U.N. is "stuck in time." Codified by treaties that reflected a belief about the U.N.'s needs in 1945, the U.N.'s immunity has not matured and narrowed with practice the way that the immunities of states and diplomats have.[99] Absolute immunity is anachronistic in most other fields, and it is not clear why the status quo has

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96 For example, in the *Mothers of Srebrenica* case, discussed in more detail *infra* Section III.D, the U.N. invoked its immunity under the Convention while the plaintiffs argued that its immunity should be restricted on the basis of Article 105 of the Charter. Both the Dutch Court of Appeals and Supreme Court upheld the U.N.'s absolute immunity, emphasizing that its immunity was necessary for the realization of the U.N.'s objectives in general, not just in that particular case. *See* discussion, *infra* notes 166–73 and accompanying text.

97 REINISCH, *supra* note 13, at 1 ("The Covenant of the League of Nations of 28 June 1919 merely provided for 'diplomatic' privileges and immunities of its employees and the inviolability of its property. Only a subsequent agreement with the League's host State, the so-called *modus vivendi*, stipulated that the League possessed international personality and capacity and that it could not 'in principle, according to the rules of international law, be sued before the Swiss Courts without its consent.'") (citing Communications du Conseil Fédéral Suisse Concernant le Régime des Immunités Diplomatique du Personnel de la Société des Nations et du Bureau International du Travail, League of Nations-Switz, Sept. 18, 1926, 7 O.J.L.N. (1926), annex 911a, 1422).

98 SCHERMERS, *supra* note 35, at n.234.

99 Rosa Freedman, *U.N. Immunity or Impunity? A Human Rights Based Challenge*, 25 EUR. J. INT'L L. 239, 242 (2014) ("State immunity is an evolving concept, while international organizations' immunity is usually enshrined within treaties. This restricts the extent to which such immunity can be interpreted or evolve.").

persisted with regards to IOs.[100] Indeed, even bodies of the U.N. such as the International Law Commission have advocated the narrowing of immunities in the contexts of state immunity and state officials' immunity from foreign criminal jurisdictions.[101] In the recent *Germany v. Italy*[102] decision before the International Court of Justice, the vitality of the restrictive immunity doctrine was recognized, even though the court held that jus cogens norms do not prevent states from claiming immunity.[103]

The threshold problem with the position that the U.N. is absolutely immune is that it severs the ordinary legal principle that an organization is responsible for the harm it causes by its negligence from the principle that its victims have a right to a remedy.[104] In other words, despite the U.N.'s humanitarian mission, injury or loss of life for the victims of U.N. action is no less grievous when caused by the U.N. rather than by another actor. This is particularly true when the harm is introduced in the course of a negligent rescue.

The U.N. Security Council has broad discretion under Chapter VII to decide whether and how to help at-risk populations. Although it sometimes decides to do nothing, these decisions are considered non-justiciable.[105] Yet, just as the majority view holds that a Good Samaritan has no obligation to act,[106] one who undertakes to perform a rescue is bound to exercise reasonable care in doing so.[107] When the U.N. intervenes certain duties attach to the U.N.,

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100 *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. 471 (2008); Don Mayer, *Sovereign Immunity and the Moral Community*, 2 BUS. ETHICS Q. 411 (1992).

101 The International Law Commission of the U.N. has, for example, advocated restrictive immunity for states and state officials. *See* U.N. Int'l Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction, *available at* http://legal.un.org/ilc/guide/4_2.shtml; Burkhard Hess, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 EUR. J. INT'L L. 269 (1993).

102 *Jurisdictional Immunities of the State* (Ger. v. It.), Judgment, 2012 I.C.J. 99 (Feb. 3, 2012), *available at* http://www.icj-cij.org/docket/files/143/16883.pdf; *see also* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS 196 (August Reinisch ed. 2013) (discussing the distinction between state and International Organization immunity).

103 *Id.* at ¶ 64.

104 Quality of Mercy, *supra* note 11, at 1387.

105 Monika Hakimi, *Toward a Legal Theory of the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 257 (2014).

106 Liam Murphy, *Beneficence, Law, and Liberty: The Case Of Required Rescue*, 89 GEO. L.J. 605, 609, 611 (2001) (noting that in civil law jurisdictions, there is a positive duty to act, but in common law, there is no duty to act; rather, immunities protect the individual from criminal charges).

107 Waisman, *supra* note 8, at 618–619.

as they would to any other rescuer.[108] These duties are derived from general principles of law and have been acknowledged in the U.N.'s policies to compensate for ordinary negligence.[109] In cases of gross negligence, the U.N. has decided that no financial limits apply.[110]

The finding that the U.N.'s absolute immunity should be upheld even when individuals are left in a worse position than they were in before the U.N. intervened is problematic. From an accountability perspective, immunity undermines the responsibility of the UN.[111] From a distributive perspective, immunity shifts the burdens to victims, rather than distributing them amongst those who benefit from the U.N.'s services. From an economic perspective, absolute immunity does not encourage efficient action such as incentivizing measures to avoid or minimize damage. In the next sections, I explore why the principled reasons to support absolute U.N. immunity are thin and why it is time to revert to a functional understanding of U.N. immunities.

A. The Case from Accountability

Power entails accountability and creates a duty to account for its exercise.[112] Where the U.N. is responsible for tortious harms arising out of its acts or omissions, it has a duty to account for its wrongs. This is a principle the U.N. accepts as a matter of course,[113] and in many instances the U.N. does address third-party claims in a responsible manner.[114] In the mass torts cases addressed

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108 Murphy, *supra* note 106, at 622 (arguing that persons are liable in tort for a failure to rescue where there is a positive course of action undertaken. By analogy, the UN has a duty to rescue based on its mandate towards the peoples in areas with peacekeeping operations.).

109 Report of the Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations*, U.N. GAOR, 51st Sess., Agenda Item 140(a), U.N. Doc. A/51/903 ¶ 13 (May 21, 1997).

110 *Id.* ¶ 14 (noting that no financial limitations are proposed with regard to claims arising as a result of gross negligence or willful misconduct).

111 Here, the distinction between accountability and responsibility is important: accountability is a political concept, which focuses on improving institutional mechanisms such as transparency, independent reporting and evaluation mechanisms, financial review, and broader rights of participation. In contrast, responsibility is legal and derives from the Rules of Responsibility in international law. *See* Kristen E. Boon, *New Directions in Responsibility*, 37 YALE J. INT'L L. 1, 5 (2011), *available at* http://www.yjil.org/docs/pub/o-37-boon-new-directions-in-responsibility.pdf.

112 INTERNATIONAL LAW ASSOCIATION, ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS: FINAL REPORT 5 (Berlin Conference 2004) [hereinafter I.L.A. Final Report], *available at* http://www.ila-hq.org/download.cfm/docid/6B708C25-4D6D-42E2-8385DADA752815E8.

113 SCHERMERS, *supra* note 35, at n.257 (citing U.N. Juridical Yearbook for instances in which the U.N. accepted responsibility).

114 *See* discussion of existing third-party claims mechanisms, *supra* notes 20–24 and accompanying text.

in this study, however, the U.N. made the internal assessment that the cases fell into the public law category and that the U.N. is internally immune, and then asserted its external immunity in subsequent cases brought in national courts.[115] An accountability gap has ensued: the finding that these claims were properly designated as public is open to challenge, but there is no alternative venue to bring a claim. Moreover, reasons for the designations were brief or forthcoming later through a different process with different actors.[116] In a 2004 report of the International Law Association, the Accountability Group found that such circumstances can amount to a denial of justice, which creates separate grounds for international responsibility.[117]

One powerful accountability-based argument against absolute IO immunity proceeds from human rights and is based on counterbalancing IO immunity with an individual's right to a remedy. The now famous *Waite and Kennedy*[118] decision of 1999, which involved a request by independent contractors at the European Space Agency for access to a remedy pursuant to an employment dispute, exemplifies this approach. In its judgment, the European Court of Human Rights found that the availability of "reasonable alternative means to protect effectively [claimants] rights" under Article 6 of the European Convention on Human Rights were required.[119] It has been argued that the same rationale should apply to other torts cases. As Freedman writes in the context of the *Haiti Cholera* case:

> individuals affected by the cholera outbreak in Haiti have been prevented from accessing the local claims board or other alternative modes of settlement. If the U.N. is granted absolute immunity from jurisdiction, then the Haitian individuals will not be able to realize their rights to access a court and to a remedy.[120]

Numerous other instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights, and customary international law, guarantee this right.[121] Determining whether the right has been

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115 The *Srebrenica* case was not brought to the U.N.'s claims unit, hence no "public" law determination was made in that case.

116 I.L.A. Final Report, *supra* note 112, at 13 ("Organs of an IO should state the reasons for their decisions or particular courses of action whenever necessary for the assessment of their proper functioning or otherwise relevant from the point of view of their accountability.").

117 *Id.* at 33 ("A total lack of remedies would amount to a denial of justice, giving rise to a separate ground for responsibility on the part of the IO.").

118 Waite and Kennedy v. Germ., App. No. 26083/94, 30 Eur. Ct. H.R. 261 (1999).

119 *See, for example*, *id.*; Beer and Regan v. Germ., App. No. 28934/95, 33 Eur. Ct. H.R. 19 (1999).

120 Freedman, *supra* note 99, at 253.

121 *Id.* at 250.

satisfied, however, involves an inquiry into reasonable alternative means, and current case law is not extensive enough to provide a clear guide on how detailed that inquiry should be. Nonetheless, the door is ajar to human rights claims, and it accompanies a growing chorus that the U.N. is bound by international human rights and that it must be accountable for its actions, both in terms of procedural rights of access and substantive remedies.[122] If effective means of redress are unavailable within the U.N. system, it may lead to a situation where member states are constitutionally unable to uphold the U.N.'s immunities, because they conflict with the U.N.'s own human rights norms.[123]

This is the standard argument against absolute U.N. immunity, and I do not disagree with it. Nonetheless, I will suggest that there are two other powerful reasons why, from a normative perspective, absolute immunity should be reconsidered: distributive justice and economic incentives.

B. The Case from Distributive Justice

Injuries are a predictable cost of any U.N. peacekeeping operation. Sometimes these involve routine traffic accidents or slip-and-fall injuries. Other times, the losses are much greater. This Article has assumed that a corrective justice approach animates the need to compensate victims of U.N. malfeasance. That is to say, those who act negligently should compensate those they have injured, and that principle applies to the U.N. as much as any other tortfeasor.[124]

The principle that the U.N. should compensate for risks it introduces can also be justified under principles of distributive justice.[125] All U.N. member states benefit from the U.N.'s mandate of maintaining international peace and security. As a result, it can be argued that all member states share the burden of compensating for instances of the Organization's negligence. The argument for collective responsibility is particularly strong in cases of social risk such as diseases like Cholera.

From a fairness perspective, the position that victims should bear the burden of U.N. malfeasance undermines the principle of distributive justice. As Thomas Franck argued, the role of law is to create systems that take

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122 *Id.* at 251.

123 For background, see Kristen Boon, *The ECJ's New Appeal Judgment on Kadi*, *available at* http://opiniojuris.org/2013/07/25/the-ecjs-new-appeal-judgment-on-kadi/.

124 John Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1054 (2002) (arguing that the U.S. government is no different from a private tortfeasor in its obligation to compensate for negligent acts, and citing the Teton Dam disaster). On a corrective justice approach to tort law generally, see DAN DOBBS, LAW OF TORTS 17 (2000).

125 Culhane, *supra* note 124, at 1092.

into account solutions to moral issues of distributive justice. Laws that unfairly allocate costs or risks are likely to provoke resistance, even from those who benefit.[126] Most U.N. interventions have multiple beneficiaries. Principles of loss distribution suggest that victims should not bear the costs of mishaps alone, but rather that a general appropriation from the Organization or all states is a more transparent and just mechanism for allocating resources to those who are harmed.

This leads to the related question of whether paying out on third-party claims would inhibit the ability of the U.N. to continue to provide peacekeeping services. The effect of settlements with past victims on the future work of the Organization implies the inter-generational aspect of the U.N.'s work. Specifically, it raises the issue of whether accidental losses that result from U.N. Peacekeeping operations should be shared by past victims and future beneficiaries.

Importantly, risk allocation was an eventuality the U.N. considered when developing its internal liability regime in 1995:

> 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, and that having expressly or implicitly agreed to the deployment of a peacekeeping operation in its territory, the host country must be deemed to bear the risk of the operation and assume, in part at least, liability for the damage arising from such an operation. As a practical matter, limiting the liability of the Organization is also justified on the ground that the funds from which third-party claims are paid are public funds contributed by the States Members of the United Nations for the purpose of financing activities of the Organization as mandated by those Member States. *To the extent that funds are used to pay third-party claims, lesser amounts may be available to finance additional peacekeeping or other United Nations operations.*[127]

This policy balances risks between the host country and the U.N. and also sets caps on the U.N.'s liability. This practice of risk distribution and liability caps is used in other civil liability regimes, such as oil pollution, to make sure that adequate compensation is available to individuals who suffer harms.[128] In addition to sharing burdens between host states and the U.N. itself, however,

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126 Thomas Franck, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 8 (1995).

127 1995 Secretary General Report, *supra* note 63 (emphasis added).

128 *See, for example*, 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC), Nov. 29, 1969, 973 U.N.T.S. 3, *available at* http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx.

burdens should be shared between all beneficiaries (past and future) of peacekeeping mandates.

C. The Case from Economics

As a historical matter, the grant of immunity from all forms of process might be explained by the political power of contributing states: member states created broad rules to safeguard the UN—and themselves—from jurisdiction by national courts.[129] Today, both TCCs and funding states continue to argue for a broad reading of the U.N.'s immunities, despite opposition at times from other branches of government.[130] Indeed, from an economic point of view, any immunity is questionable because it affects the credibility of an actor's commitments—there is a moral hazard in immunity that the actor will not fulfill transactions as promised.[131] What is striking about the economic rationale for absolute immunity is that it privileges the interests of states over individuals. Member states of the U.N. are protected by absolute immunity at the expense of the individuals, who are the intended beneficiaries of the U.N.'s actions.

There are concrete economic reasons for limited immunity. Because immunity takes away the incentive to behave as promised, lesser immunity could incentivize the U.N. not to commit future torts by, for example, encouraging investment in appropriate equipment and quick reactions when problems occur. In the *Haiti* case, narrower immunities might have led to better screening guidelines, the proper installation of lavatories, and a faster reaction after cholera was discovered. In the *Kosovo Lead Poisoning* case, narrower immunities might have led to an immediate decision to move the Roma populations to a safer site, as prevention is cheaper than ex-ante compensation.[132]

The point can also be made by considering how the U.N. reacts in the commercial sphere. In its commercial activities, the U.N. protects its reputation by providing alternatives to immunities in the form of alternate dispute resolution mechanisms, such as arbitration procedures. The U.N.

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129 Rashkow, *supra* note 9, at 333–34.

130 *See, for example*, Press Release, Rep. Maxine Waters, Congresswoman Waters Urges United Nations to Commit Resources to Eradicate Cholera in Haiti (May 31, 2013) (urging U.N. to address Haiti Cholera Claim), *available at* https://waters.house.gov/media-center/press-releases/congresswoman-waters-urges-united-nations-commit-resources-eradicate.

131 Anne Van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421, 460 (2014) (providing a behavioral international law analysis of credible commitments. Van Aaken's article on the distributional consequences of international responsibility, discussed *infra* at note 191, provides the link to the moral hazards of immunities, whereby their effect on the UN's responsibility is discussed.).

132 Culhane, *supra* note 124, at 1104 ("recognizing that some harms are inevitable, the best approach is to prevent and to compensate when prevention fails.").

behaves as a private actor because its reputation will determine its possibilities in the market place. Because private individuals are not able to protect themselves in the same way, however, individuals injured during peacekeeping operations cannot leverage their role against the Organization.

From an economic perspective, immunities should be judged according to their purpose and function, not on the legal form of the actor. The UN and courts have implicitly transformed the UN's immunities rationae materiae into immunity rationae personae. In other words, judges and policy makers justify upholding the UN's immunity because it is the UN, rather than on the basis of the UN's functional needs. This reinforces the case for partial immunity and explains the trend in other fields of immunity to accept a rule of immunity subject to exceptions.[133]

D. Counterarguments

Two objections are likely to arise in response to the arguments in favor of limited U.N. immunity. First, there is an argument that paying out on mass torts claims might bankrupt the Organization. In an era where the U.N. is increasingly called on to undertake expanded mandates, sometimes without adequate resources, the likelihood of responsibility arising from omissions is greater. One response might be that this is the cost of doing business. Even if these cases put the U.N. out of business, the independence of the Organization should not be sacrificed to individual rights.[134] This is neither a desired nor a likely outcome.

The approach advocated here is for the U.N. to get liability insurance for claims above the caps established under its general liability scheme. In other words, the U.N. has chosen a self-insurance mechanism for claims up to $50,000, whereby the U.N. pays compensation out of its regular budget. U.N. member states should consider a new policy to purchase insurance for claims above $50,000, including mass torts claims. If this is too expensive, the UN should maintain a dedicated contingency fund that it can draw from to settle or compensate torts victims.

Will third-party claims put the U.N. out of business? A closer examination of the figures is helpful. In the *Haiti Cholera* case, the complaint filed in the SDNY by the IJDH does not specifically request compensatory damages on behalf of the plaintiffs.[135] IJDH did, however, submit claims through the U.N.'s

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133 FOX & WEBB, *supra* note 48, at 411. *See also* Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUD. Q. 209 (2015).

134 *See generally* Verdier & Voeten, *supra* note 133.

135 The Complaint's prayer for relief includes only a general request for "declaratory relief,

internal claims office on behalf of 5,000 Haitians, requesting a minimum of $100,000 for the families or next of kin of each person killed by cholera and at least $50,000 for each victim who suffered illness or injury from cholera.[136] Based on these figures, the IDJH was demanding $830 million at a minimum, for the next of kin and survivors of each person killed by cholera. For the 670,700 remaining surviving victims, the IJDH sought at least $33 billion.[137] The total of these demands equals $36.5 billion (which includes a $2.2 claim against the Haitian government for remediation of Haiti's waterways). In the *Mothers of Srebrenica* case, lawyers representing the 6,000 plaintiffs asked for €25,000 per plaintiff from the Netherlands (not the UN), which represents a lower figure than the *Haiti Cholera* case. Nonetheless, it is not directly comparable to the *Haiti Cholera* case in that the claim for damages in *Mothers of Srebrenica* was made against the Dutch State rather than the UN.[138]

While these are significant figures, there is every reason to believe a more realistic number is closer to half that, at $15 - $18 billion. Plaintiffs' figures should be viewed as a negotiating position, rather than as an accurate estimate of the potential claim against the U.N. for a number of reasons. First, in the process of assessing the claim, both the class size and the monetary requests would be scrutinized and reduced. If the U.N.'s own liability scheme was applied, the compensatory ceilings would be capped at $50,000 per deceased or injured.[139] The damages requested would almost certainly be reduced by approximately half at the outset to $18.25 billion. Second, one would expect that the class size, which is optimistically proposed but not independently verified, would be reduced as well.

[]actual, injunctive, compensatory and punitive damages to remedy the injuries sustained by the Plaintiffs and the Class." Class Action Complaint, Georges v. United Nations, Docket # 1:13-cv-07146-JPO 65, ¶ 2 (S.D.N.Y. filed Oct. 9, 2013) [hereinafter Haiti Class Action Complaint], *available at* http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf.

136 According to the Complaint, the "Class includes at least 679,000 individual [victims], including the representatives of the more than 8,300 people who contracted and died from the cholera epidemic." *Id.* at 1, ¶ 2.

137 The Complaint also sought $2.2 billion "for remediation of Haiti's waterways, and provision of adequate sanitation to Plaintiffs and Class members in amounts to be determined at trial." *Id.* at 65, ¶ 2.

138 This figure can be seen in the case's Writ of Summons. Writ of Summons ¶ 439, Mothers of Srebrenica v. State of the Netherlands and United Nations, Case No. 295247 / HA ZA 07-2973 (The Hague D. Ct. 2007), *available at* http://www.vandiepen.com/fileadmin/user_upload/Documenten/PDF/Screbrenica/Srebrenica_stukken_Engels/1_Writ_of_summons.pdf. In a 2014 decision, the Dutch State was found liable for the deaths of 320 men at Srebrenica. Judgment ¶ 4.338, Mothers of Srebrenica v. State of the Netherlands, Case No. 295247/ HA ZA 07-2973 (The Hague D. Ct. 2014), *available at* http://www.vandiepen.com/fileadmin/user_upload/Documenten/Judgment_District_Court_The_ Hague_16-07-14.pdf.

139 See discussion of General Assembly Resolution 52/247, *supra* note 68.

The UN's proposed 2014–15 budget was $19.8 billion, and the revised net budget for the biennium 2012–13 was $19.7 billion.[140] Therefore, the total proposed net budget for the United Nations in 2014–2015 would equal about 54% of the total monetary demands made by the IJDH on behalf of the Haiti class action plaintiffs, according to the figures above. With the reductions suggested thereafter, it would constitute the equivalent of a year of the UN's budget.

A successful claim in this amount would place an extraordinary burden on the Organization. Nonetheless, as Byron Stier argues in the context of domestic torts cases, the endgame in large torts cases involves three possible outcomes: " (1) plaintiffs litigate the defendant into bankruptcy; (2) defendants rebuff plaintiffs' claims by litigating and generally winning; or (3) defendants and plaintiffs agree upon a non-class settlement."[141] In the *Haiti* case, the UN won under (2) by rejecting the claim internally on the basis of the public law category and successfully asserting its immunities in subsequent federal court proceedings. The plaintiffs' strategy unquestionably involved category (3) - an invitation to settle and an apology, perhaps even on an *ex gratia* (no liability).

Despite the extreme unlikelihood of bankruptcy under (1), these concerns 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.[142] At present, the UN insures against automobile and plane accidents, granting those harmed by UN action a direct right of redress.[143] It also held third-party liability insurance for its headquarters in New York until the 1980s, when it decided to move to a partial insurance scheme, largely due to increasing insurance premiums.[144] Interestingly, the UN must waive its immunity to enter into

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140 These figures reflect the "total net budget," which include itemized expenditures and income in the "regular budget," as well as itemized expenditures categorized as "extrabudgetary." U.N. Secretary-General, *Proposed Program Budget for the Biennium 2014–2015*, U.N. Doc. A/68/6, at 20 (May 10, 2013), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/68/6% 20 (Introduction).

141 Byron G. Stier, *Crimtorts, Class Actions, and the Emerging Mass Tort Method*, 17 WIDENER L.J. 893, 920–21 (2008).

142 It is outside the scope of this Article to estimate the costs or investigate the procedural ramifications of a UN liability policy.

143 Rashkow*, supra* note 9, at 338.

144 Szasz, *supra* note 29, at 740-42 (noting that "[s]ince their member states expect the organizations they establish to be good international citizens, they have prohibited them from hiding behind their functional immunity for the purpose of evading either contract- or tort-related responsibilities. Indeed, they may only use their immunity in order to avoid litigation in a national court or some other inappropriate forum; but if they cannot resolve a dispute, for example with a tort claimant, they must offer some other suitable means of settling the matter, such as by arbitration… as a result, among the many [commercial insurance] policies that the United Nations has thus contracted for,

insurance contracts, because it would not be feasible to take out insurance without permitting the insurance companies to defend against suits that might be brought against the UN.[145]

Given the rise of mass torts cases against the UN, however, the U.N. should reconsider the possibility that it can, as Paul Szasz wrote, return to "what most prudent businesses do: [] contract[s] for insurance, in the regular commercial market."[146] Insurance is therefore one way to provide for the victims of eventual torts claims and is standard in other industries. For a fee, similar to charities, the U.N. can "shift the risk of tort damages to insurers, who could calculate risks and pool funds to cover the costs."[147] Moreover, third-party liability insurance coverage would remedy injustices that the U.N.'s jurisdictional immunity before national courts imposes on parties who are harmed by its actions.[148]

Because the UN moved away from commercial insurance towards a self-insurance scheme in the 1980s, partly as a result of increasing costs in insurance premiums, private insurance may not be attractive to Member States. Although it is impossible to calculate insurance premiums for the UN in the abstract without a claims history or risk assessment, if private insurance is too expensive for the UN to bear, an alternative strategy would be for the UN to continue to self-insure, but maintain a larger contingency fund for torts cases. This is the route chosen by many major pharmaceutical and oil and gas corporations that have significant tort exposure: the public filings of Exxon, Shell, and McNeil (maker of Tylenol) all disclose that these corporations self-insure. The UN's current strategy may, therefore, be a sound one but it must be accompanied by a large enough contingency fund that the UN can compensate valid private law claims.

The second counterargument against moving away from absolute immunity is consequentialist—a retreat from absolute immunity will deter TCCs because the standard memorandum of understanding between the U.N. and TCCs indemnifies the TCCs. The U.N. routinely deals with claims that arise from the activities of its special operational programs, often entering into

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some on a worldwide basis and others locally, are those covering the Organization's third-party liability at its headquarters in New York…" Szasz then goes on to discuss the reasons for the turn to self-insurance.).

145 PIETER H.F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES 204 (1994).

146 Szasz, *supra* note 29, at 740.

147 Quality of Mercy, *supra* note 11, at 1395.

148 I.L.A. Final Report, *supra* note 112, at 39 (citing M. Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 80 (1995)).

hold-harmless agreements with host states.[149] It is not clear, however, that there is any truth to the rumors that TCCs will be deterred from future peacekeeping missions because of torts cases. In fact, what appears to be of far more concern to TCCs is the expansion of "robust" peacekeeping missions in which peacekeepers have an offensive mandate.[150] These riskier missions inherently possess a higher likelihood of peacekeeper casualties, which might affect support for peacekeeping operations of TCCs at home and raise the potential for criminal suits based on violations of international humanitarian law. Here, however, the scope of U.N. immunity would not be an issue because criminal acts by individuals are within the jurisdiction of courts of the sending state. Routine torts cases are viewed by TCCs as issues to be addressed responsibly by the Organization, not matters that will affect support for peacekeeping operations at home.

IV. CONSIDERATIONS AND CONSEQUENCES OF PARTIAL U.N. IMMUNITY

This Article has argued that the U.N.'s immunities should not be understood as absolute despite being extremely broad. It has also argued that there are external and internal aspects to the U.N.'s immunities. The U.N.'s external immunities operate with respect to the jurisdiction of national courts over the U.N. and are very broad. In contrast, the U.N.'s internal immunities are narrower and are informed by the distinction between public and private disputes.

Despite deeply problematic responses to the Haiti and Kosovo claims to date, the U.N.'s existing system is well designed to the extent that, wherever the claims go as to issues of operational necessity, policy, or constitutional matters of the Organization, it is appropriate for the U.N. to assert immunity internally and externally. Moreover, it is also sufficient in that private law claims should be settled by appropriate modes of settlement under Article 29 (or "reasonable alternative means" in the language of the court). What requires further elaboration is how to determine what is "functionally necessary" to the U.N.'s external immunities, and what remedies are available if the U.N. does not provide appropriate modes of settlement internally.

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149 *See* Rep. of the Int'l Law Comm'n, *The Practice of the United Nations, the specialized agencies and the Atomic Energy Agency concerning their status, privileges and immunities*, Mar. 8–May 23, 1967, U.N. Doc. A/CN.4/L.118; U.N. Doc. A/CN.4/L.118/Add.1, U.N. Doc. A/CN.4/L.118/Add.2 (1967); Rep. of the Int'l Law Comm'n, *The Practice of the United Nation, the Specialized Agencies and the Atomic Energy Agency Concerning Their Status, Privileges and Immunities*, May 27–July 28, 1985, U.N. Doc. A/CN.4/L.383, U.N. Doc. A/CN.4/L.383/Add.1-3 (1985).

150 Although the concept emerged generally in the 1990s with regards to peacekeeping, peace operations have become increasingly robust. The Intervention Brigade in the DRC is a current example of such an offensive mission.

In the next section, I will discuss what consequences should follow from the failure to provide a reasonable means to settlement to a private law claim; distinguish between operational necessity and constitutional matters of the organization, and suggest in borderline cases the UN should waive its immunity. I will also introduce the historic Congo case from 1964 as an example of a responsible settlement with third-party claimants. Even if in practice these considerations are difficult to implement, as a matter of public legitimacy, the U.N. must not be seen to be above the law. The status quo suggests that the U.N. has immunity from accountability. This reality is in tension with an important principle in the law of immunities: that immunity from jurisdiction is not a privilege and that it does not free an organization from applicable law.[151]

A. The U.N. Must Provide Reasonable Alternative Means

Under Article 29 of the CPIUN, the U.N. must provide alternative modes of settlement for private law claims, but no criteria were supplied in the CPIUN to indicate what those alternatives might look like. It is clear that a robust internal review system would be far superior to the alternatives.[152] From an efficiency perspective, an internal process that is fairly run will be the least costly solution to most claims. In particular, it can avoid or minimize the legal costs and delays associated with private law suits. Moreover, it will avoid the very dangerous situation of national courts taking jurisdiction over U.N. matters and assessing claims irresponsibly or in a political matter.[153]

In the last decade, the U.N. has demonstrated creativity with regards to the mechanisms it makes available to private individuals, including the establishment of a staff labor tribunal, the Ombudspersons office for the Al Qaida sanctions

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151 SCHERMERS, *supra* note 35, at 1037.

152 *See* Statement made by Denmark on Behalf of the Nordic Countries, Sixth Committee, 3, 69th Sess., 18th Meeting, U.N. Doc. A/C.6/69/SR.18 (Oct. 23, 2014), *available at* https://papersmart.unmeetings.org/media2/4654068/denmark-en-85.pdf. [hereinafter 2014 Danish Statement to Sixth Committee] ("In recent years the issue of settlement of disputes of a private character to which an international organisation is a party has gained increasing importance. Particularly with regard to dispute settlement procedures in UN peace operations the present system does not seem entirely adequate. While we do not support changing the general rules of immunity before domestic courts, we do believe that further work could be done to ensure that private individuals who suffer harm as a consequence of peace keeping operations are compensated. There are obviously important issues related to the inherent risks in situations of conflict and instability, and it is of paramount importance to the Nordic countries that the effective and independent functioning of UN peace operations is not jeopardized. But we do, nevertheless, also believe that there is room for further reflection on whether the present system and procedures are adequate to handle legitimate claims from private individuals.").

153 *See supra* text accompanying notes 44–47.

list, and the Ombudsperson for claims arising in Kosovo.[154] It is therefore time for U.N. member states to develop a new model appropriate for large torts cases.[155] There are a variety of other models that could serve as inspiration, including the 9/11 Victims Compensation Fund in the U.S. or the U.N.'s own Iran Claims Tribunal.[156] Alternatively, the U.N. might simply expand the mandate of local claims boards, which already have jurisdiction over individual torts committed in peacekeeping operations.[157] Whatever the forum, internal U.N. mechanisms must be (and appear to be) impartial, transparent, and required to provide reasons for their decisions. Moreover, there should be a limited right of review of the decisions of local boards to an appellate body.[158]

From a historical perspective, the U.N.'s response to torts that occurred in the Congo is instructive. In 1960, the U.N. established the U.N. Organization in the Congo (ONUC) to address the unrest that took place after the Republic of Congo gained independence from Belgian rule.[159] The Congolese government requested U.N. military intervention against the Belgian troops that remained in the country. At the time, it was "the biggest single effort under United Nations colours, organized and directed by the United Nations itself."[160] Peacekeeping forces were deployed to help restore law and order to the country, but these efforts failed and, in 1961, the central government of Congo collapsed. ONUC was authorized to take all measures, including the use of force, to prevent civil war.[161] Despite these efforts, conditions in the country continued to worsen and citizens from many TCCs were injured or killed.

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154 For a description of the office of the U.N. Ombudsperson for the Al Qaida regime, visit http://www.un.org/en/sc/ombudsperson/.

155 As noted above, although a standing claims commission was envisioned in the Model SOFA, it has never been set up in the Organization's history.

156 *See* Culhane, *supra* note 124 (discussing the VCF in detail with regard to corrective and distributive justice goals).

157 The Netherlands suggested this approach in a Statement to the Sixth Committee in 2014. Statement made to the Netherlands, Sixth Committee, 5 – 6 , 69th Sess., 23rd Meeting, 5 – 6 (Oct. 31, 2014) http://statements.unmeetings.org/media2/4654811/netherlands.pdf.

158 This could be an internal body, and existing court on an ad hoc basis like the PCA, or in exceptional circumstances, the matter could be appealed to a national court, which could require the UN to reassess the matter in question and report back within a year.

159 S.C. Res. 143, U.N. Doc. S/RES/143 (July 14, 1960).

160 Statement of the Secretary General to the Security Council, ¶ 19, U.N. Doc. S/PV.877 (July 20, 1960).

161 U.N. Doc. S/4741 (Feb. 21, 1961); U.N. Doc. S/5002 (Nov. 24, 1961). Despite this, the ICJ determined that the ONUC operation was not an enforcement action under Chapter VII powers. Advisory Opinion, Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), 1962 I.C.J. 151 (July 20, 1962).

In 1966, a Belgian national brought a suit against the U.N. in Belgian court for property damaged and looted during the operation.[162] In response, and "without prejudice to the privileges and immunities which the United Nations enjoys," the Secretary General made a lump-sum payment to the Belgian government for the settlement of all disputes of its nationals relating to ONUC operations.[163] The U.N. also negotiated lump-sum settlements with nine other countries to make reparations for breaches of its "obligations under international law."[164] The claims were not handled by local review boards, but through global settlement agreements to avoid the public scrutiny that would come from having the disputes brought before a claims commission.[165]

B. The Immunity Must Involve a Core Mission or a Constitutional Question

Immunities serve valid purposes in protecting the Organization. Both the internal and external immunities of the U.N. rely, to a certain degree, on concepts of functionalism. Nonetheless, functionalism is particularly pertinent to the U.N.'s external immunities because Article 5 of the U.N. Charter provides the U.N. with immunities that are functionally necessary. While it is true, as Jan Klabbers has asserted, that member states might justify anything as functionally necessary in order to protect the Organization, one of the key areas where further delineation is needed is with regards to operational necessity.

When cases arise that challenge U.N. actions in the course of a peacekeeping operation there will be a tendency to uphold the U.N.'s immunity on the basis of functionalism and operational necessity. The decision in the *Mothers of Srebrenica* case, however, serves as a cautionary tale about overbroad readings of the U.N.'s purpose. Following the disintegration of Yugoslavia in the early 1990s, Serb separatists waged war against Bosniaks in Bosnia and Herzegovina. In 1993, the U.N. established six designated "safe zones" protected by U.N. peacekeepers throughout the country, including one in Srebrenica. The U.N. Protection Force (UNPROFOR) in Srebrenica was comprised of a battalion of Dutch soldiers. In July 1995, Serb forces launched an attack against the safe zone. The lightly-armed peacekeepers stood

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162 Manderlier v. Organisation des Nations Unies et l'Etat Belge (Ministre des Affaires Etrangeres), JT 721 (Brussels Civil Court 1966); 45 I.L.R. 446 (1972).

163 *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: New York, 20 February 1965*, 1965 U.N. JURID. Y.B. 19, 39 (1965).

164 Rep. of the Int'l Law Comm'n, 59th Sess., Commentary on ¶ 2, U.N. Doc. A/62/10, Art. 39 (May 7–July 5, 2007).

165 Freedman, *supra* note 99, at 248.

down and evacuated their own forces, leaving behind the Bosniak civilians who had come there for protection. Afterward, over a period of several days, Serb forces killed over 8,000 people, mostly men and boys, as the civilians tried to leave Srebrenica on their own.

Relatives of the victims who attempted to bring a claim for compensation directly to the Secretary General, however, received no response.[166] They proceeded to litigate the matter in Dutch courts.[167] The U.N. invoked its immunity, and the District Court concluded that "in international-law practice the absolute immunity of the U.N. is the norm and is respected… it is in principle not at the discretion of a national court" to decide whether the invocation of immunity was necessary to fulfill the U.N.'s purposes as that would be "contrary to the ratio of the immunity of the UN."[168] In March 2010, the Court of Appeal upheld the U.N.'s immunity, and the Supreme Court of the Netherlands followed suit the year after.[169] In the ultimate appeal to the European Court of Human Rights, the U.N.'s absolute immunity was upheld. The court reasoned that bringing military operations under Chapter VII of the Charter of the U.N. within the scope of national jurisdiction would allow States to interfere with the key mission of the U.N. to secure international peace and security. [170]

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166 The U.N. did send a letter to the representative of the Netherlands asking for appropriate action to be taken to ensure the U.N.'s privileges and immunities. Letter from Larry D. Johnson, Asst. Secretary-General for Legal Affairs, to Mr. Frank Majoor, Permanent Representative of the Netherlands to the United Nations (Aug. 17, 2007) ("We wish to advise that it is the consistent and well-established practice of the United Nations to request Governments to intervene in court proceedings with a view to informing national courts of the position taken by the Organization and asserting the Organization's privileges and immunities under applicable legal instruments.").

167 Writ of Summons, *supra* note 138, ¶ 286 ("Prior to the commencement of these proceedings the legal representatives of Plaintiff and the persons whose interests are promoted by Foundation, have brought the present matter to the attention of the U.N. and the State of the Netherlands. Neither the State of The Netherlands nor the U.N. showed any willingness to enter into negotiations regarding the matter, and for that reason it is necessary to institute legal proceedings.").

168 Judgment in Incidental Proceedings ¶¶ 5.12–5.14, 5.24, District Court of The Hague, July 10, 2008, De Rechtspraak BD6795 (Neth.) (English translation available in De Rechtspraak at LJN: BD6796).

169 Stichting Mothers of Srebrenica v. Netherlands (Admissibility), *supra* note 4.

170 *Id.* at ¶¶ 154–65 (finding that bringing military operations under Chapter VII of the Charter of the U.N. within the scope of national jurisdiction would mean allowing States to interfere with the key mission of the U.N. to secure international peace and security; that a civil claim did not override immunity for the sole reason that it was based on an allegation of a particularly grave violation of international law, even genocide; and, that in the circumstances the absence of alternative access to a jurisdiction did not oblige the national courts to intervene).

While this case involved sensitive issues of discretion, the broad reading of operational necessity resulted in a finding that immunity trumped basic principles of law. As a matter of criminal law, when a guardian or fiduciary deserts or abandons a ward or fails to provide necessary care, criminal charges follow.[171] Similarly, in tort law, although there is no duty to rescue passersby, once a Good Samaritan begins a rescue, they are held to a certain duty of care and will usually be found liable for harms that occur in the course of a rescue.[172] Reasoning by analogy, the U.N. started a rescue by setting up a peacekeeping mission and establishing safe areas, but failed to protect the individuals who relied on these acts. The *Mothers of Srebrenica* decision suggests that the parameters of operational necessity require careful scrutiny.[173]

Tests developed by a number of European courts to assess the functional necessity of organizational immunities may provide a way forward. Several European courts have focused on whether the action taken by an IO was an essential or supplementary action, such that only the activities necessary for the Organization to carry out their essential functions may be protected under privileges and immunities.[174] Furthermore, a number of European courts have developed a distinction between "conduct that is closely related to the core of an IO's functions or entails an exercise of public authority; and, conversely, conduct that touches upon the functions of the IO in a more peripheral manner or cannot be distinguished from conduct of a private entity."[175]

C. In Borderline Cases, the U.N. Must Assess Whether It Should Waive Its Immunity

The third consideration in determining whether to assert internal or external immunities rests with the UN. The U.N. can always choose to waive its immunity

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171 WAYNE R. LAFAVE, CRIMINAL LAW (Hornbook Series 3d ed. 2000).

172 RESTATEMENT (SECOND) OF TORTS §§ 314, 323 (1965).

173 Interestingly however, the clause excepting operational necessity was omitted from the UNPROFOR SOFA, so this outcome was not mandated. Agreement on the Status of the United Nations Protection Force in Bosnia and Herzegovina, ¶ 48, May 15, 1993, 1722 U.N.T.S. 77 ("Except as provided in paragraph 50, any dispute or claim of a private law character to which UNPROFOR or any member thereof is a party and over which the courts of Bosnia and Herzegovina do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose.").

174 *See*, *for example*, Banque africaine de developpement, Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 25, 2005, Bull. civ. V, No. 04-41.012 (Fr.).

175 *See* Brief of European Law Scholars and Practitioners as Amici Curiae in Support of Plaintiffs-Appellants and Supporting Reversal, Georges v. United Nations, No. 15-455, at 15 (2d Cir. 2015), http://opiniojuris.org/wp-content/uploads/EuroLaw-· Amicus-Brief3.pdf.

and voluntarily submit itself to suit.[176] This authority rests with the Secretary General.[177] Some scholars have suggested that the failure to exercise this option can result in abuse of immunity.[178] U.N. practice on waivers is narrow, it operates on a case-by-case basis and not in advance of dispute. Moreover, it has been limited to criminal or civil cases against staff. Even in cases of insurable claims, waiver is seldom exercised.[179] Nonetheless, the U.N. can adopt new approaches to its waiver practice and has been urged to do so in other contexts. The Zeid Report on Peacekeeping, for example, recommended the U.N. waive its immunity in cases where criminal acts were committed with some connection to an official position, and "where continued immunity would impede the course of justice and where immunity can be waived without prejudice to the interests of the United Nations."[180]

V. CONCLUSION: THE PUBLIC LEGITIMACY OF THE U.N. AND ROLE OF MEMBER STATES

Since its founding, the U.N. has been an organization in the process of constant development.[181] New roles have been attributed to the Organization, and many of the U.N.'s core responsibilities today, such as peacekeeping, were not envisioned when the Charter was drafted. Moreover, its mandate has evolved toward individuals. From human rights,[182] to the creation

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176 Chanaka Wickremasinghe, *International Organizations or Institutions, Immunities before National Courts*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 9 (July 2009) ("The one exception to immunity that is applicable to all international organizations is in cases of waiver, ie a voluntary submission to the jurisdiction of the forum by the international organization in question.").

177 Convention on the Privileges and Immunities of the United Nations §§ 20, 23, Feb. 13, 1946, 1 U.N.T.S. 15.

178 JENKS, *supra* note 57, at 94–95 (arguing that immunity should be waived where it would impede the course of justice).

179 GUGLIELMO VERIDRAMER, THE U.N. AND HUMAN RIGHTS: WHO GUARDS THE GUARDIANS? 357–58 (2011).

180 Zeid Report, *supra* note 22, ¶ 86.

181 VON SCHORLEMER, *supra* note 33, at 467 ("The existence of many of the 'core' activities of the U.N. nowadays may be explained by functional necessity, i.e. they reflect the practical need to adjust the organization's structure to challenges which had not been foreseen by the drafters of the U.N. Charter at the time of its adoption.").

182 The preoccupation of the UN with individuals can be demonstrated by the Commission on Human Rights, which drafted the Universal Declaration of Human Rights (UDHR). The UDHR, now viewed as constituting customary international law was given "teeth" by the ICCPR and is overseen by a monitoring body within the UN that can hear complaints from individuals. "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." UN Charter art. 68.

of international criminal tribunals, to its sanctions practice, the U.N. regularly engages deeply with individuals.[183]

Courts have assumed that the Organization's principal function is to maintain international peace and security, and that its relations are primarily with member states. Yet international organizations have constituencies outside of member states.[184] UN Charter Provisions 1(3), 55 and 56 require the UN to respect human rights, even if there is debate over whether the Organization is directly bound by human rights.[185] The UN Charter refers to "the peoples."[186] Moreover, recent UN policies assume obligations toward private individuals. The Human Rights Due Diligence policy, for example, prohibits the UN from providing direct or indirect support (ranging from financial and tactical, to control over operations in the field) where there is a substantial risk of human rights, international humanitarian law or refugee law violations.[187] The policy also requires the UN to conduct a risk assessment involving the recipient's compliance record with international law, review its record in taking effective steps to hold perpetrators of violations accountable, and assess whether the UN can influence behavior over compliance with rights held by individuals.[188] UN practice is superceding precedents that suggest that the UN's obligation is to member states.

From the perspective of individuals as third party claimants, these developments are relevant to theories of responsibility. A threshold question with regards to who compensates third parties harmed during peacekeeping operations is what entities can be held responsible for third-party compensation. This Article has assumed that the Organization itself would be the responsible party, but it is important to acknowledge that other avenues may be available. One approach would be to pierce the corporate veil and hold member states

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183 The only regime in the last decade that has applied "comprehensive" sanctions is Libya, in Resolutions 1970 and 1973, and that decision was driven by the nature of the Libyan state and its control over most assets. Larissa Van den Herik, *Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized U.N. Sanctions Regimes,* 19 J. CONFLICT & SEC. L. 427 (2014).

184 ALISON DUXBURY, THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS: THE ROLE OF HUMAN RIGHTS AND DEMOCRACY 47–52 (2011).

185 2014 Rights Up Front Action Plan, *available at* http://www.un.org/sg/rightsupfront/doc/RuFAP-summary-General-Assembly.shtml ("*Rights up Front* speaks to the essence of the United Nations. It is a lens through which the Organization will examine and respond to threats of serious violations of international human rights and humanitarian law and by that identify actions needed to prevent mass atrocities and armed conflict.").

186 Preamble, UN Charter ("We the peoples").

187 For an assessment, see Helmut Philipp Aust, *The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?*, 19 J. CONFLICT & SEC. L. 1, 3 (2014).

188 *Id.* at 5–6.

responsible for the acts of the Organization, as in the *International Tin Council*[189] and *Westland Helicopter*[190] cases. As Christiane Ahlborn writes, however, while this method would provide injured parties with a remedy, it might be a disincentive for states to invest into international cooperation in the future.[191] This may explain why there are so few examples in practice.

Theories of multiple attribution of conduct suggest that responsibility might also be shared in cases of military operations under the U.N. The cases of *Behrami and Saramati v. France and Norway*,[192] *Al Jedda v. UK*,[193] and *Nuhanovic v. The Netherlands*[194] all concern the question of whether wrongful conduct of peacekeepers was attributable to the U.N. or to the sending states. While the judgments ultimately opted for attribution of conduct to either the U.N. or member states, the courts either explicitly or implicitly acknowledged the possibility that the conduct might be attributed to dual entities. The International Law Commission has also acknowledged that, although it may not appear frequently in practice, multiple attribution of conduct is possible.[195]

For victims of wrongdoing, these developments are important. As Andre Nollkaemper and Dov Jacobs have suggested, it is no longer acceptable for states or other actors to not be held accountable for their actions.[196] Shared

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189 Maclaine Watson & Co. v. Ltd. v. Int'l Tin Council, 81 I.L.R. 670 (UKHL 1989).

190 Westland Helicopters Ltd. et al, 80 I.L.R. 595 (ICC Int'l Ct. Arb. 1982); Arab Organization for Industrialization et al. v. Westland Helicopters Ltd.et al., 80 I.L.R. 622 (Fed. Sup. Ct. 1988) (Switz.).

191 *See* Christiane Ahlborn, *To Share or Not to Share: The Allocation of Responsibility Between International Organizations and their Member States*, Shares Research Paper, 28 (2013), http://www.shares project.nl/wp-content/uploads/2013/11/SHARES-RP-28-final.pdf; *see also* Anne Van Aaken, *Shared Responsibilities in International Law: A Political Economy Analysis*, Shares Research Paper No. 46, 7 (2014), http://www.sharesproject.nl/wp-content/uploads/2014/06/SHARES-RP-46-final.pdf (noting that peacekeeping is an enterprise for the common good, thus the goal is to secure cooperation of the states involved).

192 Behrami and Behrami v. France (Application No. 71412/01) and Saramati v. France, Germany and Norway (No. 78166/01), Eur. Ct. H. R. (2007).

193 Al Jedda v. U.K. (App. No. 27021/08), Eur. Ct. H. R. (2011).

194 Hasan Nuhanovic v. the Netherlands, The Hague Ct. App. in The Hague LJN: BR5388 (2011), *available at* http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2011 :BR5388.

195 ILC Report, 63rd Sess., U.N. Doc. A/66/20 (2011), at 81, ¶ 4. See also Ahlborn, *supra* note 191, at 12 (noting that the law of international responsibility has a strong bias towards exclusive responsibility).

196 André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Concept Paper*, at 25 (2011), *available at* http://www.sharesproject.nl/wp-content/uploads/2011/08/Nollkaemper-Jacobs-Shared-Responsibility-in-International-Law-A-Concept-Paper.pdf.

responsibility is a mechanism to hold states or other entities liable to pay reparations for damage caused.[197]

When courts have found that acts should be attributed to the UN, as the European Court of Human Rights did in the *Behrami and Saramati* case, injured parties were left without a remedy because the ECHR determined it did not have jurisdiction over the UN.[198] However, in *Nuhanovic*, the Dutch Court of Appeal in The Hague observed that effective control by the Netherlands did not exclude the possibility of effective control by others including the UN.[199] The suggestion that power may be held by more than one actor at the same time expands the opportunities for redress by claimants and hence, for compensation in cases of mass torts.[200]

This Article has made two proposals. First, it is time to revert to the functional immunities originally envisioned for the U.N. under Article 105 of the U.N. Charter. Second, the U.N. should purchase third-party insurance for mass torts or maintain a contingency fund so that it has resources available to fairly settle private claims that arise.

A third consideration is put forward in the Conclusion: U.N. member states should engage in the conversation about what types of alternative modes of dispute settlement the U.N. needs today. Member states collectively have a responsibility to steer the organization, and in certain circumstances, to make reparations on behalf of the Organization.[201]

In 1960, Inis Claude predicted that the function of legitimization was and would continue to be a highly significant part of the political role of the U.N. Distinguishing it from a process of legal order, he wrote, "Collective

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197 In the *Haiti* case, for example, a theory of shared responsibility would have led to a claim against Nepal (and potentially the independent contractors who installed tTEhe faulty latrines) in addition to the UN. It can be assumed that the plaintiffs did not choose this path for two reasons: first, Nepal does not have deep pockets, and second, the UN's policy of assuming responsibility for harms means that as a matter of internal policy, the UN was in effective control. Nonetheless, shared responsibility (and particularly joint and several liability) has strategic advantages for plaintiffs: the burden of proof risk is shifted to the injurers, and there is a better chance that a court will have jurisdiction over at least one of the multiple plaintiffs and entities.

198 *See* Behrami and Behrami v. France; Saramati v. France, Germany and Norway, *supra* note 192.

199 Hasan Nuhanovic v. Netherlands, *supra* note 194.

200 *Cf.* Van Aaken, *supra* note 191, at 20 (arguing that immunities aside, it is more advantageous for plaintiffs if there is only one subject of international law responsible).

201 *See, for example*, Rep. of the Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 53rd Sess., 109–110 (art. 39 and commentary), U.N. Doc. A/83 (Dec. 12, 2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; *see also* Rep. of the Int'l Law Comm'n, *Draft Articles on Responsibility of International Organizations*, 63rd Sess., 9 (art. 39), U.N. Doc. A/66/10 (2011), http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf.

legitimization has developed, for better or for worse, as essentially a political function, sought for political reasons, exercised by political organs through the operation of a political process, and productive of political results."[202] The U.N. is the best facsimile of an authentic voice of mankind (albeit not an authentic one), one that statesmen treat as the most impressive and authoritative instrument for the expression of the global, general will.[203] As he writes, "for better or for worse, the development of the United Nations as custodian of collective legitimization is an important political phenomenon of our time."[204]

Because of the centrality of public legitimacy to the UN, it is imperative that member states buy in to its mandate. If not, the U.N.'s significance will wane. The U.N.'s handling of large torts cases has affected the U.N.'s standing with member states.[205] It has also triggered critical commentary in the press—the New York Times reported that "the United Nations has failed to face up to its role in [Haiti's] continuing tragedy."[206] The Washington Post further argued that "by refusing to acknowledge responsibility, the United Nations jeopardizes its standing and moral authority."[207] The U.N.'s public legitimacy is damaged when programmatic principles, such as the Rule of Law, are not applied consistently.

The categorical determination that the U.N. is absolutely immune is normatively problematic and, from a political legitimacy perspective, untenable in light of the U.N.'s contemporary mandate and impact on individuals. It behooves member states to develop new mechanisms for addressing claims against it by individuals and to acknowledge that national courts may begin to step in to correct the balance if the U.N. fails to take the lead.[208]

There is some urgency to these reforms. Domestic courts are making decisions in parallel that are relevant to potential IO responsibility. The Dutch

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202 Inis Claude, *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367, 371 (1966).

203 *Id.* at 372.

204 *Id.* at 379.

205 The U.N. has acknowledged this reality in adopting 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. *See* 2014 Rights Up Front Action Plan, *supra* note 185.

206 Editorial, *Haiti's Imported Disaster*, N.Y. TIMES, Oct. 12, 2013, http://www.nytimes.com/2013/10/13/opinion/sunday/haitis-imported-disaster.html?_r=0.

207 Editorial, *United Nations must admit its role in Haiti's cholera outbreak*, WASH. POST, Aug. 16, 2013, http://www.washingtonpost.com/opinions/united-nations-must-admit-its-role-in-haitis-cholera-outbreak/2013/08/16/e8411912-05d9-11e3-a07f-49ddc7417125_story.html.

208 *See* 2014 Danish Statement to Sixth Committee, *supra* note 152.

Supreme Court's *Nuhanovic* decision held that just because responsibility is attached to a state does not necessarily mean that it cannot be attached to an IO as well.[209] This is in contrast to prior case law that suggested that if the U.N. was found responsible, a state could not be.[210] For the European Court of Human Rights in the *Waite and Kennedy* decision, the key factor of its determination was whether the applicants had reasonable alternative means to protect their rights. An IO, the court said, must provide those means.[211] If an organization fails to do this, and if the facts of the case warrant it, courts may start paring down IO immunities.[212] While the Dutch district court ultimately concluded that it was not for national courts to determine what is necessary to the U.N.'s functioning,[213] similar outcomes are not guaranteed in the future. Indeed, a dangerous situation will arise if courts read down the Organization's legal protections. Moreover, 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 or the U.N. for deaths and injuries.[214] The U.N.'s expanding mandate suggests that enhanced risks should go hand in hand with a new process for assessing future claims.

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209 The State of the Netherlands v. Nuhanovic, ECLI:NL:HR:2013:BZ9225 (Sup. Ct. of the Neth. 2013).

210 *See, for example*, Advisory Opinion, The State of the Netherlands v. Nuhanovic, Case No. 12/03324 / ECLI:NL:HR:2013:BZ9225 (Sup. Ct. of the Neth. 2013).

211 Waite and Kennedy v. Germ., *supra* note 118, ¶ 68.

212 The context here is somewhat different, being an employment dispute under the ECHR. It is hard to know whether a court would apply the same rationale in a mass torts case.

213 Mothers of Srebrenica v. State of the Netherlands, *supra* note 50, ¶ 4.4–4.5.

214 Scott Sheeran & Stephanie Case, *The Intervention Brigade: Legal Issues for the U.N. in the Democratic Republic of the Congo*, IPI REPORT 17 (2014).