

Addressing the Remedy Gap in Third-Party Claims against the United Nations Peacekeeping Missions

By

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Acronyms

ECHR	European Court of Human Rights
EULEX	European Rule of Law Mission in Kosovo
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
IDP	Internally Displaced Person
ILO	International Labour Organisation
IOIA	International Organisations Immunities Act
MINUSTAH	Mission des Nations Unies pour la stabilisation en Haïti (The United Nations Stabilisation Mission for Haiti)
OAS	Organisation of American States
ONUC	Opération des Nations Unies au Congo (United Nations Operations in the Congo)
OPEC	Organisation of Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
SCC	Standing Claims Commission
SOFA	Status of Force Agreement
UN	United Nations
UNEF	United Nations Emergency Force
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNMIK	United Nations Mission in Kosovo

UNPROFOR	United Nations Protection Force
UNSG	United Nations Secretary-General
UNTAC	United Nations Transitional Authority in Cambodia
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Nations Transitional Administration in East Timor
UNTEA	United Nations Temporary Executive Authority in Western New Guinea
VCLT IO	The Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations

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Chapter 1

Background and introduction

1.1 Background and introduction to the study

The United Nations (UN) peacekeeping missions are an important instrument in maintaining peace and security in various parts of the world. These missions are aimed at addressing conflict through peace-making, peacebuilding, and peacekeeping.¹ Achieving these objectives entails the use of peacekeeping troops in operations that would otherwise be the prerogative of the governments of the relevant territorial host States.² UN peace operations can range from acting as the de facto police force to distributing resources to the populations. This exercise of public authority by peacekeeping troops necessitates interaction with civilians in vulnerable situations, hence the need for peacekeeping. These interactions are regulated through UN instruments in general and Status of Force Agreements (SOFAs) between the host State and the UN in particular.

Over the years, there have been numerous reports of impropriety and human rights violations by UN peacekeepers.³ As integral organs of the UN,⁴

¹ 'Report of the panel on the United Nations Peace Operations' (21 August 2000) UN GA A/55/305, otherwise known as the Brahimi Report 2.

² M Zwanenburg *Accountability of peace support operations* (2005) 32.

³ 'Special measures for protection from sexual exploitation and abuse: a new approach' (28 February 2017) UN GA A/78/818 which recorded details of alleged abuse by peacekeepers from 1 January to 31 December 2016. Since the Secretary General's 'zero tolerance' stance in his 2003 'Bulletin Special measures for protection from sexual exploitation and sexual abuse' (9 October 2003) UN ST/SGB/2003/13, the UN has issued several reports over the years formulating strategies to combat sexual and other forms of abuse by peacekeepers. To name a few: 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' (24 March 2005) UN Doc A/59/710 also known as the Zeid Report; 'Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo' (5 January 2005) UNGA A/59/661; 'Taking action on sexual exploitation and abuse by peacekeepers: Report of an independent review on sexual exploitation and abuse by international peacekeeping forces in the Central African Republic' (23 June 2016) A/71/99.

⁴ UN peacekeeping operations are considered to be 'the deployment of a United Nations presence in the field' 'An agenda for peace: Preventive diplomacy, peacemaking and peacekeeping' (17 June 1992) UN Doc A/47/277 para 20.

peacekeeping missions benefit from the immunities and privileges accorded to the UN by its Charter.⁵ In terms of article 105 of the UN Charter, 'the Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'.⁶ In addition to the Charter, section 2 of the Convention on Privileges and Immunities of the UN⁷ holds the following:

The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity.⁸

The immunities accorded to the UN peacekeeping missions are meant to enable it to function independently without undue interference.⁹ As a result, UN peacekeeping missions are immune from national jurisdictions. Conversely, to ensure accountability and access to justice for parties with claims against the UN, article 29 of the Immunities Convention states the following:

The United Nations shall make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.¹⁰

This directive from the Convention is aimed at providing access to justice to those individuals who claim to have been harmed by the activities of UN peacekeeping missions. Indeed, the immunity of the UN is not intended to shield the Organisation from any liability; it is, rather, to protect its functional independence in order to achieve its objectives unhindered. To that effect, section 29 requires the Organisation to provide adequate modes of dispute settlements for those claims emanating from its activities. However, the UN's current alternative dispute resolution mechanisms have become increasingly inept at providing relief to third-party claimants. Third-party claimants whose claims either fall outside the scope

⁵ The United Nations Charter of 1945, hereafter UN Charter.

⁶ Article 105(1) of the UN Charter.

⁷ Hereafter, Immunities Convention.

⁸ Article II section 2 of the Immunities Convention.

⁹ P Neumann 'Immunity of international organisations and alternative remedies against the United Nations' Seminar on State Immunity at the Vienna University Summer Semester 2006 3.

¹⁰ Article VIII, section 29 of the Immunities Convention.

of the available mechanisms or are outright rejected find themselves without recourse. These claimants cannot have their dispute adjudicated by any other forum owing to the extensive immunity enjoyed by the UN. This state of affairs has come to be known as 'the remedy gap'.¹¹ The remedy gap thus refers to those claims that cannot be adjudicated by national courts due to the UN's immunity and that either fall outside the scope of the UN's dispute resolution mechanisms or were not provided alternative mechanisms by the UN. Of the claims levelled against UN peacekeeping missions, two claims in particular illustrate the challenges on the rights of claimants brought on by this remedy gap: the *Mothers of Srebrenica* case and the *Haiti Cholera Dispute*.

The first claim originates from the Srebrenica massacre that occurred in Bosnia and Herzegovina in 1995. Declared a 'safe area' by the UN, Srebrenica was protected by the Dutch battalion under the UN peacekeeping banner.¹² The lightly-armed Dutch battalion was overpowered by the Bosnian Serb forces resulting in the surrender and subsequent execution of 8 373 individuals who had sought refuge in the UN enclave.¹³ In 2007, an association of survivors called Mothers of Srebrenica filed a civil claim in the Dutch Court against the UN peacekeeping mission in Bosnia-Herzegovina and the Netherlands.¹⁴ The association claimed that the UN and the Netherlands were responsible for the Srebrenica casualties owing to their failure to prevent a genocide.¹⁵ Accordingly, they demanded compensation and an official acknowledgement of responsibility from the UN and the Netherlands.¹⁶ The Dutch District Court found that the UN enjoyed absolute immunity and, as such, it lacked jurisdiction to hear the matter.¹⁷ This judgement

¹¹ H Krieger 'Addressing the accountability gap in peacekeeping: Law-making by domestic courts as a way to avoid UN reforms?' (2015) 62 *Netherlands International Law Review* 260.

¹² UN Security Council Resolution UN Doc S/Res/ 819 (1993).

¹³ The Potočari Memorial Center list of missing persons from Srebrenica 95. https://web.archive.org/web/20140418221608/http://www.potocarimc.ba/_ba/liste/nestali_a.php (accessed 10 July 2018).

¹⁴ *Mothers of Srebrenica & Others v State of The Netherlands and the United Nations* (2008) (District Court of The Hague judgement) 295247/HA. Hereafter, *Srebrenica* case.

¹⁵ *Srebrenica* case (n 14 above) para 2.

¹⁶ *Srebrenica* case (n 14 above) para 2.1 (3)-(6).

¹⁷ *Srebrenica* case (n 14 above) para 6.1.

was upheld by the Dutch Appeal Court,¹⁸ the Supreme Court,¹⁹ and later the European Court of Human Rights.²⁰ Considering the absence of alternative dispute settlement mechanisms for the Srebrenica claimants,²¹ this claim is now practically extinguished.²²

Years after the *Srebrenica* case, the continued absence of alternative dispute resolution mechanisms, coupled with lack of jurisdiction by courts, extinguished yet another third-party claim against the UN. In the *Haiti Cholera Dispute*, the claim was based on gross negligence by the UN peacekeeping mission in Haiti, Mission des Nations Unies pour la stabilisation en Haïti (The United Nations Stabilisation Mission for Haiti) (MINUSTAH) which caused the deaths of approximately 10 000 Haitians.²³ In 2010, the UN was accused of discharging untreated sewage from its compound into the main river system in Haiti, which triggered an unprecedented countrywide epidemic of cholera.²⁴ It was later established by a UN-appointed panel of experts that the MINUSTAH was responsible for the outbreak.²⁵ This expert panel conclusively determined that cholera was introduced into Haiti by the UN Nepali contingent.²⁶ This contingent was not screened on arrival, despite cholera being endemic in Nepal. Following the UN report, a claim was filed with the UN Office of Legal Affairs by the Bureau

¹⁸ *Mothers of Srebrenica & Others v State of The Netherlands and the United Nations* (2010) (Court of Appeal of The Hague) 200.022.151/01. Hereafter, *Srebrenica* case (Appeal Court judgement).

¹⁹ *Mothers of Srebrenica & Others v State of The Netherlands and the United Nations* (2012) (Supreme Court of the Netherlands) 10/04437. Hereafter, *Srebrenica* case (Supreme Court judgement).

²⁰ *Stichting Mothers of Srebrenica & Others v The Netherlands* ECHR (11 June 2013) 65542/12. Hereafter, *Srebrenica* case (ECHR judgement).

²¹ *Srebrenica* case (ECHR judgment) (n 20 above) para 161-165.

²² It should be noted that the claim characterised as 'extinguished' is the Mothers of Srebrenica's case against the UN. Their case against the Netherlands concluded with the Dutch Supreme Court finding the Netherlands liable for 10 per cent of the damage that occurred when the Dutchbat evicted 350 people who were later murdered by the Bosnian Serb Forces (VRS). *State of the Netherlands v Stichting Mothers of Srebrenica & Others* (2019) (Supreme Court judgement) 17/04567.

²³ 'Haiti: Cholera outbreak 2010-2017' <https://reliefweb.int/disaster/ep-2010-000210-hti> (accessed 10 July 2018).

²⁴ 'Cholera outbreak in Haiti' *NBC News* 18 November 2010.

<https://www.nbcnews.com/slideshow/cholera-outbreak-haiti-40257150> (accessed 10 July 2018).

²⁵ 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (27 May 2011) p 23. Hereafter, UN Haiti Report. <http://www.ijdh.org/wp-content/uploads/2011/05/UN-cholera-report-final.pdf> (accessed 10 July 2018).

²⁶ UN Haiti Report (n 25 above) p 27-32.

des Avocats Internationaux and the Institute for Justice and Democracy in Haiti on behalf of the affected Haitians.²⁷ The claimants contended that the UN, through gross negligence and disregard for human life, had caused the cholera outbreak that led to the deaths of thousands of people.²⁸ They demanded that the UN establish a standing claims commission (SCC) as per the SOFA between MINUSTAH and Haiti.²⁹ They also demanded the installation of a national water and sanitation system to control the spread of the epidemic.³⁰ They further demanded compensation for all the victims and their families.³¹ These claims were based on Haitian law,³² which the UN is obliged to respect as per the SOFA,³³ international conventions,³⁴ and the victims' fundamental human rights.³⁵ The UN Office of Legal Affairs responded 15 months later by rejecting the claim based on section 29 of the Immunities Convention.³⁶ This rejection was on the basis that the claim would entail a review of UN political and policy matters. Following the UN's refusal to receive the claim, the claimants filed a suit in the United States District Court.³⁷ The US District Court maintained that the UN enjoyed absolute immunity unless explicitly waived by the UN.³⁸ On appeal, the Court rejected the

²⁷ 'Petition for relief to the Chief of the MINUSTAH Claims Unit' submitted 3 November 2011. <http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> (accessed 15 January 2018).

²⁸ Petition for relief (n 27 above) paras 3, 22-27, 72-76.

²⁹ Petition for relief (n 27 above) para 94. Pursuant to section 55 of the 'Agreement between the United Nation and the Government of Haiti concerning the status of the United Nations operations in Haiti' hereafter, MINUSTAH SOFA.

³⁰ Petition for relief (n 27 above) paras 100, 112.

³¹ Petition for relief (n 27 above) paras 105-110.

³² The claim was based on Haiti Civil Code articles 1168-1170 regulating the cause of action for injuries resulting from negligence and negligent transmission of diseases. The claim was further based on Haiti Penal Code articles 264 and 265 which criminalise involuntary homicide resulting from negligence or a failure to adhere to regulations. Furthermore, the claim mentions the National Decree on Management of the Environment, Law XV on Rural Hygiene and finally articles 253, 258 and 19 of the Haitian Constitution of 1987. Petition for relief (n 27 above) para 80.

³³ Section 5 of the MINUSTAH SOFA (n 29 above).

³⁴ Petition for relief (n 27 above) para 81.

³⁵ Petition for relief (n 27 above) para 81-83.

³⁶ 'Letter from the United Nations under Secretary-General for Legal Affairs, Patricia O'Brien to the Director of the Institute for Justice and Democracy in Haiti, Brian Concannon' (15 July 2013). <http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf> (accessed 15 January 2018).

³⁷ *Delamas George & Others v United Nations* (2015) 84 F 3d 246 (District Court judgement). Hereafter, *Haiti Cholera Dispute*.

³⁸ *Haiti Cholera Dispute* (n 37 above) 4-5.

argument that the UN's immunity was conditional to the establishment of an alternative dispute resolution mechanism.³⁹

The *Srebrenica* case and the *Haiti Cholera Dispute* illustrate the crux of the problem to be addressed in the proposed study. On one hand, the current alternative dispute resolution mechanisms provided by the UN in terms of the Immunities Convention, do not cater for these claims. On the other hand, the current jurisprudence supports the absolute immunity of the UN on the basis of the UN Charter and the Immunities Convention. These cases demonstrate the impasse created by the remedy gap in third-party claims against UN peacekeeping missions. As such, the proposed study seeks to address this remedy gap by providing an in-depth analysis of the factors contributing to the gap. This dissertation assesses the legal and policy framework behind third-party claims against the UN and its subsequent implementation by the relevant entities. This study aims to provide recommendations geared towards bridging the remedy gap in order to support the rights of third-party claimants while preserving the functional independence of the UN.

1.2 Literature review

The debate surrounding how to address the remedy gap in third-party claims against UN peacekeeping missions is a polarising one. Nevertheless, most academics agree that the remedy gap is the result of the UN's broad immunity and the inadequacy of available alternative dispute resolution mechanisms. However, while there is abundant literature assessing the scope of the immunity of international organisations in general, studies on the remedy gap are rather scarce. Of those studies, most focus on the immunity of the UN as the main proponent of the remedy gap.

To provide a comprehensive synopsis of the issue at hand, this literature review will examine the discourse surrounding the relevant components of the remedy gap. This entails an analysis of scope of the UN's immunity and the current state of the alternative dispute resolution mechanisms available to third-party claimants. Furthermore, considering the scarcity of studies on bridging the gap,

³⁹ *Haiti Cholera Dispute* (2016) 834 F 3d 88 (Second Circuit Court judgement).

this review will highlight those few contributions that provide insights into ways of bridging the remedy gap. The literature review will provide a consolidated overview of the research problem drawing on the relevant international conventions, current domestic and international jurisprudence, UN resolutions and policies, and the existing literature.

1.2.1 On the immunity of UN peacekeeping missions

UN peacekeeping missions, as a subsidiary organ of the UN,⁴⁰ benefit from the same immunity protection as the UN itself.⁴¹ In addition to the UN Charter and the Immunities Convention, the immunity of peacekeeping missions is complemented by agreements specific to peacekeeping such as UN Resolutions and SOFAs.⁴² These agreements reiterate the privileges and immunities accorded to peacekeeping missions under the UN Charter and the Immunities Convention. The wording of the immunity provision in the UN Charter appears to suggest a restricted form of immunity, one that is limited to that which is necessary for the achievement of the UN's purpose (or functional immunities).⁴³ This provision holds that the Organisation 'shall enjoy ... such privileges and immunities as are necessary for the fulfilment of its purposes'. However, section 2 of the Immunities Convention contains no such limiter. The Convention proclaims the UN to be immune from 'every form of legal process' which could amount to an absolute form of immunity.⁴⁴ In terms of section 2 of the Immunities Convention, this

⁴⁰ Section 15 of the UN Model SOFA specifically refers to UN peacekeeping operations as subsidiary organs of the UN. 'Model Status of Force Agreement for peacekeeping operations' (9 October 1990) UN GA A/45/594. Hereafter, Model SOFA.

⁴¹ F Rawski 'To waive or not to waive: Immunity and accountability in UN peacekeeping operations' (2002) 18 *Connecticut Journal of International Law* 106-107. In addition, section 15 of the Model SOFA (n 39 above) states that 'The United Nation peace-keeping operation ... enjoys the status, privileges and immunities of the United Nations'.

⁴² Section 15 of the Model SOFA (n 40 above) provides for the immunities and privileges of UN peacekeeping operations. This 'immunities provision' is repeated in all other SOFAs, such as section 15 of the SOFA for the UN mission in South Sudan (UNMISS), section 15 of the MINUSTAH SOFA, etc. In addition to SOFAs, the immunity of peacekeeping operations is reiterated in UN resolutions: 'Respect for the privileges and immunities of officials of the United Nations and the specialised agencies and related organisations' UN GA 43/225, this resolution is further reaffirmed by resolution UN GA 49/238 of the same title.

⁴³ Article 105 of the UN Charter.

⁴⁴ A Reinisch & UA Weber 'In the shadow of Waite and Kennedy: The jurisdictional immunity of international organisations, the individual's right of access to the courts and administrative tribunals as alternative means of dispute settlement' (2004) 1 c 61.

immunity can only be limited by an express waiver. This apparent discrepancy brings up questions as to the true scope of the UN's immunity.

According to the UN, the Organisation's immunity is unambiguously absolute save for an express waiver. The UN Office of Legal Affairs is of the opinion that

the immunity accorded international organisations under this system of law is an absolute immunity and must be distinguished from sovereign immunity which in some contemporary manifestations, at least, is more restrictive. While international immunities may be and, in some cases, must be waived, such waivers must be express.⁴⁵

In addition to the UN, several national judiciaries support the position that the UN's immunity is absolute and unqualified.⁴⁶ This, according to Schmalenbach,⁴⁷ is exemplified by Austrian courts which adamantly maintain the scope of international organisations' immunities as absolute on Austrian territory.⁴⁸ According to Schmalenbach, Austrian courts are reluctant to create a jurisprudence that would amount to a questioning of the absolute immunity of international organisations in Austria. The author's findings are based on an assessment of the Austrian case law concerning the immunity of international organisations and their officials.⁴⁹ Schmalenbach posits that this is due to the close collaboration between the Austrian judiciary and the government, which is aimed at attracting international organisations into Austria.⁵⁰ In addition to Austria,

⁴⁵ UN office of Legal Affairs 'Memorandum to the Legal Adviser, United Nations Relief and Works Agency for Palestine Refugees in the Near East' (28 February 1984). http://legal.un.org/docs/?path=../unjuridicalyearbook/pdfs/english/by_volume/1984/chpVI.pdf&lang=EF (accessed 12 August 2018).

⁴⁶ A Reinisch (ed) *The privileges and immunities of international organisations in domestic courts* (2013).

⁴⁷ K Schmalenbach 'Austrian courts and the immunity of international organisations' (2013) 10 *International Organisations Law Review* 457-458.

⁴⁸ *Company Baumeister Ing. Richard L v O* (Austrian Supreme Court) Decision of 14 December 2004 Case No. 10 Ob 53/04y as translated in the *United Nations Juridical Yearbook* (2004) p 394. Hereafter, the *OPEC* case (The case is commonly referred to as the *OPEC* case as it involves the Organisation of the Petroleum Exporting Countries).

⁴⁹ Schmalenbach (n 47 above) 447.

⁵⁰ Schmalenbach (n 47 above) 463.

countries such as the US,⁵¹ Canada,⁵² and Switzerland,⁵³ to name a few, support the position that international organisations should be granted absolute immunity from jurisdiction and enforcement. According to these national courts, the immunity of international organisations can only be restricted if the relevant organisation expressly waives its immunity.⁵⁴ This interpretation is rejected by some academics who argue for a more balanced interpretation of section 2 in light of article 105 of the UN Charter.⁵⁵ Singer,⁵⁶ for example, contends that it is 'unlikely' that the Immunities Convention grants broader immunities and privileges than the Charter.⁵⁷ According to Singer, the Immunities Convention was enacted at the time when the UN had a very limited membership.⁵⁸ Accordingly, section 2 was worded to echo the prevalent view at the time that 'no Member State may hinder in any way the working of the Organisation or take any measures the effect of which might be to increase its burdens, financial or other'.⁵⁹ Essentially, Singer opines that the wording of section 2 is based on the need at the time to protect the UN collective fund from disposition by Member States rather than to provide broader immunities to the UN.⁶⁰

⁵¹ S Herz 'International organisations in US courts: Reconsidering the anachronism of absolute immunity' (2008) 31 *Suffolk Transnational Law Review* 471. RJ Oparil 'Immunity of international organisations in US courts; Absolute or restrictive?' (1991) 24 *Vanderbilt Journal of Transnational Law* 689. Moreover, in the *Haiti Cholera Dispute* (n 38 above), US Courts held that the UN and its subsidiary organs are immune from US courts' jurisdiction unless the UN explicitly waives its immunity.

⁵² *Amaratunga v Northwest Atlantic Fisheries Organisation* (NAFO) (2013) 3 SCR 866 Supreme Court of Canada.

⁵³ *Groupement d'Entreprise Fougerolle et consorts v CERN*, Swiss Federal Supreme Court judgment of 21 December 1992. The Supreme Court in this case held that 'international organisations benefit from an absolute and complete immunity, not containing any restriction' para 1(a).

⁵⁴ Reinisch (ed) (n 46 above) Chapters 5 and 15.

⁵⁵ Krieger (n 11 above) 260–263; N Blokker 'International organisations: The untouchables?' (2013) 10 *International Organisations Law Review* 260–262; K Wellens 'Fragmentation of international law and establishing an accountability regime for international organisations: The role of the judiciary in closing the gap' (2004) 25 *Michigan Journal of International Law* 1176; M Singer 'The jurisdictional immunities of international organisations: Human rights and functional necessity concerns' (1995) 36 *Virginia Journal of International Law* 67.

⁵⁶ Singer (n 55 above) 67.

⁵⁷ Singer (n 55 above) 84.

⁵⁸ In 1946, the UN counted only 55 member States. <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/> (accessed 2 July 2018).

⁵⁹ Documents of the United Nations Conference on International Organisations San Francisco (UNCIO) (1945) IV/2/A/2(1) (18 May 1945) 780.

⁶⁰ Singer (n 55 above) 85–86.

Based on the wording of these two provisions and the divergent interpretations thereof, it is unclear whether the UN's immunity is limited by functional necessity or deemed to be absolute. Therefore, to gauge the true scope of the UN's immunity, it is useful to undertake an interpretation of the immunity provisions, relying on the rules of interpretation as set out by the Vienna Convention on the Law of Treaties.⁶¹

The functional necessity doctrine is the principal rationale for the immunity of UN peacekeeping operations.⁶² In terms of this doctrine, international organisations, especially the UN, are at risk of having the achievement of their objectives derailed by undue interference of Member States through their national judiciaries.⁶³ This refers to the real hazard of Member States attempting to interfere with the UN's policies, objectives, and independent functioning through their judiciary. The European Court of Human Rights (ECHR) confirmed this potential threat in the following terms:

To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field including with the effective conduct of its operations.⁶⁴

Bode,⁶⁵ an advocate of the absolute immunity principle, argues that the UN is in a peculiar position unlike any other international organisation. He reasons that the UN has many 'unhappy' governments who would not hesitate to use their national courts to jeopardise the future of the organisation with 'cooked up' charges.⁶⁶ As such, the doctrine's intended purpose is to protect the functional independence of the UN by granting the Organisation enough immunities and privileges to function unimpeded by the exercise or threat of domestic jurisdiction.⁶⁷ He thus argues

⁶¹ The Vienna Convention on the Law of Treaties of 1969. Hereafter, VCLT.

⁶² K Lundahl 'The United Nations and the remedy gap: The Haiti Cholera Dispute' (2013) 88 *Die Friedens-Warte* 94-95.

⁶³ Singer (n 55 above) 65-67.

⁶⁴ *Srebrenica* case (ECHR judgement) (n 20 above) para 154.

⁶⁵ TG Bode 'Cholera in Haiti: United Nations immunity and accountability' (2016) 47 *Georgetown Journal of International Law* 759.

⁶⁶ Bode (n 65 above) 781.

⁶⁷ As above.

that nothing short of absolute immunity is needed to protect the integrity and functional independence of the UN.

According to Schmalenbach,⁶⁸ the functional necessity doctrine is a sensible limitation of immunity to that which is necessary for the accomplishment of the UN's objectives. However, the doctrine itself is not an endorsement of a limited form of immunity. Reinisch and Weber⁶⁹ claim that this doctrine can be interpreted in two divergent ways. On one hand, they agree with the assessment that the functional necessity doctrine can be construed as a limitation of the UN's immunity.⁷⁰ On the other, the authors antithetically advance that this doctrine validates the assessment that the UN's immunity is absolute. This is due to the fact that the legal personality of international organisations is functionally limited. Any acts that fall outside their functional personality are *ultra vires*. Therefore, Reinisch and Weber surmise that 'since international organisations can only act within the scope of their functional personality there is no room left for non-functional acts for which immunity would be denied'.⁷¹ Similarly, the Austrian Court in the *OPEC* case,⁷² considered the functional personality of OPEC, an international organisation, as the principal rationale for an absolute immunity. In this case, the Court held that due to the functional personality of international organisations, all acts of the organisation are connected to its function and, as such, are subject to immunity.⁷³ This demonstrates that the functional necessity doctrine can be interpreted as a limitation to the immunity of the UN and simultaneously as a proponent of the absolute immunity.

Considering the functional necessity doctrine as a limitation further raises the issue of who determines whether a particular conduct is necessary to the accomplishment of the organisation's objectives. Permitting national courts to establish whether or not a conduct is necessary and, therefore, subject to immunity would defeat the doctrine's purpose. This was echoed by Dutch courts

⁶⁸ K Schmalenbach 'Preserving the Gordian knot: UN legal accountability in the aftermath of Srebrenica' (2015) 62 *Netherlands International Law Review* 315.

⁶⁹ Reinisch & Weber (n 44 above).

⁷⁰ Reinisch & Weber (n 44 above) 63-64.

⁷¹ Reinisch & Weber (n 44 above) 63.

⁷² *OPEC* case (n 48 above).

⁷³ *OPEC* case (n 47 above) *United Nations Juridical Yearbook* (2004) p 398.

in the *Srebrenica* case when they refused to permit an inquest into whether a conduct was in line with the UN's objectives, thereby allowing the UN to be covered by its immunity.⁷⁴ The Dutch Court held that the test to be conducted is not whether a particular conduct furthers the objectives of the UN thereby requiring immunity, but instead whether the UN needs immunity in general to achieve its objectives.⁷⁵ This approach raises further questions regarding the scope of the immunity. Opting to assess whether the UN needs immunity in general to fulfil its objectives results in an automatic endorsement of absolute immunity. This approach precludes any exercise of balancing of rights.⁷⁶ In point of fact, the Dutch courts in the *Srebrenica* case declined to balance the immunity against any other right, insisting that the UN's immunity was absolute and unconditional.⁷⁷

To further test the scope of the immunity of the UN, due regard ought to be given to the rights limited by this immunity. Immunity from national jurisdictions curtails access to the natural forums of claims and consequently affects the right of access to court.⁷⁸ The right of access to justice is a fundamental human right and a basic

⁷⁴ 'It is in principle, not at the discretion of a national court to give its opinion on the 'necessity' of the UN actions ... A testing on the merits of the merits or comprehensive testing is also contrary to the ratio to the immunity of the UN ... It is very likely that more far-reaching testing will have huge consequences for the Security Council decision-making on similar peacekeeping missions' *Srebrenica* case (District Court judgement) (n 14 above) para 5.14.

⁷⁵ When assessing the plaintiffs' claims that the immunity of the UN should be assessed on the basis of article 105 of the Charter which is limited by functional necessity, rather than the seemingly absolute section 2 of the Immunities Convention, the Dutch Court of Appeal held that 'the question that needs to be addressed is not whether the invocation of immunity in this particular case in hand is necessary for the realisation of the objectives of the UN, but whether it is necessary for the realisation of those objectives that the UN is granted immunity from prosecution in general' *Srebrenica* case (Appeal Court judgement) (n 18 above) para 4.5.

⁷⁶ Schmalenbach (n 67 above) 317.

⁷⁷ The UN's immunity was upheld against a claim of *jus cogens* violation in terms of article 1 of the Genocide Convention in the District Court (n 14 above) para 5.19 and in the Supreme Court (n 19 above) para 4.3.14. It was further upheld against the right of access to court in terms of article 6 of the European Convention on Human Rights and article 14 of the International Covenant on Civil and Political Rights (District Court judgement) (n 14 above) para 5.22, (Appeal Court judgement) (n 18 above) para 5.14, and (Supreme Court judgement) (n 19 above) para 4.3.4–4.3.6). Despite the case law of *Beer & Reagan v Germany* ECHR (1999) 27021/08 and the case of *Waite & Kennedy v Germany* (18 February 1999) ECHR 26083/94, which required that international organisations offer alternative remedies, that the court held that it 'does not consider it necessary in the light of this jurisprudence to investigate whether an alternative remedy is available. The UN was founded before the ECHR came into place.' (District Court judgement) (n 14 above) para 5.24.

⁷⁸ Reinisch & Weber (n 44 above) 65.

principle of international law.⁷⁹ In addition, it is one of the objectives the UN is mandated to promote and respect.⁸⁰ However, according to Den Dekker and Schechinger,⁸¹ balancing the UN's right to immunity with the claimants right of access to court could lead to the consequences that Member States sought to avoid by granting the UN extensive immunities. Regardless, Reinisch⁸² points out that curtailing the rights of individuals and other entities in an arguably weak position against the UN is contrary to the objectives of the UN. Indeed, Reinisch notes the inequality that exists in the power play between a claimant and the UN. He remarks that in all third-party claims against the UN, the 'weak' individual is seeking access to justice in a claim against the 'strong, immunity-protected' international organisation. Therefore, it is important to understand the current relationship between the claimants' right of access to justice and the UN's jurisdictional immunity.

The right of access to court is a basic tenet of international law enshrined in multiple international conventions.⁸³ This right forms the basis of due process

⁷⁹ Article 10 of the Universal Declaration of Human Rights (hereafter, UDHR) states: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' Although the Declaration itself is not binding, it has arguably crystallised into customary law. Moreover, the Declaration was adopted to specify the 'fundamental human rights' referred to in the Charter. It further solidifies the position of the right of access to court as an objective of the UN Charter. UN GA A/Res/3/217 A (8 December 1948).

⁸⁰ The UN aims to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person ... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. UN Charter Preamble.

⁸¹ G den Dekker & J Schechinger 'The immunity of the United Nations before the Dutch courts revisited' (2010) *The Hague Justice Portal* 5 www.haguejusticeportal.net (accessed 12 February 2018).

⁸² A Reinisch 'The immunity of international organisations and the jurisdiction of their administrative tribunals' (2008) 7 *Chinese Journal of International Law* 289.

⁸³ In addition to the Universal Declaration of Human Rights (n 78 above), article 14(1) of the International Covenant on Civil and Political Rights holds that 'all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. Article 6(1) of the European Convention on Human Rights also provides for the right to a fair trial 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Article 7 of the African Charter of People and Human Rights puts it more succinctly stating that 'every individual shall have the right to have his cause heard'.

without which the rule of law, rights, and freedoms would be abstract notions.⁸⁴ In fact, the Inter-American Court of Human Rights (IACHR) held in the *Castillo Petruzzi & Others v Peru* case that the right of access to justice 'constitutes one of the basic pillars ... of the rule of law in a democratic society'.⁸⁵ It follows that limiting or extinguishing this right ought to be approached with extreme caution. When the right of access to court is extinguished or limited, such restriction must provide a balanced proportionality between the means used to limit this right and the aim sought to be achieved by the limitation, as was held in *Waite & Kennedy v Germany*.⁸⁶ The Court in this case acknowledged the limiting impact of international organisations' immunities on claimants' right of access to court. The Court opined that for such a limitation to be acceptable, it must be proportionate. According to the Court, proportionality is determined by the availability of reasonable alternative dispute resolution mechanisms. The Court held the following:

A material factor in determining whether granting ... immunity ... is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.⁸⁷

Nevertheless, despite the Court's assessment in *Waite & Kennedy*, it appears that there is no clarity as to whether the balance between immunity and access to court is permissible under the UN Charter. Indeed, article 103 of the UN Charter holds the following:

In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 105 of the Charter places an obligation on Member States to respect the immunity of the UN in their national courts. Therefore, in terms of article 103, the

⁸⁴ S Mengjesi & K Skenderaj 'The right of access to court' (2015) 1 *Academic Journal of Business, Administration, Law and Social Science* 7. Moreover, in the case of *Delcourt v Belgium* ECHR (17 January 1970) 2689/65, the European Court held that the right of access to justice was fundamental to the prevalence of the rule of law in a democratic state.

⁸⁵ *Castillo Petruzzi & Others v Peru* (17 November 1999) IACHR para 82. Hereafter, *Castillo Petruzzi v Peru*.

⁸⁶ *Waite & Kennedy v Germany* (n 77above) para 68.

⁸⁷ As above.

immunity of the UN, as a Charter obligation, ought to prevail over the right of access to court as contained in other international agreements. Conversely, the right to justice is a fundamental right and protecting it is part of the objectives of the UN. In the *Srebrenica* case, the Court was of the opinion that article 103 should not amount to an automatic dominance of the UN Charter obligation over all other obligations. In this regard, the District Court held the following:

The rule of article 103 of the UN Charter... does not always and right away bring relief in the event of conflicting obligations of a peremptory nature (*jus cogens*) or conflicting human rights obligations of an international customary law nature.⁸⁸

The Appeal Court expanded further by emphasising the fact that article 103 was not intended to preclude balancing immunity with fundamental rights obligations.⁸⁹ As a result, it remains debatable to what extent article 103 prohibits the balancing of Charter obligations with other fundamental rights. Upholding the UN's immunity is a Charter obligation but so is promoting the Charter's objectives. This places domestic courts in a situation where they have to choose between the Charter's obligations and its objectives. Additionally, section 2 of the Immunities Convention was adopted to supplement the obligation contained in article 105 of the Charter. Therefore, it remains to be determined whether the priority afforded to Charter obligations by article 103 extends to section 2 of the Immunities Convention.

Generally, there appears to be a willingness to delineate the scope of the immunity of other international organisations through a balancing of rights. In *UNESCO v Boulois*,⁹⁰ the French Court rejected UNESCO's claim to immunity as it would

⁸⁸ *Srebrenica* case (District Court judgement) (n 14 above) para 5.16.

⁸⁹ The Appeal Court stated: 'Finally, the Court of Appeal believes that article 103 of the Charter does not preclude testing the immunity from prosecution against article 6 ECHR and article 14 ICCPR ... The Court of Appeal is of the opinion that this was not intended to allow the Charter to just set aside like that fundamental rights recognised by international (customary) law or in international conventions. The development of international law ... shows an increasing attention for and recognition of fundamental rights that cannot be ignored by the Court of Appeal. Moreover, as is clear from the preamble to the Charter and article 1 subsection 3 of the Charter, the UN explicitly has as its purpose the promotion and encouragement of respect for human rights and for fundamental freedoms. It is implausible that article 103 of the Charter intends to impair the enforcement of such fundamental rights.' *Srebrenica* case (Appeal Court judgement) (n 19 above) para 5.5

⁹⁰ *UNESCO v Boulois* (1997) Tribunal de Grande Instance de Paris (14 Ch) 5757.

amount to a denial of justice, which is contrary to public policy. In *Banque Africaine de Development v MA Degboe*,⁹¹ the Court denied the immunity of the African Development Bank as it would leave the claimant without recourse. In *Siedler v Western European Union*,⁹² the Belgian Court took it further by deciding that although the Western European Union did provide alternative dispute resolution mechanisms, these mechanisms were not adequate, leading to a denial of immunity. In addition, there is the above-mentioned case of *Waite and Kennedy*,⁹³ in which the Court found that the immunity of an international organisation is not applicable to employment-related disputes. Nevertheless, such willingness has yet to expand to the UN, as this trend pertains only to other international organisations so far despite the fact that some of these organisations' constitutive texts grant them the same immunity 'from every form of legal process' as the UN.⁹⁴ For example, the aforementioned UNESCO is a specialised agency of the UN and therefore benefits from the immunity clause afforded to it by the Convention on the Privileges and Immunities of the Specialised Agencies.⁹⁵ This clause is a verbatim copy of section 2 of the Immunities Convention. Yet, UNESCO's claim to immunity from the French Court's jurisdiction was rejected. The fact that this trend has yet to be extended to the UN is due to a reticence by national courts to balance the UN's immunity with the claimants' right of access to court.⁹⁶ In fact, this tendency, called the 'avoidance technique', is an established practice employed by national courts. Indeed, courts avoid ruling on the immunity of the UN, in particular, by dismissing claims against organisations due to lack of subject matter jurisdiction.⁹⁷ As a matter of fact, in *Broadbent v Organisation of American*

⁹¹ *Banque Africaine de Development v MA Degboe* (2005) Cour de Cassation (Appeal Court) (Chambre Sociale) 04-41012.

⁹² *Siedler v Western European Union* (2003) Cour du Travail (Labour Court) 617. The Western European Union was an international organisation and intergovernmental military alliance created by the Modified Brussels Treaty of 1954. This organisation was officially declared defunct in 2011.

⁹³ *Waite & Kennedy v Germany* (n 77 above).

⁹⁴ Article 52(1) of the Agreement establishing the African Development Bank of 1964; Article 4 of the Agreement on the status of Western European Union, National Representatives and International Staff of 1955. However, the European Space Agency at the heart of the *Waite & Kennedy* case (n 76 above) had a more limited immunity as per annex I art 4 of the European Space Agency Convention and Council Rules of Procedure of 1980.

⁹⁵ Section 4 of the Convention on the Immunities and Privileges of the Specialised Agencies of 1949.

⁹⁶ Neuman (n 9 above) 3-4.

⁹⁷ This trend is identified by Reinisch who provides detailed characteristics of the avoidance technique in *A Reinisch International organisations before national courts* (2000) 99-127.

States,⁹⁸ the US Court confirmed and explained the rationale behind this so-called avoidance technique:

An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organisations. Denial of immunity opens the door to divided decisions of the courts of different Member States passing judgement on the rules, regulations and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organisation to function properly.⁹⁹

In addition to the potential hindrance by article 103 and the avoidance technique, the right of access to court encounters further challenges. In *Spaan v Netherlands*,¹⁰⁰ the European Commission of Human Rights held that the right of access to court can only be examined if national courts have jurisdiction in the first place. If there is no jurisdiction from the start, there can be no balancing of the rights and immunity does not yield to the right of access to court.¹⁰¹ Indeed, the balancing of rights by national courts can amount to an exercise of jurisdiction as it might entail an assessment of the merits of a case against the UN.¹⁰² Assessing the merits of a claim against the UN is precluded by the Immunities Convention as this would amount to 'a form of legal process'.

The right of access to court, while fundamental, is not absolute and can be limited by a variety of factors other than the immunity of a party to the claim.¹⁰³ The main issue in this study is the disproportionate limitation of the right of access to court leading to its complete denial. However, while this right has arguably crystallised

⁹⁸ *Marvin R Broadbent & Others v Organisation of American States* US 682 F 2d 27 (1980).

⁹⁹ *Marvin R Broadbent & Others v Organisation of American States* (n 98 above) para 30-35.

¹⁰⁰ *Spaan v Netherlands* (12 December 1988) ECHR 12516/86.

¹⁰¹ *Spaan v Netherlands* (n 100 above) 122.

¹⁰² In the *Srebrenica* case, the court stated: 'A testing on the merits or comprehensive testing is also contrary to the ratio of the immunity of the UN as enshrined in international law.' *Srebrenica* case (District Court judgement) (n 14 above) para 5.14.

¹⁰³ The right of access to court can be limited by other factors such as court fees, attorney fees (if a party is not financially able to afford representation), and contractual clauses requiring disputes be settled by binding arbitration, among other things. However, the difference is that the limitation of this right should follow a legal aim and the means used must be proportionate to the legal aim. Furthermore, a limitation to the right of access to court should not affect the essence of the right. *Golder v United Kingdom* (21 February 1975) ECHR 4451/70.

into customary international law, its peremptory nature is still under debate.¹⁰⁴ As such, the test as to whether a limitation of this right is appropriate is not as stringent as the limitation of a generally recognised peremptory norm of international law.¹⁰⁵ Nonetheless, according to Cançado-Trindade,¹⁰⁶ the right of access to justice has conclusively crystallised into a *jus cogens* norm. Cançado-Trindade holds that this is supported by the Inter-American Court's statement in its *Advisory Opinion on the juridical condition and rights of undocumented migrants (Migrants Rights case)*.¹⁰⁷ In this case, the Inter-American Court held that equality and non-discrimination had become *jus cogens* norms of international law.¹⁰⁸ Cançado-Trindade, a former president of the Inter-American Court, argues that this encompasses the right to justice. Cançado-Trindade points to his separate opinion on the *Massacre of Pueblo Bello v Colombia* case,¹⁰⁹ wherein he stated that access to justice is the 'full realisation' of all the rights and fundamental guarantees common to international law and international humanitarian law.¹¹⁰ As such, this right is an imperative of *jus cogens*, without which other peremptory norms of international law would be dead letter. Cançado-Trindade states that his position has since been confirmed by the Inter-American Court in *Goiburú and Others v Paraguay* when the Court decided to expand the material content of *jus cogens* to include the right of access to court.¹¹¹ The concept of access to justice as a *jus cogens* norm is still limited to the jurisdiction of the Inter-American Court. This is an exemplification of regional *jus cogens*, which, according to Hasmath, are 'peremptory norms whose source lies within a

¹⁰⁴ D Shelton 'Hierarchy of norms and human rights: Of trumps and winners' (2002) 65 *Saskatchewan Law Review*; A Orakhelashvili 'The impact of peremptory norms on the interpretation and application of United Nations Security Council Resolutions' (2005) 16.1 *The European Journal of International Law* 64-67; AA Cançado Trindade *The access of individuals to international justice* (2011) 197.

¹⁰⁵ Currently, the international law norms that have attained peremptory status are torture, the prohibition against genocide, maritime piracy, slavery, and, arguably, the crime of aggression. Part II of the *Draft Code of Crimes against Peace and Security of Mankind* (1996).

¹⁰⁶ Trindade (n 104 above) 196.

¹⁰⁷ *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (17 September 2003) IACHR OC 18/03. Hereafter, *Migrants Rights case*.

¹⁰⁸ *Migrants Rights case* (n 107 above) paras 97-101, 110-111.

¹⁰⁹ *Massacre of Pueblo Bello v Colombia* (31 January 2006) IACHR Series C No140.

¹¹⁰ Separate Opinion of AA Cançado Trindade in the case of *Massacre of Pueblo Bello v Colombia* (n 108 above) para 64 in Trindade (n 104 above) 199.

¹¹¹ *Goiburú & Others v Paraguay* (22 September 2006) IACHR Series C No 153.

regional set of higher laws of overriding importance'.¹¹² The Inter-American Court has been a frequent contributor to the concept of regional *jus cogens*.¹¹³ While not explicitly rejecting the concept of regional *jus cogens*, ILC Special Rapporteur on *jus cogens*, Dire Tladi affirms that one of the identifiers of a peremptory norm of international law is the 'acceptance and recognition by a very large majority of States'.¹¹⁴ The effect of this criterion on the concept of regional *jus cogens* espoused by Cançado-Trindade remains to be determined. However, it is a generally accepted premise that peremptory norms of international law or *jus cogens* norms are fundamental principles of international law from which no derogation is permitted.¹¹⁵ Article 53 of the Vienna Convention on the Law of Treaties holds the following:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. (...) A peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Consequently, the UN Charter and the Immunities Convention ought not to be interpreted in a manner that would be contrary to peremptory norms of international law.¹¹⁶ However, if the immunity of the UN is considered as absolute

¹¹² R Hasmath (2012) 'The Utility of Regional Jus Cogens' Paper presented at American Political Science Association Annual Meeting (New Orleans, USA) 30 August–2 September.

¹¹³ In 'Criteria for identifying *jus cogens* norms in public international law' Final Report, International Law Seminar 2015, 51st session, UNOG identifies the following cases as instances of regional *jus cogens* as established by the Inter-American Court: *The Gomez Paquiyauri Brothers v Peru* (8 July 2004) IACHR Series C No 110; *Cantoral Benavides v Peru* (18 August 2000) IACHR Series C No 69; *Tibi v Ecuador* (7 September 2004) IACHR Series C No 114; *Caesar v Trinidad* (11 March 2005) IACHR Series C No 123 and *Baldeon Garcia v Peru* (6 April 2006) IACHR Series C No 147. More specifically on the right of access to justice/court as a regional *jus cogens*, the following cases were identified: *Goiburú v Paraguay* (22 September 2006) IACHR Series C No 153; *La Cantuta v Peru* (29 November 2006) IACHR Series C No 162, and the Separate Opinion of the aforementioned Trindade (n 99 above) in the *Massacre of Pueblo Bello v Colombia* case (n 109 above).

¹¹⁴ Draft conclusion 7 of the ILC Peremptory norms of general international law (*jus cogens*): Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading UNGA A/CN.4/L.936. Hereafter, Draft conclusions on *jus cogens*.

¹¹⁵ Article 53 of the Vienna Convention on the Law of Treaties (VCLT).

¹¹⁶ 'Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former' Draft conclusion 20 of the Draft conclusions on *jus cogens* (n114 above).

and unconditional, it raises the question as to the impact that a *jus cogens* violation such as torture or genocide would have on the immunity of the UN. If *jus cogens* was to prevail over the immunity of the UN in national jurisdictions, it would establish that the immunity of the UN is subject to some limitations. Conversely, upholding immunity in the face of a *jus cogens* violation would be problematic in light of article 53 of the Vienna Convention.

In the *Srebrenica* case, the claimants argued that the UN's immunity should not prevail over the violation of a *jus cogens* norm, namely the prohibition of genocide. The claimants argued that the Dutch battalion and the UN were responsible for the genocide in Srebrenica due to their failure to secure the Srebrenica enclave.¹¹⁷ They thus claimed that the UN had failed to prevent a genocide in contravention of article 1 of the Genocide Convention.¹¹⁸ The Dutch District Court did not assess the scope of the UN's immunity in light of a *jus cogens* violation. Instead, the Court held that the Genocide Convention 'does not provide for (any obligation pertaining to) the enforcement of the standards of enforcing the prohibition on genocide via civil action'.¹¹⁹ Ultimately, the Court did not establish whether the immunity of the UN prevails over a *jus cogens* violation but rather that there is no duty to enforce the Genocide Convention through a civil action.¹²⁰ In the *Srebrenica* case, the UN was accused of failing to prevent a genocide which does not hold the same peremptory weight as the prohibition of genocide.¹²¹ The Appeal Court confirmed so in the following terms: 'Although this reproach directed at the UN is serious, it is not that pressing that immunity should be waived or that the UN's invocation of immunity is, straightaway, unacceptable'.¹²²

¹¹⁷ *Srebrenica* case (District Court judgement) (n 14 above) para 2.2.

¹¹⁸ Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) states: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.

¹¹⁹ *Srebrenica* case (District Court judgement) (n 14 above) para 5.19.

¹²⁰ *Srebrenica* case (District Court judgement) (n 14 above) para 5.19-5.20; (Supreme Court judgement) (n 19 above) para 4.3.7.

¹²¹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia-Herzegovina v Yugoslavia* (26 February 2007) (2007) ICJ Reports p 43 para 161-163.

¹²² *Srebrenica* case (Appeal Court judgement) (n 18 above) para 5.10.

This assessment was taken by some academics to mean that the Appeal Court would have denied the UN's immunity had it been accused of committing genocide or assisting in the commission of one.¹²³ However, the Supreme Court's judgement appears to contradict this interpretation. The Court reaffirmed the absolute nature of the UN's immunity in civil proceedings.¹²⁴

The Dutch Court's assessment was based on a failure to prevent genocide in terms of the Genocide Convention and not the prohibition of genocide as a *jus cogens*. Essentially, the question of whether the UN's immunity prevails over the violation of established *jus cogens* norms such as the prohibition of slavery and genocide remains open.

1.2.2 On the UN's alternative dispute resolution mechanisms

Section 2 of the Immunities Convention, as a supplement to article 105 of the Charter, has granted sweeping immunity to the UN. Whether absolute or limited by functional necessity, this immunity is not intended to shield the UN from liability but rather to protect it from interference by domestic courts.¹²⁵ It follows that while the UN is immune from national jurisdiction, it remains beholden to the substance of the claim.¹²⁶ According to the ICJ in the *Arrest Warrant* case,¹²⁷ immunity from jurisdiction is different from the concept of criminal responsibility. The Court held the following to that effect:¹²⁸

While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

The Court in the *Arrest Warrant* case was referring to the personal immunity of a state official, not that of an international organisation. However, the same

¹²³ G Den Dekker & J Scheschinger 'The immunity of the United Nations before the Dutch Court revisited' (2008) 2 *Hague Justice Journal* 6; Schmalenbach (n 68 above) 317-318.

¹²⁴ *Srebrenica* case (Supreme Court judgement) (n 19 above) para 4.3.6.

¹²⁵ JL Kunz 'Privileges and immunities of international organisations' (1947) 41.4 *American Journal of International Law* 836.

¹²⁶ Wellens (n 55 above) 1662.

¹²⁷ *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v Belgium* ICJ (14 February 2002) (2002) ICJ Reports 75. Hereafter, *Arrest Warrant* case.

¹²⁸ *Arrest Warrant* case (n 127 above) para 60.

principle applies to the UN's immunity as a procedural matter, as opposed to the substantive nature of a claim. Thus, while the UN's immunity might present a procedural bar to a claim, the substance of the claim remains. According to Ferstman, this is due to the natural law obligation to make reparations.¹²⁹ Ferstman argues that the obligation to make reparations is a natural consequence arising from the breach of human rights or international humanitarian law. Indeed, according to Ferstman, once an international organisation is considered responsible for the breach of a primary rule of international law, it automatically owes reparation and remedy to the injured parties. This concept of automatic obligation to make reparations was seemingly confirmed by the ICJ in its opinion on the *Legal Consequences of a Wall in the Occupied Palestinian Territory*.¹³⁰ In this case, the Court held that to make reparations is an obligation resulting from the breach of international obligations. It should be noted that the ICJ was referring to Israel as a state that was in breach of international conventions, not an international organisation. However, Ferstman argues that it is the nature of the violation that determines the reparation obligation and not the nature of the entity responsible for the violation.¹³¹ As such, she contends that the immunity of an international organisation has no bearing on its responsibility to afford remedy and reparations to the parties injured by its actions. This argument is based on the ICJ's *Advisory Opinion in Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,¹³² in which the Court held the following:

The question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts.

¹²⁹ C Ferstman *International organisations and the fight for accountability* (2017) 67.

¹³⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* ICJ (9 July 2004) (2004) ICJ Reports 136 para 152.

¹³¹ Ferstman (n 129 above) 71.

¹³² *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights, Advisory Opinion (Cumaraswamy case)* ICJ (29 April 1999) (1999) ICJ Reports 62 para 66.

On this basis, Ferstman contends that the immunity of the UN must be distinguished from its responsibility for internationally wrongful acts.¹³³ Therefore, immunity is no bar to the reparation for injuries caused by the actions of the UN. The UN remains beholden to the obligation to provide reparation for injury. However, Ferstman concedes that the privileges and immunities of the UN can severely restrict the venues where such a claim can be resolved.¹³⁴ Indeed, while the legal obligation to provide reparations as substantive law remains despite the UN's procedural immunity, this immunity has the effect of extinguishing the substantive claim due to a lack of a forum with jurisdiction. These concerns were pointed out by Judge Chile Eboe-Osuji during an appeal by the Kingdom of Jordan in the *Al-Bashir* case.¹³⁵ The judge in the open session confirmed that 'immunity is a question of legal process, whereas jurisdiction is a matter of legal liability'.¹³⁶ On this basis, he questioned whether there can be a question of legal liability in the absence of a legal process. The judge essentially observed that, despite the fact that immunity is procedural in nature, it can defeat a substantive matter as it exempts the bearer of liability from legal process.¹³⁷

Owing to the barring effect of the UN's procedural immunity, section 29 of the Immunities Convention requires the UN to provide alternative mechanisms to resolve disputes that are precluded from their natural forum by the said immunity.¹³⁸ Section 29 holds the following:

The United Nations shall make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.

The wording of section 29 denotes a command directing the UN to provide appropriate modes of dispute resolution.¹³⁹ In the *Haiti Cholera Dispute*, the Court

¹³³ Ferstman (n 129 above) 73-74.

¹³⁴ As above.

¹³⁵ Paras 8-17 of the official transcripts of the Appeals Chamber hearing submissions on legal matters raised by Jordan on 10 September 2018 pursuant to the *Situation in Darfur, The Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09 p 93. Hereafter, ICC Jordan Appeal Transcripts

¹³⁶ Paras 9-11 of the ICC Jordan Appeal Transcripts (n 135 above) 93.

¹³⁷ Paras 14-17 of the ICC Jordan Appeal Transcripts (n 135 above) 93.

¹³⁸ A Reinisch *The conventions on the privileges and immunities of the United Nations and its specialised agencies: A commentary* (2016) 533.

¹³⁹ Reinisch (n 138 above) 535.

agreed that the wording of section 29 'may suggest that section 29 is more than merely aspirational, that it is obligatory and perhaps enforceable'.¹⁴⁰ This means that there is a duty on the UN to provide alternative modes of dispute resolution considering its immunity from national jurisdictions. Section 29 was intended to mitigate the effects of the UN's immunity on the rights of claimants.¹⁴¹ However, despite the authoritative wording of section 29 and its intended purpose, practice indicates that failure to provide these mechanisms has no consequence on the UN and holds no impact on the UN's immunity. In the *Haiti Cholera Dispute*, US courts dismissed the argument that failure to provide adequate dispute resolution mechanisms in terms of section 29 should result in the stripping of the UN's immunity.¹⁴² The Court, in the first dismissal of the claim, relied on the precedent of *Brzak v United Nations*¹⁴³ in which the US District Court held the following:

Nothing in the text of the CPIUN suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29.¹⁴⁴

However, in the *Brzak* case, the argument was based on the adequacy of the dispute resolution mechanisms provided by the UN. The *Haiti Cholera Dispute* claimants, on the other hand, were not provided with any alternative dispute resolution mechanism. Regardless, this judgement was confirmed on appeal by the Court in the following terms:¹⁴⁵

Section 2's express mention of the UN's express waiver as a circumstance in which the UN 'shall (not) enjoy immunity' negatively implies that all other circumstances, including the UN's failure to fulfil its Section 29 obligation, are excluded. It necessarily follows that the UN's fulfilment of its Section 29 obligation is not a condition precedent to its Section 2.

Nonetheless, it remains of the utmost importance to evaluate the alternative dispute resolution mechanisms provided by the UN. Indeed, efficient and

¹⁴⁰ *Haiti Cholera Dispute* (n 37 above) 6.

¹⁴¹ Reinisch (n 138 above) 533.

¹⁴² *Haiti Cholera Dispute* (n 37 above).

¹⁴³ *Brzak v United Nations* 597 F 3d (2010).

¹⁴⁴ *Brzak v United Nations* (n 143 above) para 107.

¹⁴⁵ *Haiti Cholera Dispute* (n 37 above) 12.

satisfactory dispute resolution mechanisms would lessen the importance of delineating the scope of the UN's immunity. Ideally, the UN should be able to self-regulate and provide an appropriate dispute resolution mechanism to claimants. Providing adequate dispute resolution mechanisms considerably mitigates the challenging effect of immunity on a claim.

Section 29 of the Immunities Convention and various SOFAs provide for dispute resolution mechanisms to claims of a private law character only. According to Schmalenbach, the UN considers public law claims to be non-receivable because these claims are based on the harmful effects of UN policy decisions and implementation.¹⁴⁶ The author argues that claims based on the breach of an international obligation can only be pursued by Member States through the appropriate diplomatic channels. This, according to Schmalenbach, is due to the fact that the UN Charter does not confer direct rights on individuals. Consequently, a claim deemed to be of a public law character would not be adjudicated by national courts due to the UN's immunity and would not have access to the UN's alternative dispute resolution mechanisms. Therefore, the characterisation of a claim is crucial as it determines whether a claim has access to a forum. As such, it is critical to establish what makes a claim private or public and who gets to make such a key determination.

The distinction between private and public law claims with regard to an international organisation is markedly different from the manner in which this distinction is applied in national legislations.¹⁴⁷ The UN is an international organisation with an international mandate derived from the UN Charter which denotes an inherently public law character.¹⁴⁸ Moreover, in every SOFA, the government undertakes to respect the 'exclusively international nature of United Nations peacekeeping operations'.¹⁴⁹ However, Schmalenbach argues that within the legal system of a host State, a UN peacekeeping mission is considered a

¹⁴⁶ Schmalenbach (n 68 above) 321-322.

¹⁴⁷ Lundahl (n 62 above) 84.

¹⁴⁸ Lundahl (n 62 above) 85.

¹⁴⁹ Section 7 of the Model SOFA.

private entity.¹⁵⁰ According to Schmalenbach, UN peacekeeping missions are generally not authorised to exercise public authority.¹⁵¹ As such, a claim between the UN as a private entity and private individuals ought to be considered as a claim of a private nature. This assertion is not supported by UN policies and regulations; UN peacekeeping missions are frequently called upon to perform duties that amount to an exercise of public authority. For instance, the UN peacekeeping mission in Haiti (MINUSTAH) is mandated *inter alia* to reform the national police and to assist in the restoration and maintenance of the rule of law.¹⁵² Accordingly, the nature of the UN as a party to a claim is not a decisive factor in determining the nature of the claim.

UN practice offers some clarity as to what constitutes a claim of a private law character, namely contractual claims and tortious claims.¹⁵³ In the peacekeeping context, more specificity is provided as to what claims are deemed to be of private law. The UN considers the following as claims of a private law character:¹⁵⁴

- i. Compensation claims submitted by third parties for personal injury or death and/or property damage or loss incurred as a result of acts committed by members of the peacekeeping force within the mission area concerned.
- ii. Claims arising out of commercial agreements (contracts or lease agreements).

However, despite this being the standard for private claims relating to peacekeeping operations as established by the UN itself, the *Haiti Cholera Dispute* claimants' demands were rejected by the UN. The UN's Office of Legal Affairs rejected the claim stating that the 'consideration of these claims would necessarily include a review of political and policy matters'.¹⁵⁵ This is despite the fact that some of the *Haiti Cholera Dispute* claims were based on tort law and ought to have

¹⁵⁰ K Schmalenbach 'Third party liability of international organisations: A study on claim settlement in the course of military operations and international administrations' (2005) 10 *International Peacekeeping* 40.

¹⁵¹ Schmalenbach (n 150 above) 42.

¹⁵² Para 7 of the UN Security Council Resolution 1542 UN Doc S/Res/1542.

¹⁵³ In addition to contractual claims, the UN is liable for 'third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH' para 54 of the MINUSTAH SOFA. The UN includes this limitation of liability in all SOFAs.

¹⁵⁴ Procedures in place for implementation of article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations UN Doc A/C.5/49/65 (24 April 1995) para 15.

¹⁵⁵ Letter of the United Nations Under-Secretary-General for Legal Affairs to the Director of the Institute for Justice and Democracy in Haiti (n 36 above).

been considered as private law. Indeed, salient elements of the *Haiti Cholera Dispute* claim were indisputably of a private nature. The claim for compensation for death and injury was based on the alleged negligence by the UN and was grounded in Haitian domestic law.¹⁵⁶

Claims that are uncontestably considered to be of a private law character still encounter challenges in their quest for remedy. Contractual claims against the UN are customarily resolved internally.¹⁵⁷ The procedure and mechanisms for dispute resolution of contractual claims are often agreed upon in the contract between the UN and the contractor.¹⁵⁸ It has been argued that the specific mechanisms for the settlement of contractual disputes lean in favour of the UN.¹⁵⁹ Nonetheless, contractual dispute resolution mechanisms are available and, according to the UN, these mechanisms are adequate and satisfactory.¹⁶⁰ Moreover, courts have demonstrated an inclination to permit contractual disputes against the UN to be litigated in their forums.¹⁶¹ As such, contractual claims are not the focus of this study.

Tort claims, on the other hand, specifically in the peacekeeping context, are subject to different dispute resolution mechanisms. To give effect to section 29,

¹⁵⁶ 'Petition for Relief to the Chief of the MINUSTAH Claims Unit' (n 27 above) para 80.

¹⁵⁷ Para 54 of the Model SOFA (which is reiterated in all subsequent SOFAs) states that 'disputes concerning the terms of employment and conditions of service of locally recruited personnel shall be settled by the administrative procedures to be established by the special representative/commander'.

¹⁵⁸ In procedures in place for implementation of article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations UN Doc A/C.5/49/65 (24 April 1995) para 3, the UN informs that 'it has been the practice of the United Nations to make provision in its commercial agreements (contracts and lease agreements) for recourse to arbitration in the event of disputes that cannot be settled by direct negotiations'.

¹⁵⁹ Schmalenbach (n 68 above) 320.

¹⁶⁰ 'The overwhelming majority of commercial agreements that have been entered into by the United Nations have been performed without the occurrence of any serious difficulty and, when problems have arisen, they have been resolved through direct negotiations in most instances. The United Nations has, therefore, had recourse to arbitral proceedings in only a limited number of cases to date. The arbitral awards that have been delivered have been largely based on the particular facts relating to the contract concerned and have not raised points of general legal interest regarding the status, privileges, and immunities of the Organisation.'

¹⁶¹ In *Effect of awards of compensation made by the United Nations Administrative Tribunal* (13 July 1957) (1957) ICJ Reports 47, the ICJ held that it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals ... that it [the UN] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them' 57.

the UN provides for dispute resolution mechanisms in the SOFAs concluded between the UN peacekeeping mission and the host States. In terms of the Model SOFA, any private law claim which falls outside of national courts' jurisdiction as a result of the UN's immunity must be settled by an SCC established to that effect.¹⁶² Section 51 of the UN Model SOFA holds the following:

Any dispute or claim of a private law character to which the United Nations peacekeeping operation or any Member thereof is a party and over which the courts of (host country/territory) do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose.

Each and every SOFA concluded between the UN and the host State following the Model SOFA includes a section providing for an SCC.¹⁶³ This commission serves as an alternative dispute resolution mechanism, as required by section 29. In terms of the dispute resolution provision as contained in every SOFA, each peacekeeping mission should establish an SCC in the host State. To date, the SCC has not been established by the UN in any of its peacekeeping missions. The UN theorises that this might be due to either lack of interest from the host States or the generally satisfactory manner in which local review boards have been operating.¹⁶⁴

In lieu of an SCC, UN peacekeeping missions offer local review boards as alternative dispute resolution mechanisms.¹⁶⁵ These review boards are intended

¹⁶² Para 51 of the Model SOFA (n 40 above).

¹⁶³ Para 54 of the SOFA between the United Nations and the Government of the Republic of South Sudan concerning the United Nations Mission in South Sudan (UNMISS) of 8 August 2011; section 7 of Regulation 2000/47 on the Status, Privileges and Immunities of the Kosovo Force (KFOR) and the United Nations Mission in Kosovo (UNMIK) of 18 August 2000; para 54 of the Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations operations in Haiti (MINUSTAH SOFA) of 9 July 2004.

¹⁶⁴ The UN Secretary-General in his report to the General Assembly was of the opinion that the reason standing claims commissions were never established was 'the result of a lack of political interest on the part of host States, or because the claimants themselves may have found the existing procedure of local claims review boards expeditious, impartial and generally satisfactory' 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: Financing of the United Nations peacekeeping operations' UN doc A/51/903 (21 May 1997).

¹⁶⁵ In his report, the UN Secretary-General stated that 'to date, third-party claims of a private law nature have been settled without resort to the establishment of standing claims commissions.

to resolve day-to-day claims against peacekeeping missions. While these review boards have been effective in resolving small claims against the missions, they are not equipped to deal with cases of a larger scale or involving a multitude of claimants. This is due to the fact that review boards have limited mandates and resources which, while adequate for their intended purpose, need to be expanded to cater for claims that fall within the purview of SCCs. In fact, the UN itself has reported that local claims review boards had difficulties coping with the volume of claims received.¹⁶⁶ In addition to logistical difficulties, the local review board mechanism was criticised for tipping in favour of the UN. According to Schmalenbach,¹⁶⁷ based on the initial structure of the local claims review boards, the claimant's position in front of the review board was as strong as the diplomatic protection afforded by the host State. Indeed, the review boards initially consisted of a negotiation between the UN and the host State.¹⁶⁸ Consequently, should the host State express no interest in the proceedings, the UN becomes the sole decision maker. Based on internal documents of the United Nations Emergency Force (UNEF) in Egypt,¹⁶⁹ Schmalenbach points to the statement by UN Advisor Cox in which she states:

The Egyptian Government is not an interested party in any claim by a private individual, so that I trust there is no implication that UNEF and the Egyptian Government represent opposite sides in a dispute. While your Liaison Headquarters may serve as a channel for claims in appropriate instances, and in helping us arrive at

Instead, it has been the practice, with respect to most past and present United Nations operations, for a local claims review board established in the mission on the basis of authority delegated by the Controller to examine, approve, or recommend settlement of third-party claims for personal injury or death and for property loss or damage.' 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: Financing of the United Nations peacekeeping operations' UN GA A/51/389 20 September 1996 para 22.

¹⁶⁶ The UN Secretary-General stated in his report that 'the increasing number and complexity of claims that have arisen from recent major United Nations operations have taxed the ability of the Organisation to deal with claims efficiently and promptly'. Para 26 of the UN GA A/51/389 (n 165 above).

¹⁶⁷ Schmalenbach (n 150 above) 41-42.

¹⁶⁸ Paras 22-23 of the UN GA A/51/389 (n 165 above).

¹⁶⁹ Letter of UN Advisor, WW Cox, to the Legal Officer of the Egyptian Liaison Staff Headquarters, Captain Khamis El Shafay (24 August 1957) UN Archives New York. Schmalenbach (n 150 above) 41.

disinterested estimates of any case, it would be a serious matter if it were to take a partisan stance in pressing claims against us.¹⁷⁰

Local claims review boards are now structured in a way that leaves the entire processing of claims in the hands of the UN. Schmalenbach thus contends that even in instances where States could participate in the proceedings, the UN would take advantage of the host State's disinterest in the proceedings to unilaterally decide on compensation claims before the review boards. The author opines that based on the current structure of review boards, the claimant has virtually no influence on the outcome.

Peacekeeping missions have grown exponentially in recent years.¹⁷¹ They now hold extensive mandates and involve a large number of members and staff. As peacekeeping missions grow in importance so do the claims levelled against them. To limit the impact of the claims on its resources, the UN adopted a resolution limiting its liability.¹⁷² This resolution imposes temporal and financial limitations on claims receivable by the UN. In addition, it excludes certain claims altogether: this resolution excludes compensation for non-economic loss, including punitive or moral damage.¹⁷³ The compensation payable is strictly capped at 50 000 US dollars, which can only be exceeded under special circumstances which can only be exceeded in exceptional circumstances after an investigation has been carried out by the Secretary-General himself.¹⁷⁴ Moreover, the resolution wholly excludes liability for claims arising out of 'operational necessity'.¹⁷⁵ It remains to be determined to what extent these limitations and exemptions of liability affect the claimants' right of access to remedies.

¹⁷⁰ Letter of UN Advisor to the Egyptian Liaison Headquarters (n 167 above).

¹⁷¹ Zwanenburg (n 2 above) 28-30.

¹⁷² Third party liability: Temporal and financial limitations A/Res/52/247 (17 July 1998).

¹⁷³ The resolution excludes compensation for non-economic loss such as pain and suffering, moral anguish, homemaker services, and any other loss that, in the opinion of the Secretary-General, are 'impossible to verify and not directly related to the injury or loss itself'. Para 9 of Resolution A/RES/52/247 (n 173 above).

¹⁷⁴ Para 9(e) of Resolution A/RES/52/247 (n 172 above).

¹⁷⁵ 'Operational necessity' in this context appears to be akin to the traditional 'military necessity' concept. However, for conduct to be considered a result of operational necessity, it must correspond to the criteria established by the UN Secretary General in his report A/51/389 (n 165 above) para 2.14.

These mechanisms put in place by the UN have resulted in catering only for a select category of claims. Only economic claims of a private law nature not resulting from operational necessity and not exceeding 50 000 US dollars may be given adequate access to remedy. This *status quo* has catered adequately for small claims such as traffic accidents, insurance claims, and other small claims over the years.¹⁷⁶ However, these dispute resolution mechanisms are not mandated to adjudicate larger claims involving a large number of claimants. As a result, these mechanisms providing dispute resolution forums to only a select category of claims coupled with the extensive immunity enjoyed by the UN create the remedy gap. Consequently, third-party claimants end up in a position where their claims can neither be adjudicated upon by national courts due to the UN's immunity nor by local claims review boards as they lack the mandate and resources to do so.

1.2.3 On bridging the gap

The current literature on the remedy gap seldom offers insights into ways of bridging the gap. The seemingly insurmountable challenge provided by the UN's 'absolute' immunity is a deterrent to most studies. Indeed, one writer, Lundahl,¹⁷⁷ is of the opinion that the remedy gap can only be addressed through political action. This is due to the author's assessment that the current jurisprudence does not provide 'argumentative tools' to assist in bridging the gap.¹⁷⁸ Similarly, Schmalenbach¹⁷⁹ has dubbed the gap a 'Gordian knot' to illustrate the complexities involved in disentangling this issue.

Reinisch¹⁸⁰ provides an assessment of the role of the judiciary as a way to bridge the accountability gap. The author credits the sweeping jurisdictional immunities of international organisations for the accountability gap in claims against the said organisations. In his article, the author traces the awareness of the accountability

¹⁷⁶ Schmalenbach (n 150 above) 320.

¹⁷⁷ Lundahl (n 62 above) 77-117.

¹⁷⁸ Lundahl (n 62 above) 109.

¹⁷⁹ Schmalenbach (n 68 above).

¹⁸⁰ A Reinisch 'To what extent can and should national courts fill the accountability gap' (2013) 10 *International Organisations Law Review* 572-587.

gap to the rise of constitutionalist thinking.¹⁸¹ This new approach to the rule of law, which places an emphasis on rights and remedies, has altered the views on the immunity of international organisations. This is especially prevalent in states bound by the European Convention of Human Rights. The author surmises that due to this constitutionalist thinking, the European Court and the European Commission have evolved from their position that the right of access to court applies only where there is jurisdiction in the first place.¹⁸² These institutions now recognise the integral conflict between immunity and the right of access to court. This shift, according to Reinisch, is evidenced by the *Waite & Kennedy* case.¹⁸³ This case, in his opinion, is the catalyst to the ensuing trend in European jurisdictions whereby national courts are now keen to limit the broad immunity of international organisations.¹⁸⁴ According to Reinisch, based on the *Waite & Kennedy* case,¹⁸⁵ national courts are demonstrably willing to restrict the immunity of international organisations. On this basis, he offers his take on how national courts can become a solution to the accountability gap. In determining whether national courts should 'fill' the accountability gap, Reinisch holds that it is crucial to establish whether they are suited for the task and whether this would disproportionately impede the functional independence of international organisations.

¹⁸¹ Further insights on constitutionalist thinking can be found in A Reinisch 'Privileges and immunities' in J Klabbers & A Wallendahl (eds) *Research handbook on the law of international organisations* (2011) 132-155.

¹⁸² *Spaan v The Netherlands* (n 100 above) where the European commission held that 'it is in accordance with international law that States confer immunities and privileges to international bodies like the Iran-United States Claims Tribunal which are situated in their territory. The Commission does not consider that such a restriction of national sovereignty in order to facilitate the working of an international body gives rise to an issue under the Convention' 122.

¹⁸³ *Waite & Kennedy v Germany* (n 77 above) 13.

¹⁸⁴ In France, *UNESCO v Boulois* (n 90 above) in which the immunity of an international organisation was rejected as it 'would inevitably lead to preventing the claimant from bringing his case to a court. This situation would be contrary to public policy as it constitutes a denial of justice and a violation of the provisions of article 6(1) of the ECHR' 295. In *Banque Africaine de Développement v MA Degboe* (n 64 above), a French Court of Appeal also denied the immunity of an international organisation on the same grounds. In Italy, the cases of *Drago v International Plant Genetic Resources Institute* (2007) Corte di Cassazione (Appeal Court) 3718/2007 and *European University Institute v Piette* (2000) Corte di Cassazione 149/1999. In Belgium, *Siedler v Western European Union* (n 65 above).

¹⁸⁵ *Waite & Kennedy* case (n 77 above).

On national courts' suitability and expertise, Reinisch holds that it depends on the type of claim. Regular domestic civil courts can competently adjudicate a simple contractual or tortious claim. With regard to more complex claims involving international law and the internal issues of an organisation, the author agrees with the argument that an international court or tribunal would be better suited. Nonetheless, he argues that national courts possess the expertise to hear complex international matters as they regularly do so. This is based on his assessment that national courts

operate as decentralised enforcers of international law: they have to interpret treaties, ascertain customary law, or decide upon international responsibility questions. They must also be presumed to be able to solve complex international law issues involving international organisations'.¹⁸⁶

However, Reinisch recommends that national courts defer to alternative dispute settlement institutions if they are available and better suited to decide on complex issues. He reckons this approach would incentivise international organisations to ensure the availability of alternative mechanisms.

The balancing of rights should take into account the functional independence of international organisations. Reinisch identifies certain criteria that would assist in determining the extent of interference on the functional independence of international organisations: the amounts involved, the legal issues at hand, and the potential 'deterrence' on the decision-making of the organisation.

Reinisch further examines which institutions are better suited to close the accountability gap. He opines that international organisations and national courts are 'judges in their own cause' because courts will always opt to exercise their adjudicatory powers and international organisations evidently desire to avoid litigation. As such, international courts or tribunals could offer a more impartial and balanced assessment. To that effect, the author recommends that an international tribunal be mandated to offer a 'preliminary ruling' to decide whether an international organisation enjoys immunity before national courts.

¹⁸⁶ Reinisch (n 180 above) 581.

In conclusion, Reinisch cautions that national courts should be called upon to close the accountability gap as a last resort and mainly to incentivise international organisations to provide adequate dispute resolution mechanisms.

Shrijver¹⁸⁷ disagrees with Reinisch's proposal of making use of national courts to close the accountability gap. He contends that this approach would result in inconsistencies due to the different national rulings. Shrijver further disagrees with Reinisch's recommendation that international courts should be called upon to decide whether a national court has unduly rejected an international organisation's immunity. Shrijver argues that international organisations should be granted immunity *ab initio* to avoid the dissatisfaction of the (initially) successful claimant who would not receive compensation once the organisation's immunity is upheld retrospectively by an international court. As such, Shrijver offers recommendations that, in his opinion, would be better suited to close the accountability gap.¹⁸⁸

In his study, Shrijver offers several alternatives to the restriction of the immunity of the UN as a solution to closing the accountability gap. First, he proposes that Member States should be held responsible instead of the UN. This is based on the obligation of the Member States to provide adequate access to court within their territories.¹⁸⁹ Shrijver agrees that while this option can work in claims against UN employees, it is more problematic in cases involving UN peacekeeping missions. The author predicts that holding troop contributing states liable for the actions committed under the UN banner would be unfair and it would negatively impact

¹⁸⁷ N Shrijver 'Beyond Srebrenica and Haiti: Exploring alternative remedies against the United Nations' (2013) 10 *International Organizations Law Review* 588-600.

¹⁸⁸ It should be mentioned that Reinisch offers recommendations on closing the accountability gap caused by the immunity of international organisations in general. Shrijver offers his recommendations based on the specific circumstances of the UN in particular.

¹⁸⁹ Shrijver provides instances in which member states were held responsible for the actions of international organisations. In the Spanish case of *X v Deodato* (1995) Tribunal Constitucional (Constitutional Court) 140/1955, the Court requested the Spanish Government to declare an Italian diplomat *persona non grata* or else be found liable for the compensation owed to the claimant. In the French case of *Minister of Foreign Affairs v Dame Burgat & Others* (1976) *Conseil d'Etat* 94218, the court concluded that the French Government would be financially liable if the claimant had no access to court in a case against a UNICEF employee.

the future of peacekeeping.¹⁹⁰ Shrijver's second solution is the establishment of an SCC as envisaged by the Model SOFA. According to the writer, there is now ample experience in peacekeeping missions based on the work of local review boards. As such, an SCC with a clear mandate would be an ideal solution. However, Shrijver cautions that this SCC should be limited to civil and administrative cases only.¹⁹¹ In addition, Shrijver reasons that the appointment of an ombudsperson to deal with claims against the UN would assist in closing the remedy gap. Shrijver states that the ombudsperson system has been successful in dealing with claims against other international organisations. The author provides the examples of the World Bank's 'compliance advisor ombudsman' and its 'inspection panel' and the European Union's ombudsman office. Shrijver recalls that the UN mission in Kosovo (UNMIK) has already made use of an ombudsperson's services to resolve claims by local populations against the mission.¹⁹² Lastly, Shrijver recommends that the mandate of the UN tribunals be expanded from staff disputes to include civil and administrative claims.

The proposal of using an international court or tribunal to adjudicate claims against an international organisation is one that is repeated by Wellens in his study on the remedy gap. Just like Reinisch, Wellens¹⁹³ is of the opinion that there is one such court that already exists that could potentially bridge the remedy gap – the International Court of Justice (ICJ). According to Wellens, the ICJ offers an ideal solution as it already fulfils a double role with regard to international organisations. The ICJ protects the general interests of international organisations with regard to the particular interests of Member States. It also monitors their adherence to the international law rules governing their activities. However, the ICJ statute is adamant that 'only states may be parties in cases before the Court'.¹⁹⁴ As such, an international organisation has no *locus standi* in the ICJ as an applicant or a respondent. Wellens argues that article 34 of the ICJ Statute ought to be expanded

¹⁹⁰ Shrijver further states that 'such an approach would run counter to the idea behind the United Nations being a separate international legal person ... It would be fairer to hold all member States of the organisation jointly liable, but this does not appear feasible for practical reasons' Shrijver (n 187 above) 595.

¹⁹¹ Shrijver (n 187 above) 596.

¹⁹² Shrijver (n 187 above) 596-597.

¹⁹³ Wellens (n 55 above).

¹⁹⁴ Article 34 of the Statute of the International Court of Justice of 1946. Hereafter, ICJ Statute.

to allow for direct access by international organisations. He holds that scholars and learned societies have made a case for the expansion of article 34 since the 1950s.¹⁹⁵ In fact, the US Department of State recommended a widening of access to the ICJ in 1976.¹⁹⁶ States and international organisations share the same systemic interest in observing their international law obligations. As such, Wellens argues that the ICJ ought to take into account these developments in international law and more specifically international relations. He advances that the ICJ offers a better advantage over any other international and domestic courts due to the fact that the Court is unobstructed by 'narrow limitations that a special regime may impose on a forum'.¹⁹⁷

In addition to the ICJ as a potential solution to the remedy gap, Wellens briefly considers the avenue of diplomatic protection as recourse for claimants. He states that injured individuals facing a denial of justice due to the immunity of international organisations and the lack of dispute resolution mechanisms should be afforded diplomatic protection by their national state. Wellens argues that such diplomatic protection could be in the form of the lifting of the jurisdictional immunity of international organisations in the domestic courts of the claimants' national state. Wellens essentially argues for the limitation of the immunity of international organisations in domestic courts framed as a form of 'diplomatic protection'.

1.3 Research objectives and questions

Current practice demonstrates the existence of a remedy gap in third-party claims against the UN as evidenced by the *Haiti Cholera Dispute* and the *Mothers of Srebrenica* case. As such, the existence of the gap is not in question in this study. The object of the study is to examine the factors contributing to this gap in order to offer recommendations aimed at bridging the remedy gap while preserving the functional independence of the UN. To this effect, the present study seeks to determine whether the remedy gap can be bridged based on the existing

¹⁹⁵ Wellens (n 55 above) 1167.

¹⁹⁶ 'United States Department of State study on widening access to the International Court of Justice' reprinted in 16 *International Legal Material* 187 (1977) 187-206.

¹⁹⁷ Wellens (n 55 above) 1167 quoting J Charney 'Is international law threatened by multiple tribunals?' 271 *Collected Courses of The Hague Academy of International Law* (1998) 101.

obligation to provide appropriate alternative dispute resolution, in terms of the Immunities Convention and other UN instruments and policies. In essence, it is an examination into whether the gap is caused by an inappropriate implementation of the international law rules governing the obligation to provide remedies or whether the international law rules in the form of conventions, customary law, jurisprudence and policies contribute to the gap. To establish this, the study will attempt to answer the following questions:

1. Based on the general understanding that the causes of remedy gap are double-pronged – the UN's immunity from national jurisdictions and the inadequacy of the UN's alternative dispute resolution mechanisms – what are the factors underlying these two components of the gap that exacerbate or contribute to the remedy gap?
2. To what extent can the alternative dispute resolution mechanisms afforded by the UN be considered an appropriate and good faith implementation of the obligation to provide remedies to third-party claimants, as dictated by the rules of international law?
3. To what extent can the remedy gap for third-party claims against UN peacekeeping mission be addressed through tools under treaty law and rules of international law?

1.4 Significance of the study

This study offers a novel approach to the issue of the remedy gap in third-party claims against the UN. It proposes to assess the multi-pronged roots of the remedy gap in order to provide recommendations tailored for the specific issues that lead to the remedy gap problem. Most studies on the remedy gap tend to focus on the jurisdictional immunity of the UN as the main and perhaps sole cause of the remedy gap. Consequently, these studies put an emphasis on national courts as an ideal solution to the remedy gap. This approach, while sound, presents a number of issues. There is not enough case law dealing with the UN itself. As a result, most of the analysis is done by extrapolating from cases regarding other international organisations and applying that to the UN. The issue with this is the very specific and peculiar nature of the UN itself. Consequently, the national courts' judgements on other international organisations will not always be appropriate for the specific circumstances of the UN. Moreover, the few cases on the UN specifically have been demonstrated to always uphold the UN's immunity. As a result, they do not considerably advance the discourse on the remedy gap.

Focusing on the jurisprudence as a way to bridge the gap is rather reactionary and does little to solve the gap. This is because when a claim against the UN goes in front of a national court, it is indicative that the claimant's rights have already been negatively impacted by the remedy gap.

The present study will determine whether the remedy gap in third-party claims is the result of inadequate implementation of the UN's legal obligations and official policies or whether the legal framework itself is inapt and part of the problem. This is intended to provide workable recommendations based on whether the remedy gap is results from an unsuitable legal framework or from an inapt implementation of the legal directives to provide remedies. Therefore, it is a study into the causes and not the effects of the remedy gap. This will exponentially advance the discourse on ways to bridge the remedy gap while promoting the functional independence of the UN. This approach intends to incentivise all relevant stakeholders to provide practical reforms aimed at safeguarding accountability in peacekeeping missions.

Chapter 2

The jurisdictional immunity of the United Nations peacekeeping missions

2.1 Introduction

As observed in the introductory chapter, the UN immunity from national jurisdictions is considered to be one of the main proponents of the remedy gap in third-party claims against UN peacekeeping missions. As demonstrated by the cases at the crux of this study, namely, the *Haiti Cholera Dispute*¹ and the *Srebrenica* case,² third-party claimants who are not granted access to alternative dispute resolution mechanisms often seek redress in national courts. Yet, as discussed in the above chapter, these claims fail in national courts as a result of the jurisdictional immunity of the UN. Therein lies the remedy gap in third-party claims against the UN. A claim is effectively extinguished due to lack of a judicial forum with jurisdiction coupled with inadequate or lacking alternative dispute resolution mechanisms.³ Accordingly, this chapter assesses how the scope of the UN's jurisdictional immunity contributes to the remedy gap. It is the scope of this immunity that is at the core of the ongoing debate on the remedy gap. Therefore, to address this remedy gap, this chapter seeks to determine whether the UN's immunity is absolute or whether it is conditional and subject to limitations.

¹ 'Petition for Relief to the Chief of the MINUSTAH Claims Unit' submitted on 3 November 2011. <http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> (accessed 15 January 2018) and *Delamas George & Others v United Nations* (2015) 84 F 3d 246 (District Court judgement), (2015) 15-455-cv (US Court of Appeal). Hereafter, *Haiti Cholera Dispute*.

² *Mothers of Srebrenica & Others v State of The Netherlands and the United Nations* (2008) (District Court of The Hague judgement) 295247/HA; (2010) (Court of Appeal of The Hague) 200.022.151/01; (2012) (Supreme Court of the Netherlands) 10/04437. Hereafter, *Srebrenica* case.

³ H Krieger 'Addressing the accountability gap in peacekeeping: Law-making by domestic courts as a way to avoid UN reforms?' (2015) 62 *Netherlands International Law Review* 260.

The UN derives its jurisdictional immunity principally from the UN Charter⁴ and the Immunities Convention.⁵ Article 105(1) of the UN Charter provides that the 'Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'. The Immunities Convention, adopted to provide more specificity to the jurisdictional immunity of the UN, further holds the following: ⁶

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 shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.⁷

The UN Charter and the Immunities Convention are the main instruments providing for the immunity of the UN in the territory of its Member States. In terms of both instruments, the underlying rationale for this jurisdictional immunity is that it is intended to allow the UN to function unimpeded by the judiciaries of its Member States.⁸ While the UN Charter provides for a seemingly functionally limited immunity, the Immunities Convention provides for absolute immunity qualified only by a waiver.⁹ Owing to the divergent interpretations of these instruments, the true scope of the UN's immunity needs to be ascertained in order to address the growing remedy gap in third-party claims. As such, the first part of this chapter provides a framework that addresses potential conflicts between two instruments dealing with the same subject matter under international law. This is done to determine how conflicts of norms are generally

⁴ The United Nations Charter of 1945, hereafter the UN Charter.

⁵ Convention on the Privileges and Immunities of the United Nations of 1946. Hereafter, Immunities Convention.

⁶ This is in terms of article 105(3) of the UN Charter which holds that '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'.

⁷ Article II, section 2 of the Immunities Convention.

⁸ As opposed to the sovereign equality rationale underpinning state immunity. Simma B *The United Nations: A Commentary* (2012) 2159. Hereafter, UN Charter Commentary.

⁹ A Reinisch & UA Weber 'In the shadow of Waite & Kennedy: The jurisdictional immunity of international organisations, the individual's right of access to court and administrative tribunals as alternative means of dispute settlement' (2004) 1 *International Organisations Law Review* 59.

resolved in international law. This is in order to apply these general conflict resolution norms specifically to the potential conflict between the Charter and the Immunities Convention. The second part of this chapter consists of a study of the scope of the UN's immunity under the Immunities Convention. This first consists of an interpretation of section 2 of the Immunities Convention in terms of the rules on the interpretation of treaties under the Vienna Convention on the Laws of Treaties (VCLT).¹⁰ It entails a study of section 2's text in its ordinary meaning, context, and subsequent practice. This practice includes agreements, UN policies, and the jurisprudence subsequent to section 2 of the Immunities Convention. The UN Charter is the first instrument providing for the UN's immunity from national courts. As mentioned above, however, the scope of the UN's immunity under the Charter seemingly differs from that which is contained in the Immunities Convention. As such, the third part of this chapter provides an interpretation of article 105 of the UN Charter so as to evaluate the nature and extent of the discrepancies between these two instruments and the implications of the scope of the UN's jurisdictional immunity. This entails an application of the above general framework of addressing conflicts between two treaties to the UN Charter and the Immunities Convention specifically.

2.2 Framework of addressing the potential conflict between the UN Charter and the Immunities Convention

As noted above, there is a potential immunity gap owing to the apparent divergence in the scope of immunity as contained in the UN Charter, on one hand, and in the Immunities Convention, on the other. The language of the Immunities Convention provides for an absolute immunity qualified only by a waiver while the text of UN Charter seemingly limits the UN's immunity to that which is 'necessary for the fulfilment of its purpose'.¹¹ This discrepancy in scope has led to differing interpretations as a result of what is understood to be a conflict between article 105 of the UN Charter and section 2 of the Immunities Convention.¹² This potential conflict exists as a matter of interpretation of both

¹⁰ Article 31 of the Vienna Convention on the Laws of Treaties of 1969. Hereafter, VCLT.

¹¹ Article 105 of the UN Charter.

¹² F Rawski 'To waive or not to waive: Immunity and accountability in UN peacekeeping operations' (2002) 18 *Connecticut Journal of International Law* 111-112; M Arsanjani 'Claims against international organisations: Quis custodiet ipsos custodes?' (1981) 7.2 *Yale Journal of World Public*

instruments. Indeed, it needs to be determined if the apparent divergence in language translates into an actual divergence in scope. This is determined through an interpretation of these treaties which should be done 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.¹³ Should this potential conflict between the immunity provisions of the UN Charter and the Immunities Convention be confirmed, it must be determined which instrument prevails. It must thus be established whether the UN's immunity is absolute and can only be limited by an express waiver or whether this immunity is limited by functional necessity. To that effect, this section assesses the manner in which conflicts of norms are generally resolved in international law.

Before resolving a conflict of norms in international law, it must first be established that such a conflict exists. The first thing to be determined in that regard is whether the norms regulate the same subject matter.¹⁴ A conflict of norms in international law occurs when two diverging norms regulating the same subject matter are applicable to a certain situation.¹⁵ There is conflict of norms if the norms are simultaneously applicable to the same situation in an equally binding manner. Thus, by applying one norm, the other applicable and binding norm is inevitably violated.¹⁶ Indeed, dealing with the same subject matter is not automatically conducive to a conflictual relationship between the norms. Some norms by regulating the same matter complement each other through a process

Order 131; M Singer 'Jurisdictional immunity of international organisations: Human rights and functional necessity concerns' (1995) 36 *Virginia Journal of International Law* 135; Reinisch & Weber (n 7 above); C Ferstman *International Organisations and the fight for accountability* (2017) 142-146.

¹³ Article 31 of the VCLT.

¹⁴ 'Draft Articles on the Law of Treaties with commentaries' (1996) 2 *Yearbook of the International Law Commission* 215. Hereafter, VCLT Commentary. 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' Report of the study group of the International Law Commission (13 April 2006) A/CN.4/L.682 17. Hereafter, *ILC Fragmentation Report*.

¹⁵ JB Mus 'Conflicts between treaties in international law' (1998) 45 *Netherlands International Law Review* 212.

¹⁶ 'A strict notion would presume that conflict exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule. This is the basic situation of incompatibility. An obligation may be fulfilled only by thereby failing to fulfil another obligation.' *ILC Fragmentation Report* (n 14 above) para 24.

called accumulation.¹⁷ Norms can accumulate with each other in a complementary manner by adding more rights and obligations to the existing norm or by merely confirming the existing rights and obligation of a norm.¹⁸ Some norms may conflict in their application as an unintended consequence even though they do not conflict at face value. The conflict resulting from the application of a norm can occur 'inadvertently or in an unforeseen manner' resulting from an interpretation of the norm.¹⁹ As such, for a conflict to exist, there has to be an unavoidable contradiction between the norms. This is in line with the international law presumption against conflict. It is an established rule of interpretation in international law that should there be more than one interpretation of a provision, the meaning that is complementary or harmonious with the previous treaty ought to be preferred over the conflictual interpretation.²⁰ This was confirmed by the ICJ in the following terms:²¹

It is a rule of interpretation that a text ... must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.

Indeed, there is a presumption that the parties creating obligations through treaties do not intend to evade their obligations derived from previous treaties or

¹⁷ J Pauwelyn *Conflict of norms in public international law* (2008) 161-164; A Gourgourinis 'The distinction between interpretation and application of norms in international adjudication' (2011) 2.1 *Journal of International Dispute Settlement* 38.

¹⁸ The Arbitration Tribunal in the *Southern Bluefin Tuna case (Australia and New Zealand/Japan)* Award of 4 August 2000 (Jurisdiction and admissibility) UNRIAA vol. XXIII (2004) provided instances of norm accumulation in international law and how this process provides for a confirmation or accumulation of obligations rather than a conflict of obligations. 'The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties ... Articles 1, 55 and 56 of the Charter of the United Nations have not been discharged for States Parties by their ratification of Human Rights covenants and other human rights treaties' para 52.

¹⁹ D Costelloe 'Peremptory norms and resolutions of the United Nations Security Council' in D Tladi (ed) *Peremptory norms of international law (Jus Cogens): Disquisitions and disputations* (2021) 444.

²⁰ 'In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict' *ILC Fragmentation Report* (n 14 above) para 37; Paulwyn (n 17 above) 241.

²¹ *Case Concerning the Right of Passage over Indian Territory (Preliminary Objections)*, Portugal v India ICJ Reports 1957 at 142. Hereafter, *Right of Passage case*.

from general international law.²² Accordingly, the interpretation of a subsequent treaty must favour legality over a conflicting interpretation that would render the parties' actions inconsistent with previous treaties in breach thereof. The ICJ confirmed this presumption of legality when it held the following:

[W]hen the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation.²³

Similarly, the ECHR has consistently adopted the presumption of harmony between two subsequent obligations relating to the same subject matter.²⁴ The European Court, on the basis of presumption of harmony, upheld the interpretation of UN Security Council resolutions that were in line with UN Charter obligations. In that regard, the European Court in the *Al-Jedda* case²⁵ held the following:

In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.²⁶

The harmonious interpretation of subsequent treaties has its limits, however. Indeed, there are instances where such a harmonious interpretation cannot be established based on the text and context of the treaties.²⁷ Therefore, a conflict of norms exists when the application of one legally binding norm inevitably constitutes a violation of another equally binding norm without the possibility of a harmonious interpretation of the relevant provisions.

²² Paulwyn (n 17 above) 240; R Jennings & A Watts (eds) *Oppenheim's International Law* (1992) 1275.

²³ *Certain expenses of the United Nations (Advisory Opinion)* ICJ (20 July 1962) (1962) ICJ Reports 151 at 168.

²⁴ *Behrami & Saramati v France* ECHR (2 May 2007) 71412/01 para 149; *Nada v Switzerland* ECHR (12 September 2012) 10593/08 para 171. *Al-Jedda v the United Kingdom* ECHR (7 July 2011) 27021/08. Hereafter *Al-Jedda* case.

²⁵ *Al-Jedda* case (n 24 above).

²⁶ *Al-Jedda* case (n 24 above) para 102.

²⁷ Ferstman (n 12 above) 170- 175; Paulwyn (n 17 above) 242-244; *ILC Fragmentation Report* (n 14 above) para 42.

Resolving conflicts of norms in international law means determining which norm replaces or prevails should the situation arise where divergent norms are equally applicable. This hierarchisation of norms is carried out through derogation.²⁸ Derogation norms are secondary norms that regulate conflict between primary norms of international law.²⁹ These derogation norms dictate which primary norm prevails in a specific circumstance. Without derogation norms, there would be no means of resolving conflicts between primary norms. This would result in a stalemate in which two divergent norms are equally binding and applicable to a single situation. The sources of derogation norms vary: they can be expressly included in a treaty in the form of a conflict provision or they can be derived from rules of customary international law.³⁰

A treaty provision providing for derogation in case of conflict between that treaty and subsequent or anterior treaties is called a conflict norm. According to the ILC, a conflict norm consists of the following:

A clause intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals. Sometimes the clause concerns the relation of the treaty to a prior treaty, sometimes its relation to a future treaty and sometimes to any treaty past or future. Whatever the nature of the provision, the clause has necessarily to be taken into account in appreciating the priority of successive treaties relating to the same subject matter.³¹

A conflict clause represents a proactive approach to norm conflict resolution. It is common State practice to add a conflict clause to treaties.³² A conflict clause can claim the priority of a treaty's obligations over other treaties or concede it to

²⁸ It should be noted that this refers to the hierarchy of norms not that of sources. There is no hierarchy of sources in international law as international law is a decentralised legal system where all the sources are equally derived from states consent. Paulwyn (n 17 above) 95.

²⁹ Mus (n 15 above) 210.

³⁰ Mus (n 15 above) 211.

³¹ VCLT Commentary (n 14 above) 214.

³² Article 311(1) of the United Nations Convention on the Law of the Sea; Article 8 of the North Atlantic Treaty; Article xxvi of the Food Aid Convention 1999; Article 90 of the United Nations Convention on Contracts for the International Sale of Goods; Article 4(2) of the 1991 Protocol on Environmental Protection to the Antarctic Treaty; etc.

another treaty.³³ A prominent example of a conflict clause is article 103 of the UN Charter which is an example of a conflict clause claiming priority over all prior and subsequent treaties. It establishes the primacy of UN Charter obligations over all other Member States' obligations. This does not render any other treaty inconsistent with the UN Charter null and void.³⁴ It merely ranks UN Charter obligations higher than those of any other treaty or customary international law principles.³⁵ This was observed when a Security Council resolution declared supremacy of the obligations contained in the resolution.³⁶ This was because obligations contained in Security Council resolutions are considered to be UN Charter obligations by virtue of the powers granted to the Security Council by the Charter. As such, an obligation derived from a Security Council resolution prevails over any other obligation on the basis of article 103. Article 103 suspends the application of other derogation norms derived from customary international law such as the *lex posterior* rule and the *lex specialis* principle.³⁷ This is evidenced by article 30 of VCLT's express reference to article 103. Indeed, article 30 of the VCLT is a codification of the general international law rules on derogation of divergent norms dealing with the same subject matter.³⁸ Article 30 of the VCLT provides that its codification of the rules on derogation is 'subject to article 103 of the Charter of the United Nations'.³⁹ The VCLT thus included article 103 to denote the fact that article 103 prevails over all other derogation norms. The

³³ Article 30(2) of VCLT.

³⁴ UN Charter Commentary (n 8 above) 1295; *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v United Kingdom & United States* ICJ Provisional Measures (14 April 1992) (1992) ICJ Reports 3 para 39; R Liivoja 'The scope of the supremacy clause of the United Nations Charter' (2008) 57.3 *The International and Comparative Law Quarterly* 585-6.

³⁵ UN Charter Commentary (n 8 above) 1295.

³⁶ 'Decides that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement ... shall deny...' UN SC Resolution 670 para 3. This resolution decreed the prevalence of its contents over any other member states obligations by virtue of the power granted to the Security Council under articles 25 and 48 of the UN Charter. Thus, the Resolution as a result of the exercise of powers under the UN Charter becomes a Charter obligation subject to the dominance granted by article 103.

³⁷ The *lex posterior* rule refers to the general international law principle that holds that in case of conflict between two treaties, the latter treaty prevails. The *lex specialis* rule states that the specific treaty prevails over the general one. *ILC Fragmentation Report* (n 14 above) paras 46-222 (on *lex specialis*) and para 243-250 (on *lex posterior*).

³⁸ UN Charter Commentary (n 8 above) 1294.

³⁹ Article 30 of the VCLT.

VCLT between States and international organisations or between international organisations (VCLT IO) similarly made express reference to article 103 in its provision on successive treaties dealing with the same subject matter.⁴⁰ The drafters of VCLT IO, with the knowledge that international organisations were not be parties to the UN Charter, intended to reaffirm the fact that UN Charter obligations also prevail over other obligations that international organisations, including the UN, might have.⁴¹ While the VCLT IO is still not in force yet,⁴² the rule regarding article 103 contained therein is still applicable. This is due to the fact that international organisations' constituent treaties are concluded by States that are parties to the UN Charter and thus bound by article 103.⁴³ Considering article 103 decrees the supremacy of Charter obligations, the VCLT and VCLT IO thus conceded that the UN Charter obligations prevail over any other treaty obligations and any derogation norms in international law.⁴⁴

A conflict clause is not always included in treaties. As such, in the event of a conflict between a treaty and previous or subsequent treaties regulating the same subject matter, other derogation norms of international law apply. The first such derogation norm is the *lex posterior derogat legi priori* meaning the latter law prevails over the earlier law.⁴⁵ *Lex posterior* is a general international law norm of derogation wherein the more recent obligations of states and international

⁴⁰ Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 1986. Hereafter, VCLT IO.

⁴¹ UN Charter Commentary (n 8 above) 1294-1295.

⁴² The VCLT IO only has 28 of the 35 ratifications it needs to enter into force. <https://legal.un.org/avl/ha/vcltsio/vcltsio.html> (accessed 24 December 2012).

⁴³ UN Charter Commentary (n 8 above) 1295.

⁴⁴ 'It appeared to the Commission to be essential to give Article 103 of the Charter special mention and a special place in the present article. Therefore ... it decided to recognise the overriding character of Article 103 of the Charter with respect to any treaty obligations of Members'. VCLT Commentary (n 14 above) 214.

⁴⁵ C McCarthy 'Legal conclusion or interpretative process? *Lex specialis* and the applicability of international human rights standards' in R Arnold & N Quenivet (eds) *International humanitarian law and human rights law* (2008).

organisations prevail over their earlier ones in case of conflict.⁴⁶ According to the VCLT, the *lex posterior* rule in treaties operates as follows:⁴⁷

When all the parties to the earlier treaty are also party to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

The *lex posterior* maxim is also reflected in a further provision in the VCLT which provides for the automatic termination of an earlier treaty in case of incompatibility with the latter one. Indeed, article 59 of the VCLT provides the following:

A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty or the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

The *lex posterior* principle essentially provides for the respect of States' contractual freedom through subsequent agreements. It is the prerogative of States to alter their obligations under one agreement by concluding another agreement on the same subject matter. This prerogative extends to other sources of international law as well. For instance, States and international organisations can amend their obligations under customary international law through the conclusion of a treaty to that effect.⁴⁸ However, due to the *pacta tertiis* rule,⁴⁹ this amendment only extends to the treaty parties while the customary international law obligations remain in their relations with non-parties.⁵⁰

⁴⁶ The *lex posterior* principle is sometimes considered to be derived from customary international law or from general principles of international law. *ILC Fragmentation Report* (n 14 above) para 225.

⁴⁷ Article 30(3) of the VCLT (n 10 above).

⁴⁸ A Bilder, O Schaschter, J Charney & M Mendelson 'Disentangling treaty and customary international law' 81 (1987) *American Society of International Law* 157-164.

⁴⁹ Article 34 of the VCLT (n 10 above).

⁵⁰ 'Such clauses, in so far as they relate to existing treaties concluded by the contracting States ... merely confirm the general rule *pacta tertiis non nocent*'. VCLT Commentary (n 14 above) 215. This view was echoed by the ICJ when it held thus 'customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have

The *lex posterior* principle is not always applicable and does not always automatically resolve the conflict in divergent. To this effect, the *lex specialis* principle is another derogation norm derived from customary international law that can aid in resolving conflicting primary norms. In terms of this rule, in case of conflict, the specific law or norm prevails over the general one. Specific norms usually aid in the interpretation of general norms.⁵¹ In cases of conflict, the *lex specialis* principle functions as a derogation norm.⁵² The ICJ confirmed the notion of using *lex specialis* both as an interpretative tool and as a derogation norm in case of conflict.⁵³ When considering the relationship between human rights and international humanitarian law, the ICJ considered international humanitarian law as the *lex specialis* that can aid in the interpretation of human rights law in armed conflict and as the prevailing norm in case of conflict due to its nature as *lex specialis*.⁵⁴ *Lex specialis*, much like *lex posterior*, is also a reflection of the respect of States' contractual freedom. Indeed, *lex specialis* reflects 'most closely, precisely and strongly the consent or expression of will of the States in question'.⁵⁵ *Lex specialis* is not used solely to resolve conflicts between treaties. It can also be used to resolve conflicts between customary international law norms and treaty norms.⁵⁶ Indeed, as discussed above, the general obligations of States under customary international law can be derogated from through specific obligations concluded in a treaty by States.⁵⁷

The rapport between *lex specialis* and *lex posterior* as derogation norms is nuanced and complex. While usually the specific law prevails over the general

an identical content' *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States of America* ICJ (27 June 1986) (1986) ICJ Reports 14 para 179.

⁵¹ Mus (n 15 above) 217, McCarthy (n 43 above) 102.

⁵² As above.

⁵³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion* (9 July 2004) (2004) ICJ Reports 136. Hereafter, *Wall Advisory Opinion*.

⁵⁴ *Wall Advisory Opinion* (n 51 above) para 106.

⁵⁵ Pauwelyn (n 18 above) 387.

⁵⁶ A Lindroos 'Addressing norm conflicts in a fragmented legal system: The doctrine of *lex specialis*' (2005) 74 *Nordic Journal of International Law* 37.

⁵⁷ '[I]t would no doubt have been possible for the Parties to identify in the Special Agreement certain specific developments in the law of the sea of this kind, and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*' *Case Concerning the Continental Shelf, Tunisia v Libyan Arab Jamahiriya* ICJ (24 February 1982) ICJ Reports 1982 para 24.

one, it may so happen that a general norm be concluded in a treaty to prevail or even altogether replace an earlier specific norm. This can, for instance, occur in the case of a specific customary law norm derogated from by a latter more general treaty on the same subject matter.⁵⁸ Evidently, this derogation is only applicable to parties to the treaty. The customary international law norm remains binding among non-parties to the treaty. Further evidence of the complex relationship between the two derogation norms is that the aforementioned latter and more general treaty does not automatically prevail over the earlier customary law norm between the treaty parties. Granted, it is accepted that customary law can be derogated from by the conclusion of a treaty between parties.⁵⁹ However, because there is no hierarchy of sources of international law, even though a latter treaty covers the same subject matter as prior customary law norms, it does not automatically mean that the treaty prevails over customary law. It could be that customary international law covers the subject matter more extensively and as such affects the interpretation of the treaty.⁶⁰ Additionally, it could be that the treaty regulates the subject only partially as part of the process of codifying customary law or as part of the process of creating customary law.⁶¹ To further showcase the nuanced relationship between *lex posterior* and *lex specialis*, it should be noted that the two derogation norms can be applied simultaneously.⁶² As such, the ILC recommends that the choice between *lex posterior* and *lex specialis*, especially as it pertains to different sources of international law, be

⁵⁸ *ILC Fragmentation Report* (n 14 above) para 223.

⁵⁹ '[I]t is well understood that, in practice, rules of (general) international law can, by agreement, be derogated from in particular cases or as between particular parties' *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands)* ICJ (20 February 1969) (1969) ICJ Reports 3 para 72.

⁶⁰ *ILC Fragmentation Report* (n 14 above) para 224.

⁶¹ As above.

⁶² On the issue of which of two instruments ought to prevail the Permanent Court of International Justice held that 'in cases of doubt, the Protocol, being a special and a more recent agreement, should prevail'. *The Mavromatis Palestine Concessions (Greece v Britain)* 1924 PCIJ Series B No 3. Similarly, in the *Lockerbie* case, Libya argued that the 1971 Montreal Convention was both *lex posterior* and *lex specialis* to the UN Charter and should prevail as such. This argument was rejected due to the specific conflict clause of article 103 as contained in the UN Charter. *Lockerbie* case (n 34 above) Oral proceedings (17 October 1992) para 4.20.

decided on a case-by-case basis as there is no blanket formula that covers all instances of norms conflicts.⁶³

2.3 Scope of the UN's immunity under the Immunities Convention

The Immunities Convention is the main instrument providing specifically for the UN's immunity from the jurisdiction of its Member States. As discussed above, there are treaties that regulate subject matter generally and those that regulate the same subject matter with more specificity. The Immunities Convention is one such treaty that regulates subject matter with the greatest deal of specificity, namely the UN's jurisdictional immunity. Section 2 of this Convention is the central provision establishing the UN's immunity from jurisdiction and execution measures.⁶⁴ As noted in the introductory chapter of this study, it is this provision that bars third-party claimants from having their claims adjudicated by any judicial forum independent of the UN. Section 2 has traditionally been interpreted as granting the UN an absolute form of immunity limited only by an express waiver.⁶⁵ This interpretation stands in contrast to the UN Charter's article 105 which seemingly provides for an immunity limited to that which is necessary for the Organisation's functioning. Therefore, to ascertain whether there is a discrepancy in scope between the immunity in terms of section 2 of the Immunities Convention and that of article 105 of UN Charter, both provisions warrant thorough study. To this effect, the scope of the UN's immunity under section 2 of the Immunities Convention must first be established. This is done through a purposeful interpretation of this provision in terms of the general rules of treaty interpretation as contained in article 31 of the VCLT. Thus, the interpretation of section 2 will consist of an analysis of the provision's language in its ordinary meaning, context, and purpose. Furthermore, a study of subsequent agreements and practice by the relevant parties will provide a more comprehensive interpretation of the scope of the UN's immunity in terms of section 2. This is done to establish whether the UN's absolute immunity, which poses an insurmountable procedural bar to third-party claims, is in line with the

⁶³ *ILC Fragmentation Report* (n 14 above) para 224.

⁶⁴ A Reinisch & P Bachmayer (eds) *The Convention on the Privileges and Immunities of the United Nations and its Specialised Agencies: A commentary* (2016) 63.

⁶⁵ As above.

scope contained in section 2. This will also determine whether the subsequent application of section 2 by the relevant stakeholders is in line with the established scope of section 2 or whether the practice deviates from the text.

2.3.1 On the ordinary meaning, context, and purpose of section 2 of the Immunities Convention

The plain language of section 2 of the Immunities Convention unambiguously grants the UN an immunity that is absolute in scope. Every section of this provision's text denotes the intent to wholly endow the UN with an absolute immunity that can only be limited by an express waiver. The recipient of the immunity in terms of section 2 is not solely the UN as the central organisation but also the UN's organs and subsidiary organs.⁶⁶ For instance, an action against the UN General Assembly was considered to be subject to section 2 as it was an action against the UN.⁶⁷ Likewise, a claim against UN peacekeeping missions is a claim against the UN as a whole and must contend with the procedural hurdle posed by section 2. In the *Manderlier* case,⁶⁸ claimants sought compensation from the UN peacekeeping mission in the Congo; the claim was redirected to the UN itself and not the specific peacekeeping unit. Similarly, claims launched against the UN Protection Force (UNPROFOR) in the *Srebrenica* case were considered to be action taken against the UN.⁶⁹ The text of section 2 thus establishes that all institutions under the UN banner are recipients of the immunity provided by this provision. This includes UN peacekeeping missions as the institution at the crux of this study.

The UN's immunity from 'every form of legal process' has traditionally been interpreted as granting absolute immunity to the Organisation.⁷⁰ The context surrounding this text demonstrates the intent to include all forms of legal

⁶⁶ The UN's specialised agencies' immunities are provided for in the Convention on the Privileges and Immunities of the Specialised Agencies of 1948. Section 4 thereof is a verbatim reiteration of section 2 of the Immunities Convention.

⁶⁷ *Joseph R Boimah v United Nations General Assembly* US District Court 664 F Supp 69 (1987). Hereafter, *Boimah v UNGA*.

⁶⁸ *Manderlier v Organisation des Nations Unies et Etat Belge (Manderlier v UN & Belgium)* Civil Tribunal of Brussels (1966) No. 4553. As reported by P Schmitt on www.ebrary.net (accessed 01/11/2019). Hereafter, *Manderlier* case.

⁶⁹ *Srebrenica* case (n 2 above).

⁷⁰ Reinisch & Bachmayer (n 64 above) 63; A Reinisch *International organisations before national courts* (2000) 62.

proceedings. In fact, the wording of section 2 is largely based on the Canadian submission to that effect during the preparatory phase of the Convention's drafting.⁷¹ Canada proposed a draft of the Immunities Convention which contained the following provision on the UN's immunity:⁷²

The Organisation, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.⁷³

The final version is remarkably similar to the Canadian draft, save for a few notable changes: the removal of the portion on waiver 'by the terms of any contract'; replacing 'judicial process' with 'legal process'; and the specification that the waiver does not extend to measures of execution. These deletions and additions demonstrate that the drafters sought to remove any doubt as to the absolute scope of the UN's immunity. Any qualifier that might be construed as limiting the scope of the UN's immunity was markedly removed.⁷⁴ Indeed, 'judicial process' can be interpreted so restrictively that it can only refer to the adjudicatory phase of a claim.⁷⁵ Replacing it with 'every form of legal process' was meant to exclude the restrictive interpretation in favour of a broad one encompassing all forms of legal measures, including those of enforcement. The concept of 'legal process' comprises both jurisdictional and enforcement

⁷¹ Delegation of Canada, draft resolution concerning the question of immunities, facilities and privileges to the Organisation, to representatives of the members and to the officials Preparatory Commission of the United Nations of 30 November 1945 PC/LEG/17 (hereafter, Canadian delegation draft); S Chesterman *The Oxford Handbook of United Nations Treaties* (2019) 550; Reinisch & Bachmayer (n 64 above) 7 and 64.

⁷² Article 4(1) of the Canadian Delegation Draft (n 71 above).

⁷³ This exact provision was contained in article 2(1) of the Draft Convention on the Privileges and Immunities in Appendix B of the Report of the Preparatory Commission of the United Nations 23 December 1946 72.

⁷⁴ In the portion which provided for a waiver by the terms of a contract, it was confirmed that the deletion was intentionally made to avoid any restrictions and/or qualifier: 'This wording was changed by the Legal Committee of the Preparatory Commission to read in the more restrictive fashion that it now stands. It must be concluded, therefore, that it was not the intention of the Preparatory Commission, or of the General Assembly, to extend the right of waiver to waiver in future by the terms of a contract'. Documents of the nineteenth session including the Report of the Commission to the General Assembly A/CN.4/SER.A/1967/Add.I (1967) 2 *Yearbook of the International Law Commission*, para 83 p 225. Hereafter, UN Study 1967.

⁷⁵ Reinisch & Bachmayer (n 64 above) 85.

measures.⁷⁶ This is evidenced by the UN statement on the illegal seizure of UNICEF assets as part of the enforcement of a court order.⁷⁷ The UN emphasised that section 2 provides for 'the immunity of UNICEF from every form of legal process, including the civil suit in question and all orders issued therein, including orders of execution of judgement'.⁷⁸

The UN is thus immune from all forms of legal process in the broadest sense possible. Moreover, 'legal proceeding' in terms of section 2 refers to any judicial, administrative, and executive action irrespective of the role played by the UN in the proceedings.⁷⁹ Indeed, this immunity applies whether the UN acts as the respondent or in any other capacity, such as providing assistance by giving information or as a recipient of a court order.⁸⁰ Whether it is garnishee orders against UN employees for personal debt or any other court order as a result of civil litigation, the 'every form of legal process' portion of section 2 exempts the UN from any legal obligation 'to participate in proceedings or abide by any judgement'.⁸¹ This all-encompassing immunity is further evidenced by the wording of section 2 which provides that 'no waiver of immunity shall extend to any measure of execution'. This part of section 2 provides for the limits of the UN's waiver. Logically, the UN's waiver would not need to extend to measures of executions if these measures were not subject to immunity in the first place.

In terms of section 2, the UN's immunity applies to all forms of legal process 'except insofar as in any particular case it has expressly waived its immunity'. Section 2 thus provides that the only way through which the UN can be subjected

⁷⁶ Reinisch & Bachmayer (n 64 above) 85-86.

⁷⁷ 'Illegal seizure of UNICEF property to satisfy court order - Immunity of the United Nations from civil suit - Arbitration - article VIII, section 29(a) of the Convention on the Privileges and Immunities of the United Nations' Note verbale to the Permanent Representative of [Member State] to the United Nations (2 February 2000) (2000) *United Nations Juridical Yearbook* 347.

⁷⁸ As above.

⁷⁹ UN Study 1967 (n 74 above) para 79 at 224.

⁸⁰ *Means v Means* US 413 F. 2d 644 (2d Cir. 1969) which concerned the immunity of the UN from garnishing an employee's salary in a spousal maintenance case. See also *Shamsee v Shamsee* US 74 AD 2d 357 (2d Cir. 1980) in which a sequestration order against an employee's UN pension fund was rejected due to the UN's immunity.

⁸¹ 'Its immunity "from every form of legal process" in itself prevents the issue of a garnishee order and the incurring by the United Nations of any legal obligation to participate in the proceedings themselves or to abide by any judgement given' UN Study 1967 (n 74 above) at 224.

to a legal process is with its consent in the form of an express waiver. The words 'in any particular case' denote the fact that there cannot be a blanket waiver for a certain type of claim or a waiver in advance by the terms of a contract as envisaged by the aforementioned Canadian draft.⁸² This waiver must be expressly given by the UN in each and every case after the institution of proceedings. Moreover, this waiver must be express, which means it cannot be implied from the conduct of the UN,⁸³ even in instances where such conduct implies a waiver of immunity.⁸⁴ The waiver must be expressly communicated by the UN's Secretary-General to avoid any uncertainty.⁸⁵ In point of fact, in the *Manderlier* case, the Belgian foreign affairs minister declared to the Belgian senate that the UN had waived its immunity following the minister's discussions with the Secretary-General.⁸⁶ The Belgian Court rejected the claim that it constituted a valid and express waiver of immunity because the minister

cannot bind the United Nations, nor its Secretary-General, through declarations he makes in the Belgian Legislative Chamber ... His view of the situation cannot bind the judge in his interpretation of international law.⁸⁷

Furthermore, the UN reserves the right to abide by court orders without waiving its prerogative to invoke its immunity at any point. Thus, the UN may of its own accord enter into administrative arrangements to satisfy payments of various court orders but those arrangements cannot be construed as a waiver of immunity.⁸⁸ Furthermore, the fact that the waiver cannot be considered to

⁸² Canadian delegation draft (n 71 above); Reinisch & Bachmayer (n 64 above) 95.

⁸³ '[T]he court should be slow to find an "express" waiver ... Courts should be reluctant to find that an international organisation has inadvertently waived immunity when the organisation might be subjected to a class of suits which would interfere with its functions' *Mendaro v World Bank* US Appeal Court 717 F.2d 610 (1983); J Wouters & P Schmitt 'Challenging acts of other United Nations organs, subsidiary organs and officials' *Working Paper N 49* (2010) *Leuven Centre for Global Governance Studies* 21.

⁸⁴ Taking liability insurance for instance, while it can be implied as acceptance of liability cannot be construed as a waiver. UN Study 1967 (n 69 above) 226; Similarly, the fact that the UN agreed to provide medical service and compensation to a person injured by a UN employee does not constitute a waiver of immunity, even though it implies an acceptance of liability. *Nicol v United Nations Mission in Liberia* US District Court No 09-1800 (2009).

⁸⁵ Wouters & Schmidt (n 83 above) 22.

⁸⁶ *Manderlier* case (n 68 above).

⁸⁷ *Manderlier* case as reported and translated by Wouters & Schmidt (n 83 above) 22.

⁸⁸ *In re Poncet* Federal Tribunal, Chambre des Poursuites et des Faillites (Chamber of Bankruptcy and Insolvency proceedings) (12 January 1948).

'extend to any measure of execution' entitles the UN to submit itself to proceedings while retaining immunity from the outcome of the said proceedings:

The manner of compliance with any decision remains within the discretion of the UN, even though the UN may have agreed to submit substantive provisions of national law as regard the issue in dispute.⁸⁹

This broad interpretation is similarly reflected in other immunity instruments which provide for the immunity of other international organisations with immunity clauses identical to section 2. Indeed, several instruments providing for the immunity of other international organisations have been greatly influenced by the Immunities Convention.⁹⁰ This influence extends to the point of including near verbatim reiterations of section 2 of the Immunities Convention, providing these organisations with immunity from 'every form of legal process'.⁹¹ These provisions are interpreted as granting absolute immunity to the international organisations on the basis of the language derived from section 2.⁹² Considering these provisions are interpreted as absolute on the basis of the same text as section 2, it stands to reason that section 2, as the originator, grants absolute immunity as well.

In addition to the text, the context surrounding the drafting of section 2 denotes a clear intent to endow the UN with an absolute immunity. This is because the understanding of immunity at the time of drafting was derived from State

⁸⁹ UN Study 1967 (n 74 above) para 88 at 226.

⁹⁰ Reinisch & Bachmayer (n 64 above) 4.

⁹¹ Section 4 of the Convention on the Privileges and Immunities of the Specialised Agencies of 1948 is a verbatim reiteration of section 2 of the Immunities Convention; Article 3 of the General Agreement on Privileges and Immunities of the Council of Europe holds that 'The Council, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process'; similarly Article 2.1 of the General Convention on the Privileges and Immunities of African Unity holds that 'The Organisation of African Unity its premises buildings, assets and other property wherever located and by whomsoever held, shall enjoy immunity from every form of legal process.' The same provision can be found in: article 2 of the Agreement on Privileges and Immunities of the Organisation of American States; article 3 of the Agreement on the Privileges and Immunities of the International Atomic Energy Agency; Article 3 of the Agreement on the Privileges and Immunities of the Association of South East Asian Nations ... etc.

⁹² C Ryngaert 'The immunity of international organisations before domestic courts: Recent trends' (2010) 7 *International Organisations Law Review* 123-129; A Reinisch & UA Weber 'In the shadow of Waite & Kennedy: The jurisdictional immunity of international organisations, the individual's right of access to court and administrative tribunals as alternative means of dispute settlement' (2004) 1 *International Organisations Law Review* 59.

immunity. Indeed, State immunity was then considered to be absolute and inviolable.⁹³ This position was transposed to the UN as there was little practice with the immunities of international organisations.⁹⁴ At present, save a few exceptions,⁹⁵ the immunity of States is now subject to limitations.⁹⁶ The immunity of international organisations did not evolve in the same way as State immunity. While state immunity developed into a more restricted concept, the immunity of the UN has remained resolutely absolute.⁹⁷ This concept of absolute immunity for the UN has influenced many subsequent international organisations into adopting the same stance which, as mentioned above, have been endowed with the same immunity provisions as section 2.

Section 2 is intended to provide greater specificity about the UN's immunity and dispel any restrictive interpretation that might limit it.⁹⁸ Indeed, prior to the conclusion of the Immunities Convention, UN staff immunity was repeatedly denied by US courts as a result of a restrictive interpretation of functional immunity in terms of the UN Charter.⁹⁹ The US Court in *Westchester County v*

⁹³ Singer (n 12 above) 54.

⁹⁴ Prior to the UN, the League of Nations was the sole sizeable international organisation and it had a very limited membership and sphere of influence. Its constitutive instrument contained no specific immunities provision. Article 7 of the Covenant of the League of Nations of 28 June 1929 only speaks of the immunity of officials 'engaged on the business of the league' and only speaks of the inviolability of the League's premises. In addition, none of the other major international organisations at the time, namely the International Labour Organisation (ILO) and the Permanent Court of International Justice (PCIJ) had been endowed with specific immunities and privileges. Reinisch & Bachmayer (n 64 above) 65; C Ferstman *International Organisations and the fight for accountability: The remedies and reparations gap* (2017) 139; Singer (n 85 above) 59.

⁹⁵ China is an example of a state which still subscribes to the doctrine of absolute immunity of states. D Qi 'State immunity, China and its shifting position' (2008) 7.3 *Chinese Journal of International Law* 307-308.

⁹⁶ In addition to the exclusion of *jure gestionis* acts, the immunity of States is also sometimes subject to other limitations such as certain torts: 'The court observes ... there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes' *Fogarty v United Kingdom* ECHR (21 November 2001) App no 37112/97; Ferstman (n 86 above) 139.

⁹⁷ 'The immunity accorded international organisations under this system of law is an absolute immunity and must be distinguished from sovereign immunity which in some contemporary manifestations, at least, is more restrictive'. *UN office of Legal Affairs Memorandum to the Legal Adviser, United Nations Relief and Works Agency for Palestine Refugees in the Near East* (28 February 1984) UNJYB (1984) p 188.

⁹⁸ Reinisch & Bachmayer (n 64 above) 4-8, 63, 8.5

⁹⁹ *Westchester County v Ranallo* 187 US Misc 777 (1946) : The immunity claim of a speeding official was rejected as the driver was not acting in his official capacity; *US v Coplon* 84 F 472: the

*Ranallo*¹⁰⁰ denied the UN staff claim to immunity on the basis that the employee was not acting in his official capacity. This strict functionalist approach to the UN's immunity by US courts was taken into account by the drafters of the Immunities Convention.¹⁰¹ Granted, the US courts had only restrictively interpreted the immunity of UN staff and not that of the UN itself but the potential of expanding that interpretation to the UN was present.¹⁰² Thus, in the language of section 2, they sought to remove any possibility of a restrictive interpretation of the scope of the UN's immunity. Indeed, in addition to the functional independence rationale of the UN's immunity,¹⁰³ the Immunities Convention, more specifically section 2 thereof, was intended to provide more specificity to the scope of the UN's immunity as provided for by article 105 of the UN Charter.¹⁰⁴ The purpose of section 2 is thus to clearly specify that the functional necessity referred to in the Charter refers to an unqualified and absolute immunity as opposed to the restrictive interpretation limiting the immunity that which is 'strictly necessary'.¹⁰⁵

2.3.2 Practice subsequent to the Immunities Convention

On assessing subsequent practice for the purpose of interpreting a treaty, article 31 of the VCLT holds the following:

1. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection

immunity of a Soviet UN official was rejected as espionage was considered 'not a function of the defendant as an employee of the UN'; similarly, in *People v Leo* 402 NYS 2d 941, the immunity of a Tanzanian UN official was rejected in an assault and resisting arrest case as it was held that '[i]mmunity is limited in scope and purpose to protection for acts committed by UN officials in the course of accomplishing their functions as UN employees in distinction to the unlimited form of immunity traditionally accorded diplomats' 943.

¹⁰⁰ *Westchester County v Ranallo* (n 99 above).

¹⁰¹ L Preuss 'Immunity of officers and employees of the United Nations for official acts: The *Ranallo* case' (1947) 41.3 *American Journal of International Law* 555.

¹⁰² Preuss (n 101 above) 560.

¹⁰³ The functional necessity rationale for UN immunity is expanded on further below.

¹⁰⁴ Article 105(3) of the UN Charter.

¹⁰⁵ Some international organisations have made it plain in their immunity instruments that they intend to have a functional immunity restricted to that which is 'strictly necessary for its operation'. Article 3(4) of the Protocol on Privileges and Immunity European Patent Organisation.

with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

2. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

It is established in customary law, as codified by article 31 VCLT¹⁰⁶ that the interpretation of a treaty involves not only the study of a treaty's text but also of any subsequent practice related to the treaty in question.¹⁰⁷ The plain text of section 2 is unambiguous in its ordinary meaning. However, subsequent practice of the treaty must be taken into account for a comprehensive and contextual interpretation of the provision.¹⁰⁸ Subsequent practice refers to any conduct in the application of a treaty which determines the agreement of the parties.¹⁰⁹ This includes any subsequent agreements between all or some of the parties to the Immunities Convention¹¹⁰ and the subsequent practice in application of the treaty itself.¹¹¹ Practice with regard to the interpretation of treaties was initially considered to represent the original intent of the parties.¹¹² It has since evolved into an expression of the parties' current interpretation of the treaty.¹¹³ The development of practice can thus aid in the interpretation as it establishes the initial intention of the contracting parties and demonstrates whether the

¹⁰⁶ 'The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith' *Case Concerning the Territorial Dispute, Libyan Arab Jamahiriya v Chad* ICJ (3 February 1994) ICJ Reports 6 para 41.

¹⁰⁷ I Buga *Modification of treaties by subsequent practice* (2018) 17.

¹⁰⁸ Buga (n 107 above) 16-103; A Aust *Modern treaty law and practice* (2013) 215.

¹⁰⁹ Conclusion 3 of the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties ILC Report A/73/10, para 51 hereafter, ILC Draft conclusions on subsequent practice; 'Second Report on Identification of Customary International law by Michael Wood, Special Rapporteur' UN Doc A/CN.4/672 para 48. Hereafter, ILC Special Rapporteur's Second Report on Customary International Law.

¹¹⁰ Section 31(2) of VCLT.

¹¹¹ Section 31(3) of VCLT.

¹¹² Buga (n 107 above) 18.

¹¹³ ILC Special Rapporteur's Second Report on Customary International Law (n 99) above) para 33; Buga (n 107 above) 18; Aust (n 108 above) 215-216; L Crema 'Subsequent agreements and subsequent practice within and outside the Vienna Convention' in G Nolte (ed) *Treaties and subsequent practice* (2013) 20-21.

understanding of the treaty provisions has changed over time. To this effect, this section analyses the subsequent practice of the Immunities Convention by the relevant stakeholders to provide a contextual interpretation of section 2.¹¹⁴ This is to determine whether the practice subsequent to section 2 has remained consistent or whether current practice has deviated from the initial practice thereby denoting a different understanding of section 2. This entails first the assessment of subsequent agreements between the UN and States in terms of headquarters and seat agreements, SOMAs, and SOFAs. These agreements, as far as they relate to the Immunities Convention, constitute subsequent practice. Secondly, this section includes a study of the UN's practice with regard to its application of the Immunities Convention in general and section 2 in particular. This section differs from the above as it relates to the UN's 'internal' practice to be distinguished from the UN's practice in relation to States. Lastly, the practice to be studied is that of States internally as they observe the immunity of the UN in their national courts by applying section 2 of the Immunities Convention directly or through their national legislation subsequent to the Convention.

Agreements subsequent to the Immunities Convention

The subsequent agreements relevant to this section are those agreements entered into by the UN and one or more States which regulate, to any extent, the UN's immunity in Member States' territory in terms of the Immunities Convention. The UN, as an international organisation, does not possess a territory. As such, it depends on the goodwill of its Member States to establish its headquarters and other missions. The need for specific agreements between the UN and its hosts is evident. The relationship with the UN and its host States is a specific one and requires specific agreements.¹¹⁵ These agreements provide a formal understanding pertaining to the particular relation between the UN and its host as opposed to a general convention between the Organisation and all of its Member States. These agreements are also meant to regulate the UN's immunity as part of this special relation between the Organisation and its hosts.¹¹⁶ It is

¹¹⁴ The actors relevant to the practice of the Immunities Convention and section 2 thereof are the UN itself and the States. Buga (n 107 above) 32.

¹¹⁵ J Klabbbers *An introduction to international institutional law* (2009) 140.

¹¹⁶ 'The United Nations may have offices ... may wish to conclude contracts, hold funds and property elsewhere than at its seat ... For these and similar reasons, therefore, the Organisation will require

important to note that for several decades after its enactment, the Immunities Convention did not possess the near universal ratification it does today.¹¹⁷ Consequently, the UN had missions and operations in the territory of States that were not party to the Immunities Convention. To ensure the immunities and privileges of the Organisation in those States, the UN entered into special bilateral agreements providing for its immunity.¹¹⁸ These supplementary agreements can provide further insight into the scope of the UN's immunity as they constitute practice subsequent to the Immunities Convention even though they sometimes concern States that are not party to the Immunities Convention.

Agreements between the UN and host States may take the form of seat agreements such as a headquarters agreement for the UN Headquarters office (UN HQ Agreement), SOMAs for the establishment and management of UN missions, and SOFAs as part of the arrangement for UN peacekeeping troops deployed in a host State's territory.

The UN has its main headquarters in New York and thus entered into a headquarters agreement with the US.¹¹⁹ This agreement was intended to delineate the mutual obligations with regard to the headquarters' establishment and functioning.¹²⁰ In terms of this agreement, the UN headquarters district 'shall be under the control and authority of the United Nations'.¹²¹ The UN HQ Agreements supplement the Immunities Convention with specifics pertaining to

in the territories of Members, the same kind of immunities and privileges as it has in the country of its seat' Report of the Preparatory Commission of the United Nations (23 December 1948) PC/20 61 para 3.

¹¹⁷ The Immunities Convention counts 162 States as parties thereto. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en (accessed 25 January 2020).

¹¹⁸ 'In those cases where the State is not a party to the Convention, agreements concerning privileges and immunities are included which incorporate all the provisions of the Convention or set forth those privileges and immunities considered essential' UN Study 1967 (n 69 above) para 91 at 227.

¹¹⁹ Agreement between the UN and the US regarding the headquarters of the UN, signed at Lake Success on 26 June 1947. Hereafter, UN HQ Agreement.

¹²⁰ Exchange of notes I: Letter from UN Secretary-General Trygve Lie to the permanent representative of the US to the seat of the UN, Warren R Austin UNTS 1947.

¹²¹ Section 7(a) UN HQ Agreement (n 107 above).

the relationship between the UN and the US with regard to the headquarters.¹²² Notably, while the UN HQ Agreement expresses the inviolability of the UN headquarters,¹²³ it does not contain an express immunities provision. This is due to the fact that the agreement is to be read in conjunction with the Immunities Convention as it is subject thereto.¹²⁴ The UN HQ Agreement provides for the dominance of UN regulations and the Immunities Convention within the headquarters district. UN regulations in terms of this agreement include the respect for the UN's immunity in terms of the Immunities Convention.¹²⁵ Furthermore, the UN HQ Agreement provides that US laws apply unless otherwise provided for by UN regulations and the Immunities Convention.¹²⁶ In that regard, the UN HQ Agreement states the following:

No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorised by this section shall, to the extent of such inconsistency, be applicable within the headquarters district.¹²⁷

This means that UN regulations and the Immunities Convention prevail over US law. In fact, the UN HQ Agreement provides that, in case of a dispute, pending the outcome of a resolution,¹²⁸ UN rules apply and prevail over US law in the following terms:

Pending such settlement, the regulation of the United Nations shall apply, and the federal, state or local law or regulation shall be inapplicable in the headquarters district to the extent that the United Nations claims it to be inconsistent with the regulation of the United Nations.¹²⁹

The UN HQ Agreement thereby decrees that on top of the prevalence of UN rules over US law, in case of discrepancy between the two, the UN gets to determine

¹²² 'The agreement regarding the headquarters of the United Nations are complementary to the Convention on the Privileges and Immunities of the United Nations' Privileges and Immunities of the United Nations UN Doc (3 December 1948) UNGA/A/res/ 259.

¹²³ Section 9 of the UN HQ Agreement.

¹²⁴ Sections 1, 7, 8 of the UN HQ Agreement.

¹²⁵ *Boimah v UNGA* (n 64 above) 4.

¹²⁶ Section 7 and section 8 of the UN HQ Agreement.

¹²⁷ Section 8 of the UN HQ Agreement.

¹²⁸ Section 21 of the UN HQ Agreement provides for the modalities of dispute resolution between the UN and the US.

¹²⁹ Section 8 of the UN HQ Agreement.

the existence of the said discrepancy or inconsistency. This is especially significant in light of divergent interpretations with regard to the scope of the UN's immunity. Therefore, should there be a change in the scope of the immunity of international organisations in US law, the UN is exempted from this by virtue of its specific agreement with the US.¹³⁰ Considering the UN's position that its immunity is absolute in terms of the UN Charter and the Immunities Convention,¹³¹ it follows that this position prevails over US law. It should be noted that this position would have been more relevant during the time when the US was not a party to the Immunities Convention. Considering US accession to the Convention, the UN would still benefit from absolute immunity directly derived from the Immunities Convention as opposed to indirectly through the UN HQ Agreement.¹³²

There have been attempts at adopting a restrictive interpretation of the UN HQ Agreement that could result in a more limited immunity for the UN.¹³³ According to the said restrictive interpretation, the UN HQ Agreement provides that US law applies as default and UN regulations only apply as an exception. This is evidenced by the wording of the agreement which provides for the application of US law 'except as otherwise provided in this agreement or in the general convention'.¹³⁴ On this basis, Klabbbers argues that the UN immunity should be interpreted restrictively so as to reflect the agreement that US law is the default

¹³⁰ As evidenced by the recent and highly publicised case of *Jam v International Finance Corp* 17-1011 US Supreme Court (27 February 2019), hereafter *Jam v IFC*. In this case, the US Supreme Court held that international organisations in the US such as the IFC do not possess broader immunities than States thereby subjecting international organisations' immunity to the same restrictions imposed on States' immunity. This was reversed by the District Court on remand from the Supreme Court as the conduct in question was not carried out in the US. The IFC's immunity was thus upheld. *Jam v International Finance Corp No 15-612* US District Court (14 February 2020), hereafter *Jam v IFC* (District Court Remand).

¹³¹ UN office of Legal Affairs memorandum to the Legal Advisor of the UN Relief and Works Agency for Palestine Refugees in the Near East (28 February 1984). http://legal.un.org/docs/?path=../unjuridicalyearbook/pdfs/english/by_volume/1984/chpVI.pdf&lang=EF (accessed 12 August 2018).

¹³² Para 61 of the ILC Fourth report on Relations between States and international organisations on the status, privileges and immunities of international organisations, their officials, experts, etc. UN Doc A/CN.4/424.

¹³³ Klabbbers (n 115 above) 145-146.

¹³⁴ Sections 7 and 8 of the UN HQ Agreement.

law and UN law only applies as an exception.¹³⁵ This restrictive interpretation is supported by the case law of *Klinghoffer v SNC Achille Lauro*,¹³⁶ wherein the US Court interpreted the UN HQ Agreement restrictively and held that the UN's immunity from legal process does not extend to UN observers and visitors.¹³⁷ Klabbers' interpretation is correct to a certain extent: the UN HQ Agreement makes no mention of observers and visitors and, as such, US law applies as the default legal system. However, this case is not an instance of a restriction of UN immunity; rather it is the application of US law in the absence of a UN regulation or treaty provision to that effect. This Court judgement should not be interpreted as a restrictive interpretation of UN immunity considering the immunity of observers is not included in the Immunities Convention or the UN Charter. Moreover, had the UN taken the stance that observers ought to be granted immunity, by virtue of section 8 of the UN HQ Agreement, the UN position would prevail pending the outcome of the dispute resolution mechanism in terms of section 21 of the Agreement. In addition, the viewpoint that in terms of the UN HQ Agreement US law is the general rule and UN rules the exception is irrelevant to the scope of the UN's immunity. Even in light of the recent case law of *Jam v IFC*, the US Supreme Court essentially restricted the immunity of international organisations in US jurisdiction by holding the following:

The International Organisations Immunities Act grants international organisations the 'same immunity' from suit 'as is enjoyed by foreign governments' at any given time. Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international organisations. The International Finance Corporation is therefore not absolutely immune from suit.¹³⁸

This case did not even restrict the immunity of all international organisations. Indeed, the US Supreme Court held that the International Organisations

¹³⁵ 'This means, generally speaking, that the privileges and immunities of the UN are to be viewed as exceptions to US jurisdiction, and therefore warrant a restrictive interpretation'. Klabbers (n 115 above) 145.

¹³⁶ *Klinghoffer & Others v SNC Achille Lauro & Others* 937 F.2d 44, hereafter *Klinghoffer* case.

¹³⁷ 'By its terms, however, the Headquarters Agreement extends immunity only to representatives of members of the UN, not to observers such as the PLO. We see no reason to extend the immunities provided by the Headquarters Agreement beyond those explicitly stated.' *Klinghoffer* case (n 136 above) para 1.

¹³⁸ *Jam v IFC* (n 130 above) 15.

Immunities Act (IOIA)'s restriction of the immunity of international organisations only applies as a default rule that can be departed from by an organisation's charter or other agreement such as a headquarters agreement.¹³⁹

In terms of the UN HQ Agreement, UN rules prevail in cases of conflict with US law and, as it pertains to the immunities and privileges of the UN, the Immunities Convention is the prevailing law. Moreover, the US is now a party to the Immunities Convention and as such is bound by section 2 both directly as a result to its accession to the Convention and indirectly through the UN HQ Agreement. In the *Boimah* case,¹⁴⁰ the US Court showed the simultaneous application of the UN HQ Agreement and section 2 of the Immunities Convention. On the claim of racial discrimination in UN employment practices, the US Court found that the UN HQ Agreement's prohibition of racial discrimination cannot be construed as an 'express' waiver of immunity in terms of section 2.¹⁴¹

In addition to the UN HQ Agreement, the UN has several seat agreements with States hosting its conferences,¹⁴² organs, institutions and regional offices.¹⁴³

¹³⁹ 'The privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organisation would be impaired by restrictive immunity, the organisation's charter can always specify a different level of immunity. The charters of many international organisations do just that. See, e.g., Convention on Privileges and Immunities of the United Nations, Art II, S 2' *Jam v IFC* (n above) at 14.

¹⁴⁰ *Boimah v UNGA* (n 64 above).

¹⁴¹ *Boimah v UNGA* (n 64 above) 4.

¹⁴² For obvious reasons, UN conference and workshop hosting agreements are temporary and concluded on an ad hoc basis. Exchange of letters constituting an agreement between the UN and the Government of Honduras regarding the hosting of the 'Technical Workshop on Principal Guidelines for the Development of Defense White Books: SICA States', to be held in Tegucigalpa, from 3 to 4 February 2005, New York, 13 and 28 January 2005; Exchange of letters constituting an agreement between the UN and the Government of the Congo regarding the hosting of the Twenty-Second Ministerial Meeting of the Standing Advisory Committee on Security Questions in Central Africa, to be held in Brazzaville, from 14 to 18 March 2005, New York, 8 March 2005; Exchange of letters constituting an agreement between the UN and the Government of Nigeria regarding the hosting of the 'Workshop on Energy Statistics with a special focus on Oil Statistics', to be held in Abuja, from 14 to 17 March 2005, New York, 24 January 2005 and 8 March 2005; etc.

¹⁴³ Agreement between the UN and Japan regarding the Headquarters of the United Nations University, signed at New York on 14 May 1976; Agreement between the Republic of Austria and the UN regarding the Headquarters of the UN Industrial Development Organisation, signed on 13 April 1967; Agreement between the Federal Government of the Republic of Austria and the UN regarding the Headquarters of the UN Industrial Development Organisation and other Offices of the UN of 28 September 1979; Agreement between the Government of the Federal Republic of Germany, the UN and the Secretariat of the Convention on the conservation of migratory species

Much like the UN HQ Agreement, these seat agreements ensure that the UN's absolute immunity in terms of section 2 is respected by the host State even when the said host is not a party to the Convention. For this purpose, the UN concludes seat agreements which either contain a verbatim reiteration of section 2¹⁴⁴ or do not contain a specific immunity clause but specify that the agreement is subject to the Immunities Convention.¹⁴⁵ These seat agreements rely on the Immunity Convention as the prevailing applicable law thus extending the UN's absolute immunity.

A notable seat agreement that departs from this formula is the Privileges and Immunities Agreement concluded between the UN and Switzerland.¹⁴⁶ This agreement is not subject to the Immunities Convention and until quite recently Switzerland was not a party to the Immunities Convention.¹⁴⁷ Considering the UN interests located in Switzerland,¹⁴⁸ the UN entered into an agreement specifically providing for its immunity on Swiss territory. Interestingly, the agreement contains an immunity provision that departs from the usual reiteration of section 2 in its language, in the following terms:

of wild animals concerning the headquarters of the Convention Secretariat of 5 May 2004. For a more comprehensive list of UN host agreements see: <https://ask.un.org/loader.php?fid=1611&type=1&key=53b154f6609d7f5fd20cffca7a807461> (accessed 15 September 2019).

¹⁴⁴ Article 12 of the Agreement between the UN and the Government of the People's Republic of China regarding the Headquarters of the Asian and Pacific Centre for Agricultural Engineering and Machinery, Bangkok 19 November 2003.

¹⁴⁵ Sections 15 & 16 of the Agreement between the Republic of Austria and the UN regarding the Seat of the UN in Vienna, Vienna 29 November 1995; Article 9 of the Agreement between the UN and the Government of the Republic of Korea regarding the Headquarters of the Asian and Pacific Training Centre for Information and Communication Technology for Development, Bangkok 31 January 2006; Preamble of the Agreement between the UN and Japan regarding the Headquarters of the United Nations University, New York 14 May 1976.

¹⁴⁶ Agreement on Privileges and Immunities of the United Nations concluded between the Swiss Federal Council and the Secretary-General of the UN on 19 April 1946. Hereafter, Swiss Agreement.

¹⁴⁷ Switzerland acceded to the Immunities Convention on the 25 September 2012. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en (accessed 10 August 2019).

¹⁴⁸ The UN Office at Geneva (UNOG) is the largest UN office establishment after the UN Headquarters in New York.

The Swiss Federal Council recognises the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organisation cannot be sued before the Swiss Courts without its express consent.¹⁴⁹

While the text of this provision and the agreement at large make no mention of the Immunities Convention, it still constitutes an application of section 2. Indeed, this agreement and its immunity provision in particular are evidence of practice subsequent to the Immunities Convention. This provision holds that the UN cannot be sued without its express consent. Thus, like section 2 of the Immunities Convention, the only way for a lawsuit against the UN to be admissible is with the UN's express waiver or consent. This is an expression of absolute immunity. Furthermore, this provision holds that this immunity is 'according to the rules of international law'. This can only mean that it is derived from the rules of international law on the immunity of the UN. Evidently, international law rules on the UN's immunity are derived from the UN Charter in general and more specifically the Immunities Convention as the more specific and more recent law.¹⁵⁰ There is no evidence that customary law rules on the immunity of the UN have formed independently of the UN Charter and the Immunities Convention.¹⁵¹ This is illustrative of the application of section 2 of the Immunities Convention by a State not party to the Convention. More remarkably, it demonstrates how the practice subsequent to the Immunities Convention by a State not party to the Convention still results in absolute immunity for the UN, even though it is in an indirect manner.

In addition to seat and conference hosting agreements, the UN enters into peacekeeping mission agreements subsequent to the Immunities Convention. As discussed in the first chapter of this study, SOFAs are agreements between UN peacekeeping missions and their host States. To a large extent, they are akin to seat agreements but with the specificity required by the peacekeeping context. Most UN peacekeeping missions enter into SOFAs with host States at the start of

¹⁴⁹ Section 1 of the Swiss Agreement (n 146 above).

¹⁵⁰ See the *Mavromatis Palestine Concession* case (n 62 above) and the *Lockerbie* case (n 34 above) for the simultaneous application of *lex specialis* and *lex posterior*.

¹⁵¹ M Wood 'Do international organisations enjoy immunity under customary international law?' in M Blokker & N Schrijver (eds) *Immunity of international Organisations* (2015) 54-60.

a peacekeeping mission. These agreements provide for the legal framework within which UN peacekeeping missions operate. This includes the privileges and immunities of UN peacekeeping missions within the territory of host States pursuant to the Immunities Convention and section 2 thereof. The UN Model SOFA,¹⁵² on the immunity of its peacekeeping missions holds the following:

The UN peacekeeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges, and immunities of the UN as provided for in the present agreement, in accordance with the Convention.¹⁵³

This provision is reiterated verbatim in all subsequent SOFAs.¹⁵⁴ Similar to the HQ agreement and the various seat agreements entered into by the UN, the SOFA is subject to the Immunities Convention. Consequently, the UN peacekeeping missions enjoy the same immunities under SOFAs as they do under the Immunities Convention.¹⁵⁵ Furthermore, UN peacekeeping missions as full-fledged organs of the UN benefit directly from the immunity provision as contained in section 2 of the Immunities Convention.¹⁵⁶ Individual peacekeepers are the only relevant parties who derive their immunity solely from the SOFA,¹⁵⁷ whereas, the Secretary-General,¹⁵⁸ other high-ranking officials,¹⁵⁹ the civilian component of the mission,¹⁶⁰ and military observers¹⁶¹ are all granted immunity under the Immunities Convention as well. Evidently, this 'dual immunity' under

¹⁵² 'Model Status of Force Agreement for peacekeeping operations' (9 October 1990) UN GA A/45/594. Hereafter, Model SOFA.

¹⁵³ Section 15 of the UN Model SOFA.

¹⁵⁴ Section 15 of the SOFA for the UN mission in South Sudan (UNMISS), section 15 of the MINUSTAH SOFA, etc.

¹⁵⁵ Section 3 of the UN Model SOFA provides that the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the United Nations peacekeeping operation subject to the provisions specified in the present Agreement'.

¹⁵⁶ 'The United Nations peacekeeping operation, its property, funds and assets, and its members, including the Special Representative/Commander, shall enjoy the privileges and immunities specified in the present Agreement as well as those provided for in the Convention, to which [host country] is a Party' Section 4 of the UN Model SOFA.

¹⁵⁷ Section 27 of the UN Model SOFA provides that 'Military personnel of national contingents assigned to the military component of the United Nations peacekeeping operation shall have the privileges and immunities specifically provided for in the present Agreement'.

¹⁵⁸ Section 24 of the UN Model SOFA.

¹⁵⁹ As above.

¹⁶⁰ Section 25 of the UN Model SOFA.

¹⁶¹ Section 26 of the UN Model SOFA.

both the SOFA and Immunities Convention is only possible if the host State is also a party to the Convention. In the extremely rare case of a peacekeeping mission host State which is not a party to the Immunities Convention, the absolute immunity of the UN mission is still guaranteed pre-emptively by the Model SOFA. Indeed, the potential of a gap in UN immunity was foreseen by the Model SOFA drafters who specified that

while the Convention is in force with respect to 124 Member States, there are a number of States that are not a party to it and there may also be United Nations operations involving relations with entities other than States. Thus, in such cases, the Status Agreement itself must provide specifically for the application of the Convention.¹⁶²

In essence, the Model SOFA was also intended to extend the application of section 2 of the Immunities Convention to those States not party to the Convention. Thus, it appears that as it pertains to UN peacekeeping specifically and the UN in general, statutory measures have been purposefully put in place to ensure the Organisation enjoys an absolute form of immunity in the territory of its hosts.¹⁶³

The practice regarding agreements subsequent to section 2 upholds the absolute immunity contained in the provision. These agreements consistently confirm the interpretation that section 2 affords the UN an immunity that is absolute in scope, qualified only by an express waiver. This demonstrates that the understanding surrounding section 2 has remained the same in ensuring the preservation of the UN's absolute immunity.

UN practice subsequent to the Immunities Convention

The UN's own application of section 2 of the Immunities Convention constitutes practice subsequent to the Immunities Convention and is relevant to the interpretation of section 2. Granted, the Immunities Convention was concluded by the Member States without the UN's direct participation. However, the UN is one of the implementing parties and its relevance expands beyond that of a mere

¹⁶² Section 3(d) of the UN Model SOFA.

¹⁶³ 'Safety and security of humanitarian personnel and protection of UN personnel' UN Resolution A/Res/ 68/101/ para 17.

treaty beneficiary.¹⁶⁴ The content of the Immunities Convention indicates that the UN is as much a party to the Convention as its Member States.¹⁶⁵ Indeed, by virtue of article 105(3) of the Charter, the Immunities Convention required the approval of the General Assembly to come into force. This has been interpreted as 'the equivalent to ratification by the UN. The contracting parties are, on the one hand each Member State and, on the other, the UN as such'.¹⁶⁶ More importantly, the UN considers itself to be a party to the Convention and fully bound by it.¹⁶⁷ Thus, to assess all relevant practice subsequent to the Immunities Convention, a study of the UN's measures of implementation of section 2 of the Convention must be undertaken. Moreover, the remedy gap, as discussed above, results from the UN's extensive immunities coupled with a lack of or inadequate alternative dispute resolution mechanism. The UN's expansive immunities are derived from the Charter and the Immunities Convention and not from a set of policies undertaken by the UN of its own accord. However, the practice and policies of the UN inform the scope of its immunity which in turn contributes to the remedy gap issue. The UN's practice on invoking immunity is thus of paramount importance in a study on the remedy gap.

UN practice with regard to its immunity is one of avoidance of legal process. Indeed, it is apparent that the UN generally endeavours to avoid any form of legal process despite the protection afforded by section 2 of the Immunities Convention.¹⁶⁸ The UN takes measures to avoid any situation that could result in an assessment of the scope of its immunity. There are only three types of cases

¹⁶⁴ Reinisch & Bachmayer (n 64 above) 11.

¹⁶⁵ The wording of several provisions of the Immunities Convention indicate that the UN is a party to the Convention: Section 29 of the Immunities Convention which holds that 'the United Nations shall make provisions for the appropriate mode of settlement'; section 30 which provides for a dispute resolution mechanism referring to the UN as a party to a dispute in terms of the Convention; section 35 which specifically refers to the UN as a party to the Convention by holding that 'this convention shall continue in force as between the United Nations and every Member'.

¹⁶⁶ J Kunz 'Privileges and Immunities of International Organisations' (1947) 41 *American Journal of International Law* 828.

¹⁶⁷ 'Since the convention was adopted by the General Assembly on 13 February 1946, it became binding on the United Nations'. UN Office of Legal Affairs in Memorandum by the Division of Immunities and Registration of Treaties of 20 December 1948, as reported in Reinisch & Bachmayer (above) 9-10.

¹⁶⁸ Procedures in place for implementation of article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations UN Doc A/C.5/49/65 (24 April 1995).

that an international organisation such as the UN encounters: cases arising from employment contracts, those from commercial contracts, and third-party claims.¹⁶⁹ The UN has taken a proactive stance with regard to its employment and commercial contracts cases to avoid litigation in any non-UN forum. With regard to employment and commercial contracts, the UN's policy is to avoid endorsing a specific municipal system by making no mention of the applicable law in the contract.¹⁷⁰ Thus, the UN's employment contracts maintain an independence from any national law system.¹⁷¹ This in itself is not an issue as the UN has put internal mechanisms to assess the claims in place. The mechanisms in place to resolve contractual disputes have generally been considered to be satisfactory.¹⁷² On claims arising from commercial contracts, the UN routinely enters into arbitration and negotiation as long as they 'do not raise points of general legal interest regarding the status, privileges, and immunity of the UN'.¹⁷³ This avoidance of legal process extends to the UN's policy on waiver of immunity. In terms of section 2 of the Immunities Convention and the UN's own policy on immunity, it is only as a result of a waiver that the UN can be under the jurisdiction of national courts. The UN has opted to waive the immunity of its staff several times in order to promote accountability and ensure the complainants' access to justice.¹⁷⁴ This waiver is not without conditions, as expressed by the UN in the following terms:

The Organisation will ... waive immunity on a case-by case basis where in the opinion of the Secretary-General, immunity would impede the course of justice and can be waived without prejudice to the interests of the UN.¹⁷⁵

¹⁶⁹ UN Doc A/C.5/49/65 (above) paras 3-22.

¹⁷⁰ 'Generally speaking, United Nations contracts (both those of a commercial nature and employment contracts) have not made any mention in the contract of the kind of law applicable to the agreement'. UN Study 1967 (above) para 5 208.

¹⁷¹ 'In the case of employment contracts, the contract itself has formed part of a growing system of international administrative law, independent of given systems of municipal law. ... The United Nations Administrative Tribunal has referred to the general principles of law in interpreting employment contracts and has largely avoided reference to municipal systems' UN study 1967 (above) para 5 at 208.

¹⁷² UN Study 1967 (above) para 8 at 209; UN Doc A/C.5/49/65 (above) para 7.

¹⁷³ UN Study 1967 (above) para 8 at 209.

¹⁷⁴ UN Study 1967 (above) at 224; Rawski (above) 113-115.

¹⁷⁵ Para 66 of Criminal accountability of United Nations officials and experts on mission UN Doc A/66/174.

Thus, according to its own policy, the UN prioritises its interests when considering a waiver of immunity. In addition, it is UN practice to first have the cases subject to waiver assessed by its Office of Legal Affairs to make sure that 'it has no complications such as might merit special treatment'.¹⁷⁶ This positioning means that the UN will only waive its immunity if the case is simple and has no effect on its interests. As a consequence, the UN routinely waives the immunity of its staff but not that of the organisation itself.¹⁷⁷ Even in those instances where the UN would decide to waive its immunity, it would still retain the discretion to curtail the waiver by virtue of section 2 which holds that the waiver does not extend 'to any measure of execution'. The UN has taken those words to mean that while it may submit itself to a legal process by waiver, such waiver does not extend to the outcome of the proceedings. In fact, the UN's position on this is that should the UN be dissatisfied with the outcome of a legal proceeding to which it submitted itself, it may opt not to comply with the judgement by reasserting its immunity.¹⁷⁸ This is also in line with the UN's immunity from legal process which includes measures of executions and enforcement.

It is only with regard to third-party claims that the UN's policy of proactively preserving its immunity leads to the remedy gap. This is due to the fact that, unlike contractual claims (commercial and employment), certain third-party claims are not granted 'appropriate' alternative dispute resolution mechanisms. The third-party claims at the crux of this study are those claims launched against UN peacekeeping missions. For this reason, it is important to assess UN peacekeeping missions' practice with regard to its immunity in terms of section 2 of the Immunities Convention.

The UN's General Assembly routinely passes resolutions reaffirming the immunity of UN peacekeeping missions and its personnel.¹⁷⁹ These resolutions provide no

¹⁷⁶ UN Study 1967 (above) at 226.

¹⁷⁷ In the early days of the organisation, the UN Secretary-General routinely waived the UN's immunity specifically so that UN insurers could defend claims against the UN. UN Study 1967 (above) 225-226.

¹⁷⁸ Fn n 81 above. UN Study 1967 (above) at 119.

¹⁷⁹ Respect for the privileges and immunities of officials of the UN and the specialised agencies and related organisations A/res/41/205, further reaffirmed by Resolutions A/res/ 43/225; A/res/47/28; and A/res/49/238, of the same title.

further insight into the scope of the UN's immunity. Instead, they reaffirm the application of the Immunities Convention and call on Member States to 'scrupulously' respect the immunity contained therein.¹⁸⁰ This is because UN peacekeeping missions' immunity is guaranteed by the SOFAs and the Immunities Convention itself. As such, a better study of the UN peacekeeping missions' practice subsequent to section 2 can be found in the UN's interim administration of territories as part of its peacekeeping measures. The UN was mandated to administer the territories of East Timor¹⁸¹ and Kosovo as part of its peacekeeping mandate.¹⁸² This effectively made the UN the de facto government of these territories. As noted above, the main rationale for immunity is to protect the UN's functional independence from interference by Member States through their judiciaries. As such, it is important to assess the extent to which the UN preserves and applies its absolute immunity even in the absence of potential interference with its functional independence by a national judiciary.

In the case of Kosovo, the UN interim administration in Kosovo (UNMIK) was mandated by the Security Council to 'ensure conditions for a peaceful and normal life for all inhabitants in Kosovo'.¹⁸³ The UNMIK is peacekeeping in nature with a strong administrative component. The UN Security Council mandate for Kosovo provided for the security element of the mission to be handled by the Kosovo Force (KFOR), a NATO-led peacekeeping force,¹⁸⁴ while authority with regards to the administrative aspect of the mission was the purview of the UN civil personnel, UNMIK under the authority of the Secretary-General.¹⁸⁵ Both bodies were empowered by Security Council Resolution 1244 and, as such, are both under the same umbrella of peacekeeping by the UN in Kosovo.¹⁸⁶ This resolution made no

¹⁸⁰ As above.

¹⁸¹ UN Security Council Resolution 1272 (1999). Hereafter, UNSC Resolution 1272.

¹⁸² UN Security Council 1244 (1999) /S/RES/1244. Hereafter, UNSC Resolution 1244.

¹⁸³ Para 10 of UNSC Resolution 1244.

¹⁸⁴ Paras 5 and 7 of UNSC Resolution 1244.

¹⁸⁵ Para 6 of UNSC Resolution 1244.

¹⁸⁶ 'Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations' Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999 S/1999/516 Annex 1 of UNSC Resolution 1244.

mention of UNMIK's immunity as this aspect was provided for in the UNMIK Regulation 2000/47 on the interim administration of Kosovo.¹⁸⁷

As it exists today, UNMIK operates in a much more diminished role since Kosovo declared its independence¹⁸⁸ and since the establishment of the European Union Rule of Law mission in Kosovo (EULEX).¹⁸⁹ However, when it first began its operations, UNMIK exercised complete powers in terms of its legislative, judicial, and policing functions, much like a government in any given state.¹⁹⁰ As part of its legislative functions, UNMIK routinely passed regulations governing various aspects of UNMIK's administration of Kosovo.¹⁹¹ Accordingly, UNMIK passed the aforementioned UNMIK Regulation 2000/47 granting UNMIK and KFOR jurisdictional immunity in a language similar to section 2. This regulation holds that 'KFOR, its property, funds and assets shall be immune from any legal process'¹⁹² and that 'UNMIK, its property, funds and assets shall be immune from any legal process'.¹⁹³ In terms of section 2 of the Immunities Convention, immunity from 'any legal process' conveys an absolute form of immunity. It stands to reason that the same applies for a UN regulation in its application of section 2 as practice subsequent to the Immunities Convention. UNMIK and KFOR are thus accorded absolute immunity in the territories they govern as the interim administration. All third-party claims subject to the procedural bar posed by UNMIK/KFOR's immunity are to be settled by a claims commission that was never

¹⁸⁷ On the status, privileges and immunities of KFOR, UNMIK and their personnel in Kosovo of 18 August 2000 UNMIK Regulation 2000/47.

¹⁸⁸ Kosovo declared its independence from Serbia on 17 February 2008. In a statement on the immunity of UNMIK, the UN confirmed the change in its peacekeeping role by stating that 'Security Council resolution 1244 (1999), pursuant to which UNMIK was established, remains in force and ... continues to apply, albeit under very different circumstances today ... following the adoption of a declaration of independence by the Assembly of Kosovo on 17 February 2008'. *Statement by the Under-Secretary for Legal Affairs and United Nations Legal Counsel to the Security Council on 10 June 2019*. <https://unmik.unmissions.org/newsletter-statement-under-secretary-general-legal-affairs-and-united-nations-legal-counsel-security> (accessed 1 October 2019).

¹⁸⁹ EULEX is an initiative by the European Union to 'assist the Kosovo authorities in establishing sustainable and independent rule of law institutions'. <https://www.eulex-kosovo.eu/?page=2,60> (accessed 3 October 2019).

¹⁹⁰ Section 1 of UNMIK Regulation 1999/1 on the authority of the interim administration in Kosovo.

¹⁹¹ 'All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General' section 1(1) of UNMIK Regulation 1999/1.

¹⁹² Section 3 of UNMIK Regulation 2000/47.

¹⁹³ Section 4 of UNMIK Regulation 2000/47.

established.¹⁹⁴ This demonstrates how the remedy gap is reinforced by the UN; the UN is essentially immunised against the consequences of its actions and channels claims arising from its activities to non-existent alternative mechanisms.

In addition to UNMIK, the UN also functioned as a government as part of the UN transitional administration of East Timor (UNTAET) from 1999 to 2002.¹⁹⁵ UNTAET is mandated by a Security Council resolution which makes no mention of the interim administration's immunity.¹⁹⁶ Similar to UNMIK, UNTAET was governed by a set of regulations governing various aspects of the territory's administration.¹⁹⁷ However, unlike UNMIK, UNTAET did not have a regulation providing for its immunity.¹⁹⁸ Still, as a UN peacekeeping and administrative mission, UNTAET was still a beneficiary of absolute immunity in terms of section 2 of the Immunities Convention. This placed UNTAET in the same position as UNMIK. Section 2 provides for absolute immunity and UNTAET was the governing authority in East Timor, effectively rendering the UN immune to its own jurisdiction similar to UNMIK.

To give effect to justice, UNMIK and UNTAET routinely waived the immunities of its officials implicated in serious human rights violations and other offences.¹⁹⁹ However, this waiver has never been applied to the missions themselves, even in cases where the violations were facilitated by the UN's mandate and resources and thus institutionalised. The most serious large claim lodged against the UNMIK

¹⁹⁴ Section 7 of UNMIK Regulation 2000/47 provides for a claims commission dealing with third party claims. This commission was never established as observed in *NM & Others v UNMIK Human Rights Advisory Panel Report* (2016) Opinion case n 26/08 P 77. Hereafter, *NM v UNMIK Report*.

¹⁹⁵ 'All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator. In exercising these functions the Transitional Administrator shall consult and cooperate closely with representatives of the East Timorese people.' Section 1(1) of UNTAET Regulation 1999/1 *On the authority of the transitional administration in East Timor*.

¹⁹⁶ UNTAET is mandated by UN Security Council Resolution 1272.

¹⁹⁷ For a comprehensive list of all UNMIK Regulations from 1999 to 2002 see: <https://unmik.unmissions.org/sites/default/files/regulations/02english/Econtents.htm>; For a comprehensive list of all UNTAET Regulations see <http://mj.gov.tl/jornal/lawsTL/UNTAET-Law/Regulations%20English/regenglish.htm> (accessed 15 January 2020).

¹⁹⁸ M Benzing 'Midwifing a new state: The United Nations in East Timor' 9 (2005) *Max Planck Yearbook of United Nations Law* 338.

¹⁹⁹ For a detailed account of UN waivers with respect to serious crimes allegedly committed by UNMIK, KFOR and UNTAET officials. Rawski (above) 118 -120.

concerns the Kosovo Lead Poisoning dispute.²⁰⁰ This refers to a claim by ethnic minorities in Kosovo (Roma, Ashkali, and Egyptians) who were moved into an Internally Displaced Persons (IDPs) camp run by UNMIK.²⁰¹ The UN established the IDP camp in very close proximity to a smelter and mining industrial complex. This, coupled with extremely poor hygienic and living conditions, led to the lead poisoning of thousands of IDPs.²⁰² Despite being made aware of the dangerous lead poisoning as early as 2000, UNMIK opted to keep the reports private and kept the IDPs in the camp for a decade.²⁰³ As a consequence, many more IDPs were affected by lead poisoning which led to deaths and long-term illnesses. Individual criminal responsibility can possibly be identified with regard to who was aware of the poisoning and who was duty-bound to ensure the welfare of the IDPs and relocate them. However, the waiver of individual immunities would not address the fact that this was an action attributable to UNMIK as a whole. This is not the only case of institutionalised human rights violations by UN administrations. For instance, claims arising from the destruction or repossession of private property by UNMIK and KFOR were excluded from national jurisdiction before the enactment of Regulation 2000/47.²⁰⁴ This meant that claims of land dispossession by UNMIK and KFOR were left without a forum with jurisdiction. The advent of Regulation 2000/47 changed nothing since the Regulation placed these claims within the purview of a non-existent mechanism. Indeed, section 7 of the Regulation states:

Third-party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to KFOR, UNMIK, or their respective personnel and which do not arise from 'operational necessity' of either international presence, shall be settled by claims commissions established by KFOR and UNMIK, in the manner to be provided for.

Similarly, UNTAET institutionalised land repossession by granting development rights of public land without input from the locals and by adopting an ad hoc system of long-term land leasing which concentrated too much power in the

²⁰⁰ The facts of this case are contained in NM v UNMIK Report (n 194 above).

²⁰¹ NM v UNMIK Report (n 194 above) paras 42-62.

²⁰² NM v UNMIK Report (n 194 above) paras 63-89.

²⁰³ NM v UNMIK Report (n 194 above) paras 46-49.

²⁰⁴ Rawski (n 12 above) 121.

hands of UNTAET land administrators.²⁰⁵ These are more illustrations of wrongful acts attributable to the UN as a whole whereby the waiver of individual immunities does not address the institutional responsibilities. For instance, UNMIK threatened to invoke its immunity in the face of accusations of human trafficking by UNMIK civilian police.²⁰⁶ Indeed, the trafficking of women and girls for prostitution has boomed in Kosovo since the establishment of UNMIK.²⁰⁷ This trafficking is facilitated by UN resources with the protection granted by the immunities of Regulation 2000/47.²⁰⁸ The UN has acknowledged this and issued strategies to combat this issue.²⁰⁹ However, it has limited its judicial action to waiving the immunity of officials implicated without waiving that of the Organisation despite the fact that these are systemic and institutionalised crimes.²¹⁰ Illustrating this further, UNMIK and UNTAET have been accused of illegal detentions of individuals for long periods of time.²¹¹ UNTAET set regulations to ensure limits to the pre-trial detention of suspects.²¹² In terms of UNTAET Regulation 2000/30, pre-trial detention must be reviewed monthly by a judge.²¹³ However, owing to UNTAET's

²⁰⁵ D Fitzpatrick 'Land policy in post-conflict circumstances: Some lessons from East Timor' Working Paper no 58 (2000) *New Issues in Refugee Research* UNHCR; 'Housing, property and land rights in East Timor: Proposals for an effective dispute resolution and claim verification mechanism' Report of the United Nations Centre for Human Settlement 2000; 'Managing land conflict in Timor-Leste' Crisis Group Asia Briefing 110 of 9 September 2010.

²⁰⁶ Personal communication of UNMIK staff as reported by Rawski (n 12 above) 121.

²⁰⁷ 'Kosovo UN troops 'fuel sex trade'' *BBC News* 6 May 2004; 'Kosovo's Mafia: A hotbed of human trafficking' *Global Post* 6 March 2011; 'Trafficking in Persons Report 2008: Special Cases – Kosovo' Report of the United States Department of State (2008); 'So does that mean I have rights? Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo' Report of Amnesty International EUR 70/010/2004. Hereafter, Amnesty Report.

²⁰⁸ Amnesty Report (n 207 above) 7-9.

²⁰⁹ 'Combatting human trafficking in Kosovo: Strategy and Commitment' Report by the United Nations Interim Administration in Kosovo (2004); UNMIK Trafficking and Prostitution Investigative Unit (TPIU) End of Year Report, 2003. Report of the Secretary-General: Special measures for protection from sexual exploitation and abuse: A new approach (28 February 2017) A/71/818; Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse (9 October 2003) ST/SGB/2003/13.

²¹⁰ Personal communication of UNMIK staff as reported by Rawski (n 12 above) 119.

²¹¹ UNMIK Regulation 1999/26 which allowed for the extension of pre-trial detention indefinitely; Concluding Observations of the Human Rights Committee, *Serbia* UN Doc CCPR/C/UNK/CO/1 (2006); Country Reports on Human Rights Practices for 2001: East-Timor 1 (2002) by US State Department to the US House of Representative Committee on International Relations and the US Senate Committee on Foreign Relations 937.

²¹² 'On Transitional Rules of Criminal Procedure' UNTAET Regulation 2000/30 which regulates the amount of time a detainee may spend in pre-trial detention.

²¹³ Section 20 (9) UNTAET Regulation 2000/30 as amended by UNTAET Regulation 2001/25.

limited resources, individuals ended up in detention for much longer periods than allowed.²¹⁴ These instances of illegally prolonged detentions clearly denote the responsibility of the Organisation as a whole. The waiver of individual immunities would not be possible as these individuals are acting in their official capacity as judges and police officers. UNMIK Regulation 2000/47 grants absolute immunity to the UNMIK, KFOR, and several categories of officials. High-ranking officials are granted absolute immunity from national courts 'in respect of any civil or criminal act performed or committed by them in the territory of Kosovo'.²¹⁵ UNMIK Regulation 2000/47 also accords functional immunity to its local staff. Section 2 of UNMIK Regulation 2000/47 holds that:

2.3 Locally recruited KFOR personnel shall be immune from legal process in respect of words spoken or written and acts performed by them in carrying out tasks exclusively related to their services to KFOR.

2.4 KFOR personnel other than those covered under section 2.3 above shall be: immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo.

This is reiterated for UNMIK personnel in section 3 of the same regulation. Even UNMIK and KFOR's contractors are granted immunity 'from legal process within Kosovo in respect of acts performed by them within their official activities'.²¹⁶ These detentions for indeterminate amounts of time without charges were permitted by the UNMIK administration.²¹⁷ Therefore, these officials were considered to be acting in their 'official capacity' and were thus immune. The same goes for UNTAET officials who participated in land repossessions through

²¹⁴ Country Reports on Human Rights Practices for 2001: East-Timor (n 194 above) 941.

²¹⁵ 'The Special Representative of the Secretary-General, the Principal Deputy, and the four Deputy Special Representatives of the Secretary-General, the Police Commissioner, and other high-ranking officials as may be decided from time to time by the Special Representative of the Secretary-General, shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in the territory of Kosovo'. Section 3(2) UNMIK Regulation 2000/4.

²¹⁶ Section 4 of UNMIK Regulation 2000/47.

²¹⁷ 'The Committee notes with concern that criminal suspects have been arrested solely under a detention directive of the Commander of KFOR and under executive orders of the Special Representative of the Secretary-General without being brought before a judge promptly and without access to an independent judicial body to determine the lawfulness of their detention' Para 17 of *Concluding Observations of the Human Rights Committee, Kosovo (Serbia)* (n 194 above).

long-term public land leasing. This public land leasing was authorised by UNTAET regulations.²¹⁸ These are all instances of institutional crimes by the UN itself and the waiver of individual immunities would not address the institutional liability of the UN itself.

The UN has officially endorsed functional necessity as the rationale behind its absolute immunity. In an amicus brief, the UN confirmed that the immunity of international organisations such as the UN itself 'is purely functional and designed to protect their ability to function independently of any government'.²¹⁹ However, despite the UN's official position that its immunity is intended to safeguard its functional independence from interference, it still endowed itself and its personnel with absolute immunity. This is in the absence of a government with the potential to interfere with the UN's functioning through its judiciary. As it exists today, UNMIK operates in a much more diminished capacity.²²⁰ However, at the height of its administration of Kosovo, the UN exercised the functions of a government in Kosovo insofar as:²²¹ UN Legal Affairs drafted laws; the Special Representative of the Secretary-General was empowered to enact, amend, and repeal these laws;²²² the UNCIVPOL enforced them;²²³ and UN-employed international judges applied them in court.²²⁴ There was no room in this process for a government to unduly interfere with the UN's functioning through its courts, considering the UN was the government and the courts. Yet, UNMIK in Kosovo was immune from 'any legal process' including the ones instituted by UNMIK itself as the administrative authority. Thus, even in the absence of potential interference, the UN still insisted on absolute immunity. It should be mentioned that the potential of state interference could, in theory, materialise at the end of the UN's administration of

²¹⁸ Report of the United Nations Centre for Human Settlement (n 205 above) 7.

²¹⁹ Amicus curiae brief of the United Nations in the litigation of *Marvin R Broadbent & Others v Organisation of American States* US 682 F 2d 27 (1980). As reported in the *United Nations Juridical Yearbook* (1990) 228.

²²⁰ Fitzpatrick (n 190 above) 13-18.

²²¹ UNMIK Regulation 1999/1.

²²² Para 10 of UNSC Resolution 1244.

²²³ UNMIK Regulation 1999/1.

²²⁴ 'The Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person.' Section 1.2 of UNMIK Regulation 1999/1; UNMIK Regulation 1999/6; UNMIK Regulation 1999/18. This was also the case for UNTAET, UNSC Resolution 1272 para 6.

the territories. Kosovo and East Timor both became independent states.²²⁵ Had the UN waived its immunity as the administrator, these newly independent states could, in theory, interfere with the UN's functional independence by allowing claims against the UN resulting from its activities during its administrative tenure. For UNMIK, this risk was neutralised by UNMIK Regulation 2000/47 which provided that the immunity of UNMIK and its personnel 'shall continue after UNMIK and KFOR's mandate expires or after such entities and/or personnel are no longer employed by UNMIK or KFOR'.²²⁶ As for the duration of UNTAET's immunity, as it is solely regulated by the Immunities Convention, it will remain

for so long as that Member remains a Member of the United Nations or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.²²⁷

Subsequent practice of States and municipal courts

The practice subsequent to section 2 of the Immunities Convention also includes various case laws against the UN. State practice with regard to the Immunities Convention entails a study of how section 2 is applied in the national and regional courts of States. In order to ensure the respect of the obligation contained in section 2, States in whose judiciaries claims against the UN are lodged endeavour to participate in the proceedings on behalf of the UN.²²⁸ This is because it is UN practice not to participate directly in the proceedings.²²⁹ The UN usually opts to issue a reaffirmation of its immunity to the relevant Member State's representative at the UN or directly to the relevant court.²³⁰ It is then up to the

²²⁵ Kosovo declared independence in 2008 (n 177 above); East Timor (Timor Leste) declared its independence in 1999 and was internationally recognised as an independent state in 2002 after the end of UNTAET's mission. 'Council endorses proposal to declare East Timor's independence' 20 May 2002 UNSC Press release (31 October 2001) UN SC/7192.

²²⁶ Section 5 of UNMIK Regulation 2000/47.

²²⁷ Section 35 of the Immunities Convention.

²²⁸ *Srebrenica* case (District Court judgement) (n 2 above) paras 3.3, 5.6; (Appeal Court judgement n 2) paras 2.1-2.5

²²⁹ In the *Srebrenica* case, the Dutch State representative in the state's bid to be joined in the proceedings submitted a letter from the United Nations to the Permanent Representative of the Netherlands to the UN dated the 17 August 2007 reaffirming the UN's immunity from Dutch courts. *Srebrenica* case (District court judgment) (n 2 above) para 1.1.

²³⁰ 'On a number of occasions, most notably in the case of actions involving United Nations immunities ..., the United Nations has entered an amicus curiae brief The established practice at the present time is to assert the immunity from suit of the United Nations in a written

States to ensure their judiciaries respect the States' obligations pursuant to the UN Charter and the Immunities Convention.²³¹

Most of the legal process referred to in section 2 occur in the national courts of States. They are, therefore, the primary actors implementing the Member States' obligation to respect the UN's immunity. The practice of these courts demonstrates the direct application of section 2 by States. In most of the cases involving the UN, the concept of immunity versus that of access to justice becomes the central issue.²³² Claimants attempt to have their fundamental right of access to justice recognised over the UN's absolute immunity. This aspect of claims against the UN is not the focus of the practice subsequent to section 2. Rather, it is the practice of the courts' reasoning in upholding the absolute immunity that is more indicative of the current interpretation of section 2.

The practice of national and regional courts has consistently reflected the position that the immunity of the UN is absolute and unconditional.²³³ The Dutch Court in the *Srebrenica* case held that 'in international-law practise (sic) the absolute immunity of the UN is the norm and is respected'.²³⁴ Courts either uphold the content of section 2 directly or do so indirectly through national legislation enacted for that purpose. The US is one such example of a judiciary that has consistently upheld the UN's immunity on the basis of multiple instruments: the Immunities Convention, the UN HQ Agreement, and its own national legislation, namely the IOIA.²³⁵ This is demonstrated in *Boimah v UNGA*²³⁶ which applied both

communication to the Ministry of Foreign Affairs of the State concerned. When time permits this communication is sent through the Permanent Representative of the State concerned at United Nations Headquarters' UN Study 1967 (n 70 above) 224 para 72.

²³¹ '[T]he State argues rightfully that it has a reasonable interest in a Netherlands court not delivering any judgments which conflict with the immunity granted to the UN according to Conventions to which the Netherlands is a party (as is the case with article 105 of the Charter and article II § 2 of the Convention), because in that case the State, to whom such rulings should be imputed under international law, would violate its obligations arising from those conventions. The State therefore has a reasonable interest in explaining its interest before a court of law and to defend why that court should find it has no jurisdiction'. *Srebrenica* case (Appeal Court judgement) (n 2 above) para 2.5.

²³² *Effects of Awards* case p57; *Cumaraswamy* case at 89.

²³³ A Reinisch *International organisations before national courts* (2000).

²³⁴ *Srebrenica* case (District Court judgement) (n22 above) para 5.13.

²³⁵ International Organisation Immunities Act of 1945. Hereafter, IOIA.

²³⁶ *Boimah v UNGA* (n63 above) 3-6.

the IOIA and section 2 of the Immunities Convention in assessing the UN's immunity. The IOIA holds the following with regard to the immunity of international organisations in US territory:

International Organisations, their properties and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organisations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.²³⁷

The US Court noted that the IOIA provides international organisations with the same immunity as foreign states. Considering that the immunity of foreign states can be limited under certain circumstances,²³⁸ it stands to reason that the same limitations apply to international organisations.²³⁹ However, the Court pointed out that by virtue of section 2 of the Immunities Convention, the UN enjoys absolute immunity in the US regardless of the restrictions imposed by the national legislation's current interpretation.²⁴⁰ The Court held that even if the IOIA was the sole applicable law, the UN's employment practices could not be considered to be 'commercial activity' and thus excluded from immunity protection.²⁴¹ US courts demonstrated this tendency to distinguish between the UN's 'official' activities from its 'commercial' activities when assessing its jurisdiction over claims involving the UN. In fact, in *Abdi Hosh Askir v Boutros-Gali et al*,²⁴² the US Court went further with the *ius gestionis/imperii* distinction than it did in the *Boimah* case. In the *Boimah* case, the US Court first upheld the UN's absolute

²³⁷ Section 2(b) of the IOIA (n 218 above).

²³⁸ The immunity of foreign states in US Court was curtailed by the Foreign Sovereign Immunities Act of 1976 which restricted states' immunities to *iure imperii* acts only. 'Notes: Jurisdictional immunities of international organisations' 91.6 (1982) *The Yale Law Journal* 1167.

²³⁹ 'It is unclear whether the Act, by granting to international organisations immunity coextensive with that of foreign governments, confers the absolute immunity foreign governments enjoyed at the time of the Act's passage, or the somewhat restrictive immunity provided for in the Foreign Sovereign Immunities Act ... withholding immunity from claims based on, among other things, a foreign government's "commercial activity"' *Boimah v UNGA* (n 63 above) 3.

²⁴⁰ 'The court need not decide the issue. Under the Convention the United Nations' immunity is absolute, subject only to the organisation's express waiver thereof in particular cases' *Boimah v UNGA* (n63 above) 3.

²⁴¹ '[A]n international organisation's self-regulation of its employment practices is an activity essential to the "fulfillment of its purposes", and thus an area to which immunity must extend' *Boimah v UNGA* (n63 above) 4.

²⁴² *Abdi Hosh Askir v Boutros-Ghali & Others* (1996) 933 F. Supp. 368.

immunity and only applied that distinction to showcase how the UN's immunity would still be upheld even in the absence of section 2, solely on the basis of the IOIA.²⁴³ In the *Abdi Hosh Askir* case, the US Court went further in that it assessed the UN's immunity on the basis of the *ius imperii* and *ius gestionis* distinction.²⁴⁴ This Court considered that it does not matter whether the UN's immunity is restricted by IOIA or whether the IOIA trumps the Immunities Convention because 'even if the more limited restrictive immunity doctrine applied, the claims in this case do not arise out of commercial activity by the United Nations'.²⁴⁵ The Court further held the following:

The scope of restrictive immunity is determined by the nature of the activity rather than its motivation or purpose ... even if the immunity available to the United Nations and its officials is only restrictive immunity, the immunity still applies because the nature of the acts complained of by the plaintiff are the exercise of governmental functions rather than private commercial activity.²⁴⁶

In a deviation from its usual practice, the US Court demonstrated an inclination to decide on granting the UN immunity based on the nature of its activities. The Court even examined in detail whether the UN's peacekeeping mission's illegal occupation of Abdi Hosh's property in Somalia amounted to a commercial activity. This Court, to a certain extent, opened the door to the potential of assessing the UN's entitlement to immunity based on the nature of its activities. The mere act of assessing the nature of the UN's activities constitutes submitting the UN to a legal process in contravention of section 2. In addition, it amounts to a deviation from the absolute immunity granted to the UN under section 2 as it potentially purports to limit the UN's immunity to its 'official' activities only. However, this potential precedent set by the *Abdi Hosh Askir* case was not maintained by US courts in other claims against the UN. The US continued to grant absolute immunity to the UN on the basis of section 2 without testing the nature of its

²⁴³ *Boimah v UNGA* (n63 above) 3.

²⁴⁴ *Abdi Hosh Askir v Boutros-Ghali* (n 225 above) para A.

²⁴⁵ As above.

²⁴⁶ As above.

functions.²⁴⁷ In *Brzak v United Nations*,²⁴⁸ the US dispelled the notion that the Immunities Convention needed an implementing legislation to be binding on the US. To this effect, the Court held the following:

[T]he CPIUN is self-executing and applies in American courts without implementing legislation. As the CPIUN makes clear, the United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity'.²⁴⁹

This stance dispels the notion that the UN's immunity might be restricted on the basis of the IOIA. It essentially holds that the Immunities Convention as self-executing legislation applies directly as law in the US. In the case of *Delamas et al v United Nations*,²⁵⁰ which stems from the *Haiti Cholera Dispute*, the US Court maintained the position that pursuant to section 2, the UN's immunity was absolute, unconditional, and qualified solely by an express waiver.²⁵¹ On appeal, the US Court reaffirmed that the UN's immunity was unconditional by rejecting the claim that access to alternative remedies in terms of section 29 of the Immunities Convention was a condition precedent to section 2.²⁵²

There are abundant cases against UN officials worldwide as those immunities are subject to limitations and waivers.²⁵³ However, due to the absolute immunity contained in section 2, there is a scarcity of cases against the UN itself. National judiciaries have consistently dismissed claims against the UN and upheld the UN's absolute immunity. In the *Manderlier* case,²⁵⁴ which concerned the property damage done by UN peacekeepers in the Congo, the Belgian Court upheld the UN's absolute immunity. The Belgian Court confirmed that there was nothing in the wording of section 2 that allowed for a restrictive interpretation of the UN's

²⁴⁷ *De Luca v United Nations Organisations* 841 F. Supp. 531 (1996); *Brzak v United Nations* (2008) No. 06 Civ. 3432, (2010) Appeal Court 08-2799-cv; *Delamas v United Nations* (n1 above).

²⁴⁸ *Brzak V United Nations* (Appeal Court) (n 231 above).

²⁴⁹ *Brzak v United Nations* (Appeal Court) (n 231 above) 6.

²⁵⁰ *Delamas v United Nations/Haiti Cholera Dispute* (n 1 above).

²⁵¹ *Delamas v United Nations/Haiti Cholera Dispute* (n 1 above) 4-7.

²⁵² *Delamas v United Nations/Haiti Cholera Dispute* (Appeal Court) (n 1 above) 18.

²⁵³ V Maginnis 'Limiting diplomatic immunity: Lessons learned from the 1946 Convention on the Privileges and Immunities of the United Nations' (2003) 28.3 *Brooklyn Journal of International Law*; MB McDonough 'Privileged outlaws: Diplomats, crime and immunity' (1997) 20 *Suffolk Transnational Law Review*.

²⁵⁴ *Manderlier v United Nations & Belgian State* (Brussels Appeal Court) Decision of 15 September 1969. 1969 *United Nations Juridical Yearbook* 236. Hereafter, *Manderlier* case.

immunity.²⁵⁵ The Court expressed its 'regrets' at having to uphold the UN's immunity in the absence of alternative measures of redress.²⁵⁶ However, it maintained that the UN's immunity was absolute and unconditional²⁵⁷ even though the UN's action 'does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights'.²⁵⁸ The Belgian Court maintained that despite human rights concerns, by virtue of section 2, the UN had been placed above any form of external authority, in the following terms:

It follows necessarily that the Organisation is an independent entity which places itself above the nations, acting according to its own free will, without being subject to any national, judicial, or other authority.²⁵⁹

The UN's immunity has consistently been upheld by national judiciaries all over the world, on the basis of section 2.²⁶⁰ In one notable instance, the Chilean Supreme Court upheld the UN's immunity on the basis of a seat agreement between the UN and Chile.²⁶¹ In *A v UN Economic Commission for Latin America*,²⁶² the Chilean Court upheld the UN's immunity on the basis of the seat agreement which provided that 'the Government recognises the immunity from legal process of the Headquarters of ECLA'²⁶³ and further that 'ECLA and its property, wherever situated and by whomsoever held, shall enjoy immunity from legal process, except in so far as in any particular case ECLA shall have expressly waived such immunity'.²⁶⁴ The Chilean Court considered the seat agreement to be the specific legislation applying the principles of the more general Immunities Convention with regard to the ECLA's immunity.²⁶⁵ This establishes that practice

²⁵⁵ As above.

²⁵⁶ As above.

²⁵⁷ '[T]he UN enjoys immunity from jurisdiction, except in so far as it has expressly waived it in a particular case. This provision is both general and absolute' *Manderlier* case (n 236 above) p 2.

²⁵⁸ *Manderlier* case (n 236 above) 237.

²⁵⁹ As above.

²⁶⁰ Rashkow (n above) 78-83.

²⁶¹ Agreement (with exchange of notes) regulating conditions for the operation in Chile, of the Headquarters of the United Nations Economic Commission for Latin America. Signed at Santiago, on 16 February 1953. Hereafter, ECLA Seat Agreement.

²⁶² *A v UN Economic Commission for Latin America* (Chile Supreme Court) Decision of 8 November 1969 199 *United Nations Juridical Yearbook* 237.

²⁶³ Section 2 of the ECLA Seat Agreement (n 262 above).

²⁶⁴ Section 7 of the ECLA Seat Agreement (n 262 above).

²⁶⁵ See fn 263 above.

subsequent to section 2 of the Immunities Convention, regardless of how indirect the connection to the Convention, results in absolute immunity for the UN. In the same spirit, the Dutch Court in the *Srebrenica* case held the following:

[T]he immunity referred to in article II s 2 of the Convention, which is indisputably defined as broadly as possible, is clear and ... does not allow any other interpretation than that the UN has been granted the most far-reaching immunity, in the sense that the UN cannot be brought before any national court of law in the countries that are a party to the Convention.²⁶⁶

Thus, as long as it is based on section 2, the immunity of the UN is absolute and, as such, the UN cannot be brought before any national court of a Member State.

2.4 The scope of the UN's immunity under article 105(1) of the UN Charter

Article 105 of the UN Charter is the foundation of the UN's jurisdictional immunity. In terms of this provision, the UN, its representatives, and officials are granted such privileges and immunities as are necessary for the exercise of their functions. The UN specifically is granted 'such immunities as are necessary for the fulfilment of its purpose'.²⁶⁷ This is referred to as the functional necessity doctrine.²⁶⁸ This immunity doctrine differs from that of States which is granted on the basis of the sovereign equality doctrine.²⁶⁹ In terms of the sovereign equality doctrine, a State should not be subjected to the jurisdiction of another State.²⁷⁰ The scope of state immunity was initially considered to be absolute but has since developed into a more restricted concept.²⁷¹ It is now generally accepted that State immunity is restricted to sovereign acts (*jure imperii*) and does not extend

²⁶⁶ *Srebrenica* case (Appeal Court judgement) (n 2 above) para 4.2.

²⁶⁷ Article 105 (1) of the UN Charter.

²⁶⁸ A Reinisch 'To what extent can and should national courts fill the accountability gap?' (2014) 10 *International Organisations Law Review* 573.

²⁶⁹ M Shaw *International law* (2003) 523; '[S]overeign immunity is a concept of international law, developed out of the principle, *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State' *Al-Adsani v United Kingdom* ECHR (21 November 2001) App no 35763/97 para 54.

²⁷⁰ 'Explanatory report to the European Convention on State immunity' (1972) 74 European Treaty Series para 1.

²⁷¹ Shaw (above) 698.

to commercial acts (*jure gestionis*).²⁷² In contrast, the immunity of international organisations is based on functional necessity. The functional necessity principle serves to ensure the functional independence of international organisations like the UN. It is meant to enable an international organisation to perform its functions within the territories of Member States unimpeded.²⁷³ Thus, theoretically, the immunity of an international organisation is limited to that which is necessary for the functioning of the organisation.²⁷⁴ However, it is precisely the uncertainty surrounding the limits of functional necessity that leads to the language of article 105 being considered ambiguous.²⁷⁵

According to some interpretations, the functional necessity doctrine limits the immunity of international organisations to their 'official' activities.²⁷⁶ However, considering the scope of the UN's activities and its prominence in the international sphere,²⁷⁷ the functional necessity thereof can be quite broad. Indeed, it is accepted that the UN's legal personality is functional in nature.²⁷⁸ Accordingly, the UN does not possess the capacity to act outside its functions; any such acts would

²⁷² H Fox & P Webb *The law of State immunity* (2013) 27; Article 10(1) of the United Nations Convention on Jurisdictional Immunities of States and their Property which explains further the *ius gestionis* limitation, which holds that 'If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.'

²⁷³ Explanatory Report to the European Convention on state immunity (above) para 2; E Gaillard & I P Lenz *International organisations and immunity from jurisdiction: To restrict or to bypass* (2001) 51 *International and Comparative Law Quarterly* 4.

²⁷⁴ Rawski (n 12 above) 107.

²⁷⁵ Singer (n 12 above) 67.

²⁷⁶ Singer (n 12 above) 84.

²⁷⁷ The UN's activities have expanded exponentially beyond what was envisaged in the UN Charter to respond to the changes in the global world order since its inception. This increase in activities and power by the UN was endorsed early on by the ICJ as being a normal aspect of the UN's international legal capacity. *Reparations for Injuries Suffered in the Service of the United Nations* ICJ (11 April 1949) (1949) ICJ Reports 182. Hereafter, *Reparations* case. The ICJ also referred to the 'necessities of international life' of an international organisation as being the basis for the ever-growing mandate and activities of international organisations in *Legality of Use by a State of Nuclear Weapon in Armed Conflict* ICJ (8 July 1996) (1996) ICJ Reports 226. See also WA Knight *A changing United Nations: Multilateral evolution and the quest for global governance* (2000).

²⁷⁸ N Bloker in Reinisch & Bachmayer 52; The ICJ confirmed the functional personality of the UN by stating that 'Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'. *Reparations* case (n 277 above) 182.

be *ultra vires*.²⁷⁹ Consequently, considering that the UN cannot act outside its functions, all the Organisation's acts are functionally necessary and therefore subject to immunity.²⁸⁰ To establish the limits of functional necessity, what is considered necessary for the UN's fulfilment of its purposes must first be delineated.²⁸¹

On one hand, functional necessity in terms of article 105 has been interpreted as a limitation of the UN's immunity.²⁸² This restrictive interpretation considers the UN's immunity to be limited to its 'official' activities.²⁸³ This restrictive interpretation of the functional necessity doctrine is akin to the State immunity doctrine which distinguishes between an entity's sovereign and commercial activities. In terms of this doctrine, international organisations are granted immunity for acts of an official nature as opposed to their commercial activities.²⁸⁴ The official nature of these acts is determined by their necessity to the realisation of the organisation's objective.²⁸⁵ This interpretation holds that for an act to be

²⁷⁹ Reinisch & Weber (above) 63.

²⁸⁰ *Firma Baumeister Ing. Richard L v O* (Austrian Supreme Court) Decision of 14 December 2004 Case No. 10 Ob 53/04y as translated in the *United Nations Juridical Yearbook* (2004) 398. Hereafter, *OPEC* case. In this case, the Austrian court held that due to the functional personality of the OPEC, all of its acts are connected to its functions and as such, subject to immunity.

²⁸¹ Reinisch (n 268) 273.

²⁸² Rawski (n 12 above) 107.

²⁸³ As above.

²⁸⁴ This distinction between the commercial and official activities of an international organisation was explicitly rejected by the UN: 'The exception to state immunity in situations where the state is undertaking commercial activities is not provided for by the United Nations Charter or the General Convention with respect to the United Nations'. 'Note to the Minister of Foreign Affairs of [State] to the United Nations concerning certain labour claims filed against the United Nations Logistics Base in [City] in the Court of [City] by five former individual contractors Unit' (2012) *United Nations Juridical Yearbook* 361.

²⁸⁵ The plaintiffs in the Srebrenica case claimed that 'the immunity provided for under article 105 of the Charter is more restricted than that under article II, § 2 of the Convention, because on the basis of the former a court must determine in each and every case brought before it whether the immunity invoked is necessary for the realisation of the UN's objectives' *Srebrenica case* (Appeal Court judgment) (n 2 above) para 4.3. According to the claimant this necessity is determined by the UN's 'functional needs' *Sitchting Mothers of Srebrenica & Others v The Netherlands* ECHR (11 June 2013) 65542/12 para 122. Hereafter, *Srebrenica* case (ECHR judgment).

deemed official and necessary, it must be intrinsically linked to the functions of the organisation.²⁸⁶

On the other hand, as observed in the *Srebrenica* case,²⁸⁷ functional necessity can be interpreted as referring to the necessity of preserving the functional independence of the UN as a whole, rather than in connection with any specific acts:

The question that needs to be addressed is not whether the invocation of immunity in this particular case in hand is necessary for the realisation of the objectives of the UN, but whether it is necessary for the realisation of those objectives that the UN is granted immunity from prosecution in general.²⁸⁸

These diverging interpretations are the result of article 105's vague wording. This is in contrast with section 2's clear and unambiguous text that only allows for a single and uniform interpretation on the scope of UN's immunity. Thus, to conclusively determine the scope of UN's immunity under article 105(1) of the UN Charter, this discrepancy needs to be addressed.

2.5 Addressing the apparent conflict between article 105(1) of the UN Charter and Section 2 of the Immunities Convention

As demonstrated above, under section 2 of the Immunities Convention, the UN's immunity is absolute, qualified only by a waiver. In contrast, article 105(1) of the UN Charter is ambiguously worded leaving space for an interpretation of a more restricted immunity for the UN.²⁸⁹ As discussed above, when there is conflict between two norms regulating the same subject matter, there are derogation rules in international law determining which norm prevails over the other. The conflict in this case stems from an interpretation of article 105 that limits the immunity of the UN to its official acts which is at odds with the absolute immunity contained in section 2. To conclusively establish the scope of the UN's immunity,

²⁸⁶ A Reinisch & RA Janick 'The personality, privilege and immunities of international organisations before national courts: Room for dialogue' in A Reinisch (ed) *The privileges and immunities of international organisations in domestic courts* (2013) 330.

²⁸⁷ *Srebrenica* case (Appeal Court judgement) (above).

²⁸⁸ *Srebrenica* case (above) (Appeal Court judgement) para 4.5.

²⁸⁹ A Reinisch *International organisations before national courts* (2000) 346.

it should be determined which interpretation ought to prevail. Under general international law, there are derogation measures employed to resolve a conflict of treaties that consist of rules such as *lex posterior*, *lex specialis*, and the concept of including a derogation clause in a treaty. These derogation rules can resolve the apparent conflict between article 105(1) and section 2 by determining the prevailing interpretation.

As it pertains to the law on the immunity of the UN, article 105 is the general law and section 2 is the more specific, more recent law. Article 105(3) provides for further specifications on the UN's immunity to be made by the General Assembly.²⁹⁰ The Immunities Convention is the result of this directive by article 105(3).²⁹¹ Thus section 2 is simultaneously the *lex posterior*, having been concluded after article 105, and the *lex specialis*, being the provision providing the most specificity on the law regarding the UN's immunity. However, article 103 of the UN Charter contains a derogation clause which decrees the prevalence of the UN Charter in the following terms:

In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

As established above, a derogation clause suspends the application of other derogation rules. Therefore, the fact that section 2 is both the *lex posterior* and the *lex specialis* is irrelevant owing to the presence of article 103 as a derogation clause. However, article 103 does not automatically make article 105 prevail over section 2. Indeed, article 103 is about the supremacy of UN Charter obligations and, by virtue of article 105(3), section 2 is a Charter obligation.²⁹² This is because the Immunities Convention was enacted to provide more specificity to the

²⁹⁰ In terms of article 105(3) of the UN Charter, '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'.

²⁹¹ Resolution relating to the adoption of the General Convention on the Immunities and Privileges of the United Nations and text of the convention UN Doc A/res/1/22A; 'Pursuant to Article 105(3), the General Assembly approved a convention on the privileges and immunities of the United Nations which elaborated on the ... privileges and immunities of the Organisation...' *Repertory of Practice of the United Nations* (1945-1954) Volume 5 para 9 at 326.

²⁹² UN Charter Commentary (n 8 above) 1295; fn n 36 above.

immunity accorded by article 105(1).²⁹³ Therefore, as a specification of article 105, section 2 is a UN Charter obligation and cannot be in conflict with a Charter provision.²⁹⁴ Moreover, before resolving a conflict of norms, the presence of a conflict must first be established. A conflict of norms exists when there is no possibility of a harmonious interpretation of the treaty. As observed above, section 2's language and subsequent practice leaves no room for any interpretation other than that of absolute immunity for the UN. As such, it is article 105 that can be interpreted to align with section 2.

There are several reasons to opt for a harmonious interpretation of article 105(1) in line with section 2. First, the functional necessity doctrine contained in article 105 speaks to the rationale of the UN's immunity not the scope. Interpreting the functional necessity doctrine as a limitation to the UN's immunity would be erroneous. Indeed, functional necessity defines the reason for the UN's immunity as preserving the functional independence of the Organisation from unilateral interference by Member States. The UN affirmed this in the following terms:

International organisations may be considered as collective enterprises of their Member States. Their constituent treaties define precisely the influence each Member is to have on the operation of the Organisation ... If individual members could then exert additional influence on those organisations ... this could drastically change the constitutionally agreed sharing of power within the Organisation. Thus, the immunity granted by Member States to international organisations is really their unilateral pledge that none will attempt to garner unilaterally an undue share of influence over its affairs.²⁹⁵

This was the opinion of the UN on the Organisation of American States' (OAS) immunity in which the rationale of an international organisation's immunity and the impact on the scope of the said immunity was explained. Indeed, the legal framework of the OAS's immunity is structured in the same manner as the UN's. The OAS Charter states that the OAS enjoys immunities 'as are necessary for the

²⁹³ Article 105(3) UN Charter; UN Doc A/res/1/22A (n 288 above); Reinisch & Bachmayer (n 64 above) 3-4.

²⁹⁴ See fn n36 above.

²⁹⁵ Amicus curiae brief of the UN in the litigation of *Marvin R Broadbent & Others v Organisation of American States* US 682 F 2d 27 (1980) as reported in the *United Nations Juridical Yearbook* (1990) 228. Hereafter, UN Amicus Curiae brief.

exercise of its functions and the accomplishment of its purposes'.²⁹⁶ These immunities are further specified in an Immunities Agreement which provides for the OAS's immunity from 'every form of legal process except insofar as in any particular case the immunity has been expressly waived'.²⁹⁷ The UN in its amicus brief drew the same parallels between the UN Charter and the OAS Charter and between the Immunities Convention and the OAS Immunities Agreement. The UN explained that these founding charters lay out the reason for the Organisations' immunities while the subsequent immunities agreements provide the specificities of the scope of these immunities.²⁹⁸ Indeed, functional necessity does not automatically entail a restricted immunity. Member States wishing to endow their international organisations with a limited functional immunity make it plain in the language of their immunity provision,²⁹⁹ whereas those organisations endowed with immunity as much as 'necessary for the accomplishment' of objectives are referring to the rationale of the immunity and, just like the OAS and the UN, the scope of their immunity is further specified in another agreement or in separate clauses. This is instantiated by the International Criminal Court (ICC)'s own Immunities Convention which provides for its immunity's rationale and scope in the same agreement albeit in different provisions.³⁰⁰ Similar to article 105(1) of the UN Charter, article 3 of the ICC's Immunities Agreement provides that the ICC 'shall enjoy ... such privileges and immunities as are necessary for the fulfilment of its purpose'.³⁰¹ Article 6 of the same document specifies that the ICC 'shall be immune from every form of legal process' as in section 2 of the Immunities Convention.³⁰² The practice of international organisations demonstrates that functional necessity refers to the rationale of the Organisation's immunity not the scope of the immunity. For the scope of the UN's

²⁹⁶ Article 103 of the Charter of the Organisation of American States of 1948. Hereafter, OAS Charter.

²⁹⁷ Article 2 of the Agreement on Privileges and Immunities of the Organisation of American States.

²⁹⁸ UN Amicus Curiae brief (n 295 above) 228.

²⁹⁹ Article 3(4) of the Protocol on Privileges and Immunities of the European Patent Organisation holds that 'The official activities of the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention'.

³⁰⁰ Agreement on the Privileges and Immunities of the International Criminal Court. Hereafter, ICC Immunities Agreement.

³⁰¹ Article 3 of the ICC Immunities Agreement.

³⁰² Article 6 of the ICC Immunities Agreement.

immunity, it is section 2 that must be assessed as it provides 'the details of the application' of article 105(1).³⁰³

Section 2, as the provision specifying the scope of the UN's immunity under article 105(1), is the second reason for a harmonious interpretation of article 105(1). Indeed, as a specification of article 105,³⁰⁴ the Immunities Convention qualifies as both an agreement subsequent to the UN Charter and its subsequent practice.³⁰⁵ Article 105(3) required the General Assembly, composed of all Member States,³⁰⁶ to provide the details of the application of article 105(1) and (2). Thus, the resultant Immunities Convention is a subsequent agreement and a manifestation of the UN Charter's parties' practice of article 105. There is no hard distinction between subsequent agreement and subsequent practice.³⁰⁷ Agreements subsequent to a treaty can be considered as subsequent practice. Subsequent agreements and practice are both activities undertaken by Member States to express their power to 'create, interpret and modify a treaty'.³⁰⁸ The value of subsequent agreement and practice to the present discourse is equal as they both provide a reliable indication of the UN Charter parties' understanding of article 105.³⁰⁹ Therefore, the UN's absolute immunity in terms of section 2 represents the Charter parties' interpretation of article 105.

³⁰³ Article 105(3) of the UN Charter.

³⁰⁴ UN Charter commentary (n 8 above) 1316; *Srebrenica* case (Appeal Court judgment) (n 2 above) para 4.4; UN Doc A/res/1/22A (n 291 above).

³⁰⁵ Conclusion 6 of the 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' ILC Report A73/10 (2018) 2 *Yearbook of the International Law Commission*. Hereafter, ILC Draft conclusions on subsequent agreements and practice.

³⁰⁶ Article 9 of the UN Charter.

³⁰⁷ G Hafner 'Subsequent agreements and practice: Between interpretation, informal modification and formal amendment' in G Nolte (ed) *Treaties and subsequent practice* (2013) 109; Buga (n 107 above) 53.

³⁰⁸ 'La raison fondamentale en est que les deux activités sont menées par les parties contractantes en vertu d'un même pouvoir de création, d'interprétation et de modification du droit'. Translated from I Voicu *De l'interprétation authentique des traités internationaux* (1968) 87.

³⁰⁹ 'Subsequent agreements and subsequent practice under article 31, paragraph 3(a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31' Conclusion 3 of the ILC Draft conclusions on subsequent agreements and subsequent practice (n 306 above); *Kasikili/Sedudu Island (Botswana v Namibia)* ICJ (13 December 1999) (1999) ICJ Reports 1153 Dissenting opinion of Vice-President Weeramantry para 23-24.

Moreover, should the restrictive interpretation of article 105 be confirmed as the initial understanding of article 105(1), then section 2 must be considered a manifestation of the changing interpretation of article 105(1). Indeed, subsequent practice can arguably modify the interpretation of a treaty provision³¹⁰ or, at least, widen its scope.³¹¹ Section 2 as subsequent agreement and practice of article 105 does not amend article 105(1) altogether. However, in view of the restrictive interpretation, it can be deemed as widening the scope of article 105 to accommodate the absolute immunity contained therein. It is accepted that the effect of subsequent agreements and subsequent practice on the interpretation of treaties can consist of 'a widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties'.³¹² Therefore, while article 105(1) can be interpreted at face value as restricting the UN's immunity, this interpretation is not supported by the practice and agreement subsequent to this provision. There is thus no basis for a meritless interpretation that would result in a conflict between the UN Charter and the Immunities Convention to prevail over a harmonious interpretation that is supported by consistent practice and agreements subsequent to the UN Charter. In fact, section 2 and article 105(1) must be considered as complementary through accumulation rather than in conflict with each other.³¹³ It should thus be concluded that article 105(1) does not restrict the UN's immunity and as such is not in conflict with section 2 of the Immunities Convention.

³¹⁰ There is a presumption that subsequent practice in the application of a treaty consists of interpreting the treaty and not modifying it. The ILC holds that '[t]he possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognised'. Conclusion 7(3) of the ILC Draft conclusion on subsequent agreements and practice (n 109 above). There are, however, several instances where the modifying effect of practice on treaty interpretation was recognised: *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* ICJ (13 July 2009) ICJ Reports 213 para 64; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* ICJ (10 October 2002) ICJ Reports 303 para 68; *Soering v The United Kingdom* ECHR (7 July 1989) 14038/88 para 103; etc. There are also several scholarly writings recognising this: See Buga (n 107 above) 108 for a compilation of scholarly articles on the matter.

³¹¹ Conclusion 7 of the ILC Draft conclusions on subsequent agreements and practice (n 306 above); Buga (n 107 above) 166-170.

³¹² Conclusion 7(1) of the ILC Draft conclusions on subsequent agreements and practice (n 306 above).

³¹³ Paulwyn (n 12 above) 161-164.

2.6 Conclusion

The above assessment conclusively determines that in terms of article 105 of the UN Charter and section 2 of the Immunities Convention, the UN's immunity is absolute. Save for an express waiver, there is no legal basis for national jurisdiction to curtail the UN's immunity. As such, it can be concluded that the immunity component of the remedy gap is due to the legal framework which offers no room for the limitation of the immunity. However, practice subsequent to the Immunities Convention demonstrates that the UN exacerbates the remedy gap issues. Indeed, the immunity granted to the UN is based on the rationale of protecting the Organisation's independence from the undue influence of national judiciaries. Yet, as seen in the UNTAET and UNMIK case study, even in the absence of this potential threat, the UN upholds its immunity and as such actively extinguishes claims made against it as the administrative authority. As a result, there is no forum independent of the UN that has the jurisdiction to hear third-party claims against the UN. While this aspect contributes to the remedy gap to a large extent, there would be no remedy gap if adequate dispute resolution mechanisms were available to claimants. Indeed, the UN's absolute immunity is not an issue in and of itself; it is only when coupled with non-existent or inadequate dispute resolution mechanisms that the remedy gap is created.

Chapter 3

The United Nations' obligation to provide access to remedies under international law

3.1 Introduction

The remedy gap in third-party claims against UN peacekeeping missions has been the subject of a few studies since the *Srebrenica* case and the *Haiti Cholera Dispute*.¹ Studies on the remedy gap share similar conclusions with regard to the main causes of this gap. These studies are in agreement that the remedy gap is the result of the UN's absolute immunity coupled with inadequate or non-existent alternative dispute resolution mechanisms. Indeed, as discussed in the introductory portion of this study, the remedy gap in third-party claims against the UN refers to those third-party claims that either fall outside the scope of the UN's dispute resolution mechanisms or are not provided access to these mechanisms. Consequently, these claims are all extinguished due to lack of a forum with jurisdiction. As established in the previous chapter, the UN's immunity from national jurisdictions is absolute and qualified only by an express waiver. Apart from the UN's alternative dispute resolution mechanisms, there is no forum with jurisdiction to adjudicate claims against the UN. However, the UN's immunity is not the sole cause of the remedy gap. There would be no remedy gap issue if the UN's absolute immunity was coupled with effective alternative dispute resolution mechanisms for third-party claims. As such, this chapter seeks to provide a thorough examination of an underlying factor within the second component of the remedy gap. This chapter aims to study the underlying obligation to provide access to remedies as a potential component of the remedy

¹ F Mégret 'Responsabilité des Nations Unies aux temps du Cholera' (2013) 46.1 *Revue Belge de Droit International*; K Schmalenbach 'Judge and jury' (2014) 11 *International Organisations Law Review* ; K Schmalenbach 'Preserving the Gordian knot: UN Legal accountability in the aftermath of Srebrenica' (2015) 62 *Netherlands International Law Review*; C Ferstman International organisations and the fight for accountability: The remedies and reparations gap (2017); K Schmalenbach 'Third party liability of international organisations: A study on claim settlement in the course of military operations and international administrations' (2005) 10 *International Peacekeeping* 40.

gap. It seeks to assess the legal framework of the source and scope of the UN's obligation to provide access to remedies. This is to establish whether the lack of or shortfalls of the UN's alternative dispute resolution mechanisms are imputable to an inadequate legal framework which does not provide sufficient legal tools to ensure the suitable adjudication of claims or whether the issue lies in the implementation phase through the UN's policies and practice. In essence, this chapter seeks to determine the basic rules that form part of the UN's obligation to provide access to remedies. This is done through a comprehensive analysis of all the possible sources of this obligation in order to determine its exact scope.

The first part of the chapter consists of a study of the UN's obligation to provide remedies under section 29 of the Immunities Convention. This study aims to determine the scope of the UN's treaty obligation through an interpretation of the provision's text, context, and purpose in line with article 31 of the VCLT.² This section also analyses the UN's practice and policies subsequent to the provision as indicative of the UN's own interpretation of section 29. This will establish whether the shortcomings of the UN's alternative dispute resolution mechanisms are attributable to the limits of this provision or whether this is caused by an inadequate interpretation and subsequent discharging of the treaty obligation. The second part of this chapter assesses the UN's obligation to provide remedies under other sources of international law, namely customary international law and general principles of law. This is to determine whether the UN has an obligation under general international law to provide access to remedies that differ from its treaty obligation. As such, this section will determine the content of the UN's obligation to provide access to remedies under general international law in contrast with its treaty obligation under section 29. The third part of this chapter will provide a consolidated study of the UN's obligation to provide remedies under both section 29 and general international law. This section will assess the interplay between the UN's treaty obligation and general international law obligation, and the extent to which one source prevails, limits, or expands the other.

² Vienna Convention on the Laws of Treaties of 1969. Hereafter, VCLT.

3.2 The UN's treaty obligation to provide remedies in terms of section 29 of the Immunities Convention

Article VIII, section 29 of the Immunities Convention holds the following:

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.

The Immunities Convention is the sole multilateral treaty directly imposing on the UN an obligation to provide access to remedies.³ It is UN practice to enter into agreements with host States that contain a provision setting out alternative dispute resolution mechanisms pursuant to section 29. These agreements are specific to the particulars of the UN's mission in the host State's territory such as SOFAs and headquarters agreements.⁴ However, such agreements, as established in the previous chapter, are bilateral agreements subsequent to the Immunities Convention and are subject thereto.⁵ As such, it is important to assess the obligation contained in section 29 as the original source of the UN's treaty obligation to provide access to remedies to determine the contents and limits of this treaty obligation through a study of the provision's text, context, purpose, and subsequent practice.⁶

³ A Reinisch 'Introduction to the General Convention' in A Reinisch & P Bachmayer (eds) *The Convention on the Privileges and Immunities of the United Nations and its Specialised Agencies: A commentary* (2016) 11-12.

⁴ Section 51 of Comprehensive review of the whole question of peacekeeping operations in all their aspects: Model status of force agreement for peacekeeping operations (9 October 1990) UN Doc A/45/595. Hereafter UN Model SOFA. See also, section 26 of Agreement on Privileges and Immunities of the United Nations concluded between the Swiss Federal Council and the Secretary-General of the United Nations on 19 April 1946; section 21 of Agreement between the United Nations and Japan regarding the Headquarters of the United Nations University, signed at New York on 14 May 1976. These provisions are verbatim reiterations of section 29 of the Immunities Convention.

⁵ Sections 1, 7 and 8 of the *Agreement between the United Nations and the United States of America regarding the headquarters of the United Nations*, signed at Lake Success on 26 June 1947. Hereafter, UN HQ Agreement; section 3 of the UN Model SOFA, etc. See Chapter 2 above for more comprehensive source of agreements subsequent to the Immunities Convention.

⁶ Article 31 of the VCLT.

The wording of section 29 imposes a direct obligation on the UN to provide access to remedies for third-party claimants. In the *Haiti Cholera Dispute*, a US Court recognised the compulsory aspect of section 29's wording by stating that 'section 29 uses mandatory language ... This language may suggest that section 29 is more than merely aspirational that it is obligatory and perhaps enforceable'.⁷ Thus, the language of section 29 conclusively imposes an obligation on the UN to provide access to remedies. The context and purpose of section 29 are also indicative of the intent to place an obligation on the UN to provide access to remedies. Section 29 was intended to mitigate the prohibitive effects of the UN's immunity on claims made against it.⁸ Indeed, section 29 is considered by commentators as 'the necessary supplement' to the UN's immunity under section 2 of the same Convention.⁹ This is evidenced by its inclusion in a Convention intended to specify the immunities of the UN and its officials.¹⁰ As established in the previous chapter, under section 2 of the Immunities Convention, the UN's immunity from national jurisdictions is absolute and qualified only by an express waiver. As a result, claims against the UN cannot be adjudicated in their natural forums.¹¹ The UN's immunity thus places a procedural bar on these claims but the UN remains beholden to the substance of the claim.¹² This is due to the fact that this immunity is not intended to allow the UN to evade its obligations or to shield

⁷ *Delamas George & Others v United Nations* (2015) 84 F 3d 246 (District Court judgement) p 6. Hereafter, *Haiti Cholera Dispute*.

⁸ 'The immunity accorded to the United Nations by Article II of the Convention on the Privileges and Immunities of the United Nations ... is offset by an obligation in article VIII to make remedies available to private parties who might otherwise be harmed by the immunity of the Organisation and its agents' Statement by Mr Hans Corell, UN Under-Secretary-General for Legal Affairs in *Request for Advisory Opinion in Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Verbatim Record (10 December 1998) ICJ CR98/17 para 5.

⁹ K Schmalenbach 'Dispute settlement: Article VIII section 29 General Convention' in Reinisch & Bachmayer (above) 529.

¹⁰ A Reinisch & UA Weber 'In the shadow of Waite and Kennedy: The jurisdictional immunity of international organisations, the individual's right of access to the courts and administrative tribunals as alternative means of dispute settlement' (2004) 1 *International Organizations Law Review* 65-67.

¹¹ 'Fourth report on the relation between States and international organisations on the status, privileges and immunities of international organisations, their officials, experts, etc.' (second part of the topic) UN Doc A/CN.4/224 para 24.

¹² Ferstman (n 1 above) 137-138.

it from liability altogether.¹³ The principle that immunity is not meant to be a shield against liability was confirmed by the ICJ when it held the following about the immunity of a state official:

While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.¹⁴

This statement referred to the immunity of a state official confronted with a criminal case and not that of an international organisation with civil claims against it.¹⁵ However, this statement is relevant in its essence as it confirms the fact that immunity as a procedural matter does not extinguish the substantive matter of a claim; it simply bars it from certain forums and/or for a certain period. As it pertains to the UN's immunity specifically versus claims made against it, the ICJ held the following:

The question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts.¹⁶

Section 29 is thus the result of this consideration that the UN should be required to bear responsibility for claims against it despite its immunity. The UN's immunity dictates which forums are excluded from adjudicating on matters relating to the UN's liability while section 29 provides for the forums through which these matters ought to be adjudicated:

[A]s is clear from article VIII, section 29 of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be

¹³ R Harpignies 'Settlement of disputes of a private law character to which the United Nation is a party: a case in point – the Arbitral Award of 24.9.1969, in *Re Starways Ltd v the United Nations* 452.

¹⁴ *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v Belgium* ICJ (14 February 2002) (2002) ICJ Reports 75 Para 60. Hereafter, *Arrest Warrant* case.

¹⁵ *Arrest Warrant* case (n 14 above) paras 13-20.

¹⁶ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion (Cumaraswamy case)* ICJ (29 April 1999) (1999) ICJ Reports 62 para 66. Hereafter, *Cumaraswamy* case.

settled in accordance with the appropriate modes of settlement that 'the United Nations shall make provisions for' pursuant to Section 29.¹⁷

The context and purpose of section 29 thus demonstrate that this provision was included in the Immunities Convention to express the fact that precisely because of its immunity, the UN has an obligation to provide alternative remedial avenues to claims made against it.

Furthermore, the inclusion of section 29 in the Immunities Convention adds another binding dimension to the UN's obligation to provide access to remedies. Indeed, the Immunities Convention was concluded pursuant to article 105(3) of the UN Charter.¹⁸ Article 105(3) directs the UN General Assembly to make recommendations and propose conventions 'with a view to determining the details of the application' of the UN's immunity in terms of article 105.¹⁹ Thus, as part of the Immunities Convention, Section 29's obligation to provide access to remedies is directly linked to the UN Charter. Consequently it stands to reason that by virtue of article 105(3), the UN's obligation to provide access to remedies under section 29 is a Charter obligation.²⁰ This pre-empts the debate as to whether an international organisation can bear obligations not contained in its constituent treaty.²¹ Thus, by virtue of article 105(3) of the UN Charter, as specified by the Immunities Convention and its section 29, the UN has a Charter obligation to provide access to remedies.

Section 29 unequivocally establishes that the UN is under the obligation to provide access to remedies in the form of alternative dispute resolution mechanisms. However, section 29 is more ambiguous about what this entails, only requiring

¹⁷ As above.

¹⁸ Resolution relating to the adoption of the General Convention on the Immunities and Privileges of the United Nations and text of the convention UN Doc A/res/1/22A; 'Pursuant to Article 105(3), the General Assembly approved a convention on the Privileges and Immunities of the United Nations which elaborated on the... privileges and immunities of the Organisation...' Repertory of Practice of the United Nations (1945-1954) Volume 5 para 9 at 326.

¹⁹ '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' Article 105 (3) of the UN Charter.

²⁰ Schmalenbach (n 9 above) 530.

²¹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* ICJ (8 July 1996) (1996) ICJ Reports 226 para 25. Hereafter, *Legality of Nuclear Weapons*. The UN's capacity to bear obligations not contained in its Charter is further explored below.

those mechanisms to be 'appropriate'. The language of section 29 provides no further information as to the standard that needs to be met in order for those mechanisms to qualify as 'appropriate'. The required standard in terms of section 29 is considered purposefully vague by some, as a means to give the UN the discretion to implement section 29 the way it sees fit.²² Indeed, section 29 does not require the UN to institute specific dispute resolution rules, to create specific tribunals, or to enter into international agreements to that effect.²³ Consequently, the UN has interpreted this as granting it the vast discretion to create any mechanism it deems appropriate to settle claims made against it. There is, however, one interpretation that diverges from and restricts the UN's interpretation. This interpretation is from the *Manderlier* case in which the Belgium Court considered the appropriateness of the UN's alternative dispute resolution mechanism.²⁴ The Court in this case held that measures taken by the UN to settle third-party claims against it in terms of section 29 could not be appropriate if they resulted in the UN being a 'judge in its own case'.²⁵ In this case, the UN had chosen a mode of dispute resolution in the form of a lump sum agreement between itself and Belgium in fulfilment of its obligation in terms of section 29.²⁶ The Belgian Court, however, considered the agreement to be inappropriate in terms of section 29 due to the following:

The defendant considers quite wrongly that the ... agreement reached between the UN and Belgium ... constitutes the appropriate method of settlement provided for by section 29. The defendant had the claims addressed to it, and in particular those of the plaintiff, examined by its own authorities without argument of any kind. It then took a unilateral decision by which ... it believed itself bound to limit its spontaneous intervention. The defendant has thus in reality been a judge in its own case. Such a

²² Schmalenbach (n 9 above) 535.

²³ Harpignies (n 13 above) 453.

²⁴ *Manderlier v Organisation des Nations Unies and Etat Belge (Ministre des Affaires Etrangères) Tribunal Civil de Bruxelles* (11 May 1966) No 4553, as reported by P Schmitt on www.ebrary.net (accessed 19/02/2020). Hereafter *Manderlier case*.

²⁵ As above.

²⁶ 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, 1 United Nations Juridical Yearbook (1965) 39.

procedure in no sense constitutes an appropriate method of settlement for deciding a dispute.²⁷

This *Manderlier*-derived restriction, however, had no substantial effect on the UN's discretion to provide what it deemed to be the appropriate mode of dispute resolution. The Court itself noted that despite it being inappropriate for the UN to be a judge in its own matter, the UN is still within its right to do so owing to the vast discretion granted by the broadly worded section 29:

Be that as it may, it is for the United Nations, and for it alone, to set up the courts which would produce an appropriate method of settlement for the dispute which it may have with third parties ... however inconvenient may be its results for litigants.²⁸

Indeed, section 29 is interpreted by the UN as granting it the discretion to institute any mode of dispute resolution for claims made against it as long as they are 'appropriate'. This is because of the wording of section 29 which merely requires the UN to 'make provisions' in anticipation of future claims that could arise from its activities.²⁹ Based on this permissive wording, the UN is thus permitted to institute any mode of alternative dispute resolution and impose restrictions and limitations to its alternative dispute resolution mechanisms as it sees fit.³⁰ It is these UN-mandated restrictions to how it implements section 29 that constitutes practice subsequent to the provision.³¹

Despite the vagueness of the standard required by section 29, the content of the UN's treaty obligation to provide access to remedies may be gauged by other aspects contained in the provision. These other aspects comprise certain limits to the UN's obligation to provide access to remedies as contained in section 29. The first limitation consists of the beneficiary of the UN's obligation to provide remedies under section 29. Section 29 requires the UN to provide appropriate dispute resolution mechanisms to 'disputes arising out of contracts or other

²⁷ *Manderlier case* (n 25 above).

²⁸ As above.

²⁹ J Wouters & P Schmitt 'Challenging acts of other United Nations organs, subsidiary organs and officials' *Working Paper N 49* (2010) *Leuven Centre for Global Governance Studies* 31-32.

³⁰ Procedures in place for implementation of article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations UN Doc A/C.5/49/65.

³¹ The detailed implementation of section 29 in the form of the UN's alternative dispute resolution mechanisms is further assessed in the next chapter.

disputes of a private law character to which the United Nations is a party'.³² Contractual disputes are not the focus of this study as these disputes have not led to the remedy gap present in third-party claims. This is because claims arising from contractual relationships with the UN, such as employment contracts and UN contractors, are granted what are generally considered adequate modes of dispute resolution.³³ Third-party claims under the umbrella term of 'other disputes' are more subject to the remedy gap as a result of the restrictions imposed by section 29. Indeed, third-party claims are only beneficiaries of section 29 to the extent that these claims can be deemed to be 'of a private law character'. This restricts access to section 29-mandated dispute resolution mechanisms to those third-party claimants with a private law claim against the UN. This restriction results in claims of a so-called 'public law character' being altogether excluded from the ambit of section 29.³⁴ This restriction thus informs the content of the UN's obligation to provide remedies under section 29 as it results in the UN not having a treaty obligation to resolve a certain category of third-party claims, namely public law character claims.

What constitutes a claim of private law character, however, is not defined in the Immunities Convention, nor do the *travaux préparatoires* of the Convention offer assistance.³⁵ It was only elaborated on during the drafting of the Convention on the Privileges and Immunities of the Specialised Agencies, two years after the conclusion of the Immunities Convention.³⁶ During this drafting, it was explained that claims of a private law character refer to the following:

Contracts and other matters incidental to the performance by the Agency of its main functions under its constitutional instruments and not to the actual performance of its

³² Section 29 (a) of the Immunities Convention.

³³ Procedures in place for implementation of section 29 (n 30 above) para 3-8; Administration of justice at the United Nations UNGA 63/253 (2009), 62/228 (2008); 'Report of the interim independent assessment panel on the system of administration of justice at the United Nations' (15 April 2016) UNGA A/71/62/Rev.1

³⁴ Procedures in place for implementation of section 29 (n 30 above) para 23; Ferstman (n 1 above) 113.

³⁵ Schmalenbach (n 9 above) 551.

³⁶ This resulted in section 31 of the Specialised Agencies Immunities Convention which provides the following: 'Each specialised agency shall make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the specialised agency is a party'.

constitutional functions ... The provision relates to disputes of such a character, that they may have gone to municipal courts.³⁷

It has thus been UN practice since the early days of the Immunities Convention to consider claims of a private law character as those claims that would customarily be considered under national laws to be private law disputes. These are, for instance, claims based on tort (illness, injury, death), property claims, or claims of undue enrichment, as long as they are incidental to the UN's performance of its constitutional functions.³⁸ Claims of a public law character, on the other hand, are considered by the UN as referring to those claims directly based on the UN's Charter-mandated functions.³⁹ These claims of a public law character entail the review of the UN's constitutional functions.⁴⁰ Moreover, they are based on the breach of an international obligation by the UN and involve the application of public international law.⁴¹ This is as opposed to claims of a private law character which are based on the private law of the host State. Public law claims are thus excluded from the scope of section 29 because they entail a review of the UN's policies and mandate.⁴² It is understood that to preserve the UN's functional independence, public law claims must be pursued by Member States through the available international law processes and diplomatic channels.⁴³

The distinction between private and public claims, however, is not as straightforward in practice, especially in the peacekeeping context. Consider for

³⁷ 'Final report of subcommittee 1 of the sixth committee on coordination of the privileges and immunities of the United Nations Specialised Agencies (15 November 1947) UN Doc A/C.6/191 12 para 32.

³⁸ Procedures in place for the implementation of section 29 (n 30 above) paras 16-17; Schmalenbach (n 9 above) 552.

³⁹ 'Final report of subcommittee 1 of the sixth committee on coordination of the privileges and immunities of the United Nations Specialised Agencies' (n 37 above) para 32; Procedures in place for the implementation of section 29 (n 30 above) para 23.

⁴⁰ As above.

⁴¹ Schmalenbach (n 9 above) 552.

⁴² Mégret (n 1 above) 166.

⁴³ Parties can get an advisory opinion from the International Court of Justice in terms of Chapter xiv of the UN Charter or section 30 of the Immunities Convention if the dispute relates to the Immunities Convention's interpretation and application. An example of a diplomatic channel is the General Assembly composed of all member states. 'The General Assembly may discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the Charter' Article 10 of the UN Charter.

instance, a claim of injury or death as a result of the actions of a UN peacekeeping mission. Such a claim would simultaneously be a private law claim based on tort and a public law claim based on the UN peacekeeping's failure to adequately perform its UN Security Council mandate to protect.⁴⁴ It could also entail the application of human rights law and international humanitarian law.⁴⁵ This is known as a hybrid claim.⁴⁶ The *Manderlier* case demonstrated characteristics of a hybrid claim.⁴⁷ Indeed, the *Manderlier* claimant based their claim on the destruction of property by the UN Operation in the Congo (French: Opération des Nations Unies au Congo, abbreviated to ONUC) peacekeepers.⁴⁸ In addition, they claimed compensation for the ONUC's failure to protect their property from damage by third parties as per ONUC's mandate to maintain law and order.⁴⁹ Considering the claim for destruction of private property could be assessed on the basis of tort law alone, the UN considered this claim to be of a private law character, thereby under the scope of section 29(a).⁵⁰ However, since the second part of the claim was based on the inadequate implementation of ONUC's mandate, the UN considered it to be a public law claim falling outside the scope of section 29.⁵¹ The UN's straightforward approach to the *Manderlier* hybrid claims does not represent its consistent practice. Indeed, the UN's inconsistent approach

⁴⁴ Mégret (n 42 above) 168

⁴⁵ Mégret (n 42 above) 174-177; Ferstman (n 1 above) 23-27.

⁴⁶ Mégret (n 42 above) 168; Ferstman (n 1 above) 113-115.

⁴⁷ Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (n 26 above); *Manderlier* case (n 25 above)

⁴⁸ As above.

⁴⁹ The Congo Question/Security Council Resolution 143 (14 July 1960) S/RES/143.

⁵⁰ '[T]he Secretariat received a number of claims from Belgian citizens as well as from individuals of various other nationalities alleging that they had suffered injury or damage to property by acts of United Nations personnel which gave rise to liability on the part of the Organisation. It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organisation was legally liable. This policy is in keeping with generally recognised legal principles and with the Convention on Privileges and Immunities of the United Nations' *Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics* (Document S/6597) United Nations Juridical Yearbook (1965) 41.

⁵¹ 'It is pointed out that, under these principles, the United Nations does not assume liability for damage to persons or property which resulted solely from military operations or which, although caused by third parties, has given rise to claims against the United Nations; such cases are therefore excluded from the proposed compensation' *Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals* (n 26 above).

when confronted with a with a similar hybrid claim in *the Haiti Cholera Dispute* demonstrates that there is no settled practice with regard to the characterisation of claims. The *Haiti Cholera Dispute* claim was similarly based on both private and public law.⁵² However, the UN, in this case, did not follow its own precedent of granting access to remedies to the private law part of the claim to the exclusion of the public law element of the claim as it did with the Belgians' claims. Instead, the UN combined all the grounds of the hybrid claim together and considered the entire claim as a public law claim by stating that 'consideration of these claims would necessarily include a review of political and policy matters'.⁵³ The UN adopted a similar approach with regard to the *Kosovo Lead Poisoning* dispute⁵⁴ which was also hybrid in the sense that the claims were based on both public and private (tort) law and involved a large number of claimants. The UN did not apply the *Manderlier* distinction either and deemed the entire claim to be of public law nature which would amount 'to a review of the performance of UNMIK's mandate as the interim administration of Kosovo'.⁵⁵ This statement signalled that the UN considers hybrid claims to be of a public law nature in contrast to their earlier position of making a distinction between tort claims and policy-based public law claims. This is despite the fact that it is UN practice to provide compensation for other smaller tort claims such as accidental injuries or deaths caused by its peacekeeping missions.⁵⁶ It stands to reason that the motive for rejecting the *Haiti Cholera Dispute* and the *Kosovo Lead Poisoning* dispute is not based on the

⁵² *Petition for Relief to the Chief of the MINUSTAH Claims Unit submitted on 3 November 2011* paras 3, 22-27, 72-76, 94,100, 105-110,112. <http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> (accessed 15/01/2018).

⁵³ Letter from the United Nations under Secretary-General for Legal Affairs, Patricia O'Brien to the Director of the Institute for Justice and Democracy in Haiti, Brian Concannon (15 July 2013). <http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf> (accessed 15/01/2018).

⁵⁴ The *Kosovo Lead Poisoning* case refers to the claim against the United Nations Mission in Kosovo (UNMIK) by Kosovo ethnic minorities who were moved to an internally displaced persons (IDPs) camp run by UNMIK. This camp was established near a smelter and mining industrial complex and the resultant pollution coupled with extremely poor hygienic and living conditions led to the deaths of thousands. UNMIK kept these IDPs in the polluted camp for decades despite being made aware of the lead poisoning that was occurring. This led to more deaths and long-term illnesses. *NM & Others v UNMIK* Human Rights Advisory Panel Report (2016) Opinion Case n 26/08. Hereafter *NM v UNMIK*.

⁵⁵ *NM v UNMIK* (n 54 above) para 94.

⁵⁶ Procedures in place for implementation of section 29 (n 30above) para 13-18; B Rashkow 'Remedies for harm caused by UN Peacekeepers' (2014) 108 *American Journal of International Law (unbound)* 11; Ferstman (n 1 above) 114.

legal nature of the claim but rather stems from the large number of claimants which would result in a large settlement.⁵⁷ While this can be considered the new practice to the characterisation of claims, which consists of hybrid claims being deemed to be of public law nature, this presents a challenging dichotomy with regard to determining the legal nature of a claim against the UN. Indeed, despite the fact that section 29 does not expressly grant the UN the discretion to determine the nature of a claim, the UN has constantly interpreted the provision as granting it this discretion. According to the UN's interpretation, the UN Secretary-General (UNSG) has the discretion to determine the legal nature of a claim.⁵⁸ The UNSG's decision in that regard is final and cannot be appealed.⁵⁹ Indeed, considering that this positioning relates to the UN's interpretation of section 29 as a provision of the Immunities Convention, it can only be challenged by States on the basis of section 30 of the Convention.⁶⁰ Third-party claimants cannot challenge the characterisation of their claims and, to date, no Member State has exercised their option to challenge the UN's interpretation of section 29 under section 30. As a result, the UN is the sole entity interpreting and implementing section 29 which, to date, remains unchallenged. Consequently, there is no external independent authority deciding on the legal nature of a claim.⁶¹ This is an illustration of what was referred to by the Belgian Court as the UN being 'a judge in its own case'.⁶² This state of affairs explains why the practice of characterisation of hybrid claims has been inconsistent throughout the years.

⁵⁷ Schmalenbach (n 9 above) 553.

⁵⁸ 'Report of the Secretary General on Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations' (20 September 1996) UN Doc A/51/389 para 20. Hereafter, Administrative and budgetary report.

⁵⁹ As above.

⁶⁰ Section 30 of the Immunities Convention holds the following: 'All differences arising out of the interpretation or application of the present convention shall be referred to the international court of justice, unless in any case it is agreed by the parties to have recourse to another settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved'.

⁶¹ 'The irony is of course that the precise determination of the legal nature of a claim is based on the largely internal and inaccessible 'jurisprudence' of the UN'. Translated from Mégret (n 42 above) 166.

⁶² *Manderlier* case (n 25 above); K Schmalenbach 'Judge and jury' (2014) 11 *International Organisations Law Review* 247-250.

The fact that the UN is afforded such large discretion with regard to the application of section 29 constitutes the second limitation to the UN's treaty obligation to provide remedies. Indeed, as mentioned above, section 29's vague wording has consistently been interpreted by the UN as granting it vast discretion to put into effect the content of the provision. It is precisely how the UN implements section 29 in terms of this discretion that informs the content of its treaty obligation to provide remedies.⁶³ The rationale behind this vast discretion has been explained by the UNSG as intending to safeguard the UN against frivolous claims by allowing the UN to impose measures to ensure it only deals with legitimate claims.⁶⁴ Thus, by virtue of its uncontested interpretation of section 29, the UN is empowered to impose restrictions to its obligation to provide access to alternative dispute resolution mechanisms and to decide on the form these mechanisms will take. As a result, the UN can and does restrict or refuse access to alternative dispute resolution mechanisms to a vast category of claims. As established above, the UN can deem certain claims excluded from section 29 due to the legal nature of the claim, as determined by the UN itself. In addition, the UN can also reject private law claims if they do not meet certain financial or temporal limitations set by itself. The UN has already imposed several temporal and financial restrictions to receivable claims under section 29.⁶⁵ These measures by the UN are technically meant to only restrict its liability but, in effect, it restricts its obligation to provide

⁶³ '... subsequent practice ... contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties' Conclusion 7 of the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* (2018) UNGA A/73/10.

⁶⁴ 'The Organisation does not agree to engage in litigation or arbitration with the numerous third parties that submit claims (often seeking substantial monetary compensation) based on political or policy-related grievances against the United Nations, usually related to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters. Such claims, in many instances, consist of rambling statements denouncing the policies of the Organisation and alleging that specific actions of the General Assembly or the Security Council have caused the claimant to sustain financial losses. The Secretary-General considers that it would be inappropriate to utilise public funds to submit to any form of litigation with the claimants to address such issues'. Procedures in place for implementation of article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations (24 April 1995) UN DOC A/C.5/49/65 para 23.

⁶⁵ *Third-party liability: temporal and financial limitations* (17 July 1998) UNGA A/RES/52/247; P Szasz 'The United Nations legislates to limit its liability' (1987) 81.3 *American Journal of International Law* 739-744.

access to remedies. Consider, for instance, the UN's decision to impose a monetary restriction on its liability for tort claims. This technically only refers to the UN's liability not its obligation. The consequence of this, however, is that a claim exceeding that amount will be excluded from the UN's dispute resolution mechanisms. Considering that the UN has interpreted section 29 as giving it the right to impose these restrictions, it would not be contravening its obligation to provide remedies under section 29. Thus, based on its uncontested interpretation, the UN is under no obligation to provide appropriate access to remedies to a claim of a private law character if it exceeds the UN-mandated monetary cap.⁶⁶ In addition, unlike what was presumed by the Belgian Court in *Manderlier*,⁶⁷ under section 29, the UN is not required to establish a standing court or tribunal with jurisdiction over all private law claims.⁶⁸ As a result, the implementation of the UN's obligation to provide remedies to third-party claim in terms of section 29 is solely determined by the UN itself.

A final notable aspect of the UN's obligation to provide remedies in terms of section 29 is not contained within this provision but relates to the immunity of the UN itself. While this aspect does not directly inform the content of the UN's obligation in terms of section 29, it is crucially relevant to the issue of the remedy gap. As established in the previous chapter, on the basis of section 2 of the Immunities Convention, the UN's immunity is absolute and unconditional. This unconditionality of the UN's immunity affects its obligation to provide access to remedies as it directly relates to the enforcement of section 29 or the consequence of non-compliance therewith. As mentioned above, the purpose of section 29 is to mitigate the prohibitive effects of the UN's immunity on the rights of third-party claimants. However, this does not imply that the UN's immunity is

⁶⁶ 'The amount of compensation payable for injury, illness or death of any individual, (...), shall not exceed a maximum of 50,000 United States dollars' *Third-party liability: temporal and financial limitations* (n 65 above) para 9 (d).

⁶⁷ 'It is true that the U.N. has set up certain courts of special jurisdiction, such as the Administrative Tribunal of the United Nations. However, it is an undisputed fact that it has not set up any court with a general or unlimited jurisdiction. In fact, no independent and impartial court has been set up before which the plaintiff could bring the defendant to have the claim decided which he has brought before the present Court' *Manderlier case* (n 25 above).

⁶⁸ Harpignies (n 13 above) 453-455.

conditioned on the observance of the obligation contained in section 29. As was held in the *Haiti Cholera Dispute*:

Nothing in the text of the CPIUN suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29.⁶⁹

Indeed, there is nothing in the language of both provisions that links section 29 as a condition precedent to section 2.⁷⁰ In fact, the language of section 2 makes it clear that the UN's immunity is unconditional and may only be limited by an express waiver.⁷¹ The breach of section 29, even when acknowledged by the UN itself,⁷² has no impact on the UN's immunity and cannot be construed as a waiver.⁷³ Thus, even in the clear absence of access to alternative dispute resolution mechanisms, courts still uphold the UN's immunity unconditionally.⁷⁴ Consequently, third-party claims denied access to remedies by the UN's breach

⁶⁹ Haiti Cholera Dispute (n above) 5.

⁷⁰ '[C]onditions precedent to most contractual obligations ... are not favoured and must be expressed in plain, unambiguous language to manifest their intent to create a condition precedent. ... No such language links section 2 and section 29 in the CPIUN. ... There is no language in the CPIUN which, even straining, we could read as imposing the UN's fulfilment of its Section 29 obligation as a condition precedent to its Section 2 immunity' *Delamas Georges & Others v United Nations* (2015) No 15-455-cv (Court of Appeal) 12-13. Hereafter *Haiti Cholera Dispute* (Court of Appeal).

⁷¹ '... construing the UN's failure to provide "appropriate modes of settlement" for Plaintiffs' claims as subjecting the UN to Plaintiffs' suit would read the strict express waiver requirement out of the CPIUN' *Haiti Cholera Dispute* (n above) 5; 'Seen in this light the Court of Appeal does not hold decisive, although it regrets the fact that the UN has not instigated an alternative course of proceedings in conformity with their obligations under article VIII § 29 in the preamble and under (a) of the Convention for claims as this in order to waive the immunity from prosecution' *Mothers of Srebrenica & Others v State of The Netherlands and the United Nations* (2010) (Court of Appeal of The Hague) 200.022.151/01 para 5.13. Hereafter *Srebrenica* case (Court of Appeal judgment).

⁷² 'It was pointed out that the UN has failed to make provisions as laid down in article VIII, § 29. That the UN failed to do so has been admitted between the parties' *Srebrenica* case (Court of Appeal Judgment) (n 69 above) para 5.11.

⁷³ 'Section 2's express mention of the UN's express waiver as a circumstance in which the UN shall not enjoy immunity negatively implies that all other circumstances, including the UN's failure to fulfil its Section 29 obligation, are excluded' *Haiti Cholera Dispute* (Court of Appeal) (n 70 above) 12.

⁷⁴ 'It does not follow,... that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court'. *Stichting Mothers of Srebrenica & Others v The Netherlands* ECHR (11 June 2013) 65542/12 para 164.

of section 29 cannot find forum in any national jurisdiction due to the UN's absolute and unconditional immunity.

In conclusion, the UN has a treaty obligation to provide appropriate access to remedies in terms of section 29 of the Immunities Convention. This provision is, however, vague and ambiguous. As a result, the UN has interpreted its obligation to provide access to remedies very restrictively, granting itself the discretion to decide which mode of dispute resolution it deems appropriate. In addition, according to the UN, only the UN may decide on the legal nature of the claim thus determining whether it has an obligation to provide access to remedies to a claim in terms of section 29. Should the UN characterise a claim as being of a public law nature, such a claim falls outside the scope of section 29 and this decision is final. Should the claim be characterised as a private law claim within the ambit of section 29, it is also at the discretion of the UN to impose further limitations to its obligations. As such, a claim of a private law character as envisaged by section 29 can still be denied access to remedies if it exceeds the temporal or financial limitations set by the UN. Consequently, the content of the UN's obligation to provide access to remedies in terms of section 29 is determined by the UN itself. This determination is made internally without any exterior oversight and is final. Moreover, due to the UN's absolute immunity, there are no consequences to its breach of section 29. Therefore, even if a claim complies with all the UN-mandated limitations and can be characterised as a private law claim, the UN can still fail to provide access to remedies and there would be no forum with jurisdiction for the claimant to contest this. It is thus evident that the UN's interpretation of section 29 contributes directly to the remedy gap as it leaves a multitude of claims without recourse.

It remains to be determined whether the UN's uncontested interpretation and subsequent application of section 29 conclusively determines the content of its treaty obligation to provide access to remedies or whether this interpretation departs from the actual content of section 29.⁷⁵ Indeed, on one hand, it can be argued that since the wording of section 29 does not expressly grant the vast

⁷⁵ For the purpose of this section, 'subsequent interpretation' and 'subsequent practice' are used interchangeably to convey the notion of the UN's interpretation and application of its obligation under section 29.

discretion to the UN to discharge its obligation, the UN is essentially modifying the content of this provision through its own interpretation and subsequent practice.⁷⁶ While the question of whether a treaty can be modified through subsequent practice has been generally rejected by several states,⁷⁷ it is still up for debate with multiple arguments for and against.⁷⁸ However, modification of a treaty through subsequent interpretation and practice implies that there was an original interpretation that differs from the current interpretation. This is not the case for section 29; as mentioned above, section 29's wording, context, and drafting history do not provide sufficient information in that regard. As such, it is unclear if there is an original interpretation that diverges from the UN's subsequent interpretation and practice. On the other hand, the UN's consistent interpretation and practice of section 29 can be considered as determining the content of its treaty obligation to provide access to remedies. Indeed, it is an accepted premise in international law that subsequent practice represents an 'authentic means of interpretation of a treaty'.⁷⁹ It is established that subsequent practice can thus be used as a primary means to interpret a treaty and determine the contents thereof. Furthermore, in addition to being used as a primary means to interpret a treaty as envisaged by article 31 of the VCLT,⁸⁰ subsequent practice can also be used as a supplementary means to interpret a treaty if the interpretation resulting from article 31 'leaves the meaning ambiguous or

⁷⁶ G Hafner 'Subsequent agreements and practice: Between interpretation, informal modification, and formal amendment' in G Nolte (ed) *Treaties and subsequent practice* (2013) 114-115.

⁷⁷ The possibility of amending treaties through subsequent practice was part of the Draft Article on the Law of Treaties. Article 38 of the Draft Articles proposed that 'A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions'. The adoption of this article was rejected by a large majority of states present at the Vienna Convention. Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018 UN GA A/73/10 paras 25-26; MG Kohen 'Keeping subsequent agreements and practice in their right limits' in G Nolte (ed) *Treaties and subsequent practice* (2013) 36.

⁷⁸ As above.

⁷⁹ Conclusion 3 of the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (n 77 above); Draft Articles on the Law of Treaties with Commentary Yearbook of the International Law Commission 2 (1996) 222.

⁸⁰ Article 31(3)(b) of the VCLT 'There shall be taken into account, together with the context: any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.

obscure'.⁸¹ It has been observed above that the language of section 29 is ambiguous and vague. As such, UN practice in the application of section 29 can be used as a supplementary means of interpretation to clarify the ambiguous wording of the provision. Regardless of whether the UN's subsequent practice in this case is used as a primary or supplementary means of interpreting section 29, it remains that this practice can be used to inform the content of its treaty obligation. Indeed, using subsequent practice to interpret a treaty can result in the terms of a treaty being interpreted more broadly to encompass certain concepts or more narrowly to specify the meaning of terms.⁸² In fact, there is a precedent for the ICJ using the UN's subsequent practice as a means of interpreting the terms of the UN Charter and the Immunity Convention provisions narrowly. Indeed, the ICJ narrowed down the meaning of 'expert on missions' in terms of section 22 of the Immunities Convention on the basis of the UN's practice of interpreting the term 'expert' broadly so as to include non-UN officials. In this regard, the ICJ held the following:

In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions – increasingly varied in nature – to persons not having the status of United Nations officials ... In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the Members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.⁸³

Similarly, the ICJ interpreted the term 'expenses of the organisation' within the meaning of article 17(2) of the UN Charter on the basis of the UN's broad interpretation of the term.⁸⁴ These ICJ opinions, however, do not conclusively

⁸¹ Article 32 VCLT; VCLT Commentary 223; Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018 UN GA A/73/10 19-20.

⁸² G Nolte 'Jurisprudence of the International Court of Justice and Arbitral Tribunal of Ad Hoc jurisdiction relating to subsequent agreements and subsequent practice: Introductory report of the ILC study group on treaties over time' in G Nolte (ed) *Treaties and subsequent practice* (2013) 178; Conclusion 7 of the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (n above).

⁸³ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* ICJ (15 December 1989) (1989) ICJ Reports para 48.

⁸⁴ *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* ICJ (20 July 1962) (1962) ICJ Reports 49 p 157-160.

settle the issue. Indeed, there is also the argument that an international organisation's application of a binding treaty obligation does not automatically and conclusively dictate the content of the said obligation.⁸⁵ This refers to the general understanding that although subsequent practice can help determine the content of a treaty and clarify the meaning of the terms of a treaty,⁸⁶ it does not provide a conclusive and binding interpretation immediately.⁸⁷ In essence, practice, even though authoritative in the interpretation of a treaty, is still just practice. This illustrates the legal uncertainty surrounding the exact content of the UN's treaty obligation to provide access to remedy. The ordinary meaning of section 29 is vague and ambiguous and it remains uncertain whether the UN's subsequent practice can be considered as conclusively determining the content of its obligation in terms of the provision.

3.3 The UN's obligation to provide access to remedies under general international law

The concept of remedies is considered to have a dual meaning: substantive and procedural.⁸⁸ There is a noted lack of uniformity in the interpretation of the concept of remedies in international law.⁸⁹ As such, the term 'remedies' is used to refer to both the procedural and the substantive. The procedural aspect of remedies refers to the manner in which claims are received and processed. This entails the procedure regarding the mechanisms in place to hear claims, the rules regarding the nature of claims deemed receivable, and so on. Procedural remedies thus refer to the access to remedies aspect of the obligation to provide remedies.⁹⁰ The substantive aspect of remedies, on the other hand, refers to the outcome of the claim, meaning the form of redress obtained by the claimant.⁹¹ Substantive redress in international law entails reparation for the wrongful act

⁸⁵ Kohen (n 77 above) 41.

⁸⁶ Conclusion 7 of the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (n 77 above).

⁸⁷ Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (n 77 above) 25.

⁸⁸ D Shelton *Remedies in international human rights law* (2015) 16.

⁸⁹ S Haasdjick 'The lack of uniformity in the terminology of the international law of remedies' (1992) 5.2 *Leiden Journal of International Law* 245.

⁹⁰ Shelton (n 88 above) 16, 18.

⁹¹ Shelton (n 88 above) 19; Haasdjick (n 89 above) 246.

committed.⁹² Reparation can take the form of restitution, compensation, and/or satisfaction.⁹³

The UN's obligation to provide remedies in the substantive sense stems from its international responsibility. In international law, it is established that international responsibility is the natural consequence of the breach of an international obligation.⁹⁴ Consequently, states and international organisations bear international responsibility for the breach of their international obligations.⁹⁵ The legal consequence of international responsibility is the obligation to provide reparations, in other words remedies, in the substantive sense.⁹⁶ The responsibility of international organisations is a fairly recent concept compared to the long-established international responsibility of States.⁹⁷ Nonetheless, international organisations are just as liable for the internationally wrongful acts attributable to them.⁹⁸ The principles governing the international responsibility of international organisations were codified by the ILC in the Draft Articles on the Responsibility of International Organisations (DARIO).⁹⁹ DARIO is not in itself binding yet but it represents a codification of pre-existing principles of general international law that are binding on the subjects of international law.¹⁰⁰ Moreover, DARIO is an almost verbatim reiteration of the Articles on State

⁹² As above.

⁹³ Article 34 DARIO.

⁹⁴ 'Report of the International Law Commission on the Work of its Fifty-fourth Session' (2002) UN Doc A/57/10 paras 465-468.

⁹⁵ Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts (2001) hereafter ARS; Article 3 of the Draft Articles of the Responsibility of International Organisations of 2011 (2011) 2.2 *Yearbook of the International Law Commission*. Hereafter, DARIO.

⁹⁶ Articles 28 and 31 of ARS and DARIO; 'the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'. *Chorzow Factory (Germany v Poland)* PCIJ (13 September 1928) PCIJ Series A No 17 para 73. As translated by Oxford Public International Law. <https://opil.ouplaw.com/view/10.1093/law:icgj/255pcij28.case.1/law-icgj-255pcij28#law-icgj-255pcij28-judgment-1> (accessed 10 June 2019).

⁹⁷ The international legal personality of states can be traced as far back as the Treaty of Westphalia in 1648. J Hickey 'The sources of international legal personality in the 21st century' (1997) 2.1 *Hofstra Law and Policy Symposium* 3-6.

⁹⁸ Chapters 1 and 2 of DARIO.

⁹⁹ 'Draft Articles on the Responsibility of International Organisations' Report of the International Law Commission on the Work of its Sixty-third Session (2011) UN Doc A/66/10.

¹⁰⁰ The ILC is tasked with the codification and development of international law. Article 13(1)(a) of the UN Charter; article 1 of the Statute of the International Law Commission of 1947.

Responsibility, which are binding on the UN. Indeed, the UN considers itself bound by the principles of international responsibility as contained in the Articles of States Responsibility by transposing them to international organisations. On the UN's liability for the actions of its peacekeeping forces, the UNSG reported the following:

The international responsibility of the United Nations for the activities of United Nations forces ... is also a reflection of the principle of State responsibility – widely accepted to be applicable to international organisations – that damage caused in breach of an international obligation and which is attributable to the State (or to the Organisation), entails the international responsibility of the State (or of the Organisation) and its liability in compensation.¹⁰¹

As such, it can be definitively said that the UN's obligation to provide remedies in the substantive sense, as derived from general international law, is not in contention. It is the procedural aspect of its obligation to provide remedies under general international law that needs to be determined and specified.

In terms of section 29 of the Immunities Convention, the UN is under the obligation to provide appropriate access to remedies to third-party claimants. However, as discussed above, owing to the vast discretion afforded to the UN, resulting from its own interpretation of section 29 over the years, a large number of claims are excluded from this treaty obligation. Indeed, claims of a public law character, hybrid claims, and claims exceeding the UN's temporal and financial limitations to its liability are left without recourse. In view of this restricted treaty obligation, this section of the study assesses whether there is an obligation on the UN to provide access to remedies under general international law. This is so as to determine whether there is a wider obligation on the UN to provide access to remedies beyond the restrictions read into section 29 by the UN. As such, this section will establish the existence of this obligation and its contents and limits. This will establish whether there are tools under international law that supplement

¹⁰¹ 'Report of the Secretary-General on Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: Financing of the United Nations peacekeeping operations' (20 September 1999) UN GA A/51/389.

and specify the UN's obligation to provide access to remedies beyond what is provided for in section 29 of the Immunities Convention.

The obligation to provide access to remedies is an obligation resulting from the fundamental right of access to court or access to justice.¹⁰² Indeed, fundamental rights have corresponding obligations imposed on the entity responsible for protecting and promoting the said rights.¹⁰³ Access to justice is the essential mechanism in the protection and enforcement of all fundamental human rights.¹⁰⁴ As such, the obligation to provide access to remedies is the norm corresponding to the individual's right of access to justice.¹⁰⁵ Indeed, in addition to the negative duty to not obstruct justice, the right of access to justice imposes a positive duty to put in place mechanisms designed to give full effect to the right.¹⁰⁶ This positive duty is the obligation to provide access to remedies. As such, it is evident that the content of the right of access to justice informs the content of the corresponding obligation to provide access to justice.

The right of access to justice is firmly established in international human rights law. Indeed, this right is contained in almost all major regional and global human rights treaties.¹⁰⁷ In addition to treaties, the right of access to justice is subject to constant development through soft law and jurisprudential development from

¹⁰² The terms 'obligation to provide access to remedies' and 'obligation to provide access to justice' are used interchangeably for the purpose of conveying the notion of giving claimants access to a dispute resolution forum.

¹⁰³ HT Terry 'The correspondence of rights and duties' (1916) 25.3 *The Yale Law Journal* 174.

¹⁰⁴ F Francioni 'The right of access to justice under customary international law' in F Francioni (ed) *Access to justice as a human right* (2007) 65.

¹⁰⁵ Shelton (n 88 above) 17, 59.

¹⁰⁶ 'States not only have a negative obligation not to obstruct access to those remedies but, in particular, a positive duty to organise their institutional apparatus so that all individuals can access those remedies' in 'Access to justice as a guarantee of economic, social, and cultural rights: A review of the standards adopted by the Inter-American System of Human Rights' para 1, 7 September 2007, OEA/Ser.L/V/II.129. available at: <https://www.refworld.org/docid/477e3d062.html> [accessed 12 March 2022]

¹⁰⁷ Articles 8 and 10 of the Universal Declaration of Human Rights of 1948 (hereafter UDHR), article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (hereafter, ICERD), article 2(3) of the International Covenant on Civil and Political Rights of 1966 (hereafter, ICCPR), article 25 of the American Convention on Human Rights of 1966 (hereafter, ACHR), article 7(1) of the African Charter on Human and People's Rights of 1981 (hereafter ACHPR), articles 6(1) and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereafter, ECHR), etc.

human rights bodies.¹⁰⁸ Moreover, this right has crystallised into customary international law and is a general principle of law as a norm common to all legal systems¹⁰⁹ As such, there is ample legal basis for the right of access to justice in international law as derived from treaties and general international law. This right, whether derived from human right treaties or customary international law, provides for the access to grievance mechanisms to any person whose human rights have been violated.¹¹⁰ Accordingly, the entities responsible for promoting human rights (traditionally States) have a duty to grant access to grievance mechanisms to address this violation of fundamental rights. However, due to the plurality of sources in international human rights law, the scope of this right differs with interpretations ranging from a restrictive scope to a broader one. Indeed, on the one hand, due to the varying terms of the different treaty provisions on the matter, the right of access to justice can be restrictively interpreted as granting claimants the right to have their claim heard by a competent court.¹¹¹ On the other hand, depending on the source, access to justice can be interpreted so extensively as to include the right to a remedy as a natural legal consequence of an injury suffered due to the violation of a right.¹¹² Most human rights treaties simultaneously provide for both the procedural right of access to a competent court and the substantive right to a remedy as part of the right of access to justice.¹¹³ Notwithstanding the different scopes of the right, access to justice always presents a common aspect by requiring that access to

¹⁰⁸ Shelton (n 88 above) 73-81; M Scheinin 'Access to justice before human rights bodies: Reflections on the practice of the UN Human Rights Committee and the European Court of Human Rights' in F Francioni (ed) *Access to justice as a human right* (2007) 256-281.

¹⁰⁹ Francioni (n 104 above) 64- 138; F Francioni 'Access to justice, denial of justice and international investment law' (2009) 20.3 *European Journal of International law* 729-731 I Saunders *General principles as sources of law* (2021) 64.

¹¹⁰ Access to justice as a guarantee of economic, social, and cultural rights: A review of the standards adopted by the Inter-American System of Human Rights (n 106 above) para 1.

¹¹¹ Shelton (n 88 above) 58; J McBride 'Access to justice and human rights treaties' (1998) 17 *Civil Justice Quarterly* 235.

¹¹² As above; article 2(3)(b) of the ICCPR is one such provision that explicitly requires the development of judicial remedies as part of the right of access to justice. Another example of this is article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 1984 (hereafter, Convention against Torture) which includes an 'enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'.

¹¹³ A few examples of this are: Article 8 and 10 of the UDHR, article 2(3)(b) of the ICCPR, articles 6(1) and 13 of the ECHR.

justice, whether broad or restricted, be given effect in accordance with the standards of fairness and justice.¹¹⁴ These standards of fairness and justice represent the commonality in the various interpretations of the right of access to justice. In terms of these standards, access to justice essentially entails the right to a fair hearing by an independent and impartial judicial body.¹¹⁵ An administrative body can also be an adequate venue of access to remedies, provided it complies with certain criteria to guarantee fairness and justice.¹¹⁶ Indeed, as compiled by Shelton,¹¹⁷ administrative bodies can satisfy the requirements of fairness and justice 'if they are accessible, affordable, timely or prompt, effective, legitimate, predictable, compatible with rights and transparent. They must also be equitable'.¹¹⁸ However, while widely acknowledged as guarantors of effective access to justice in an administrative setting, these criteria compiled by Shelton are not immutable. This is due to the fact that, as a matter of international law, States are granted wide discretion in the organisation of their domestic system of remedies.¹¹⁹ The sole overarching criteria for these administrative forums is that they must provide a process equivalent to that of a judicial forum.¹²⁰ Administrative bodies are often required to be 'reinforced or complemented by judicial remedies' in the form of a judicial appeal.¹²¹

¹¹⁴ Francioni (n 104 above) 64.

¹¹⁵ Shelton (n 88 above) 17; 'The principle of the independence of judges and lawyers has been defined as international custom and general principle of law recognised by the international community, ... it has also been a treaty-based obligation, as shown by the requirement of "independence of a tribunal" established in article 14, paragraph 1, of the ICCPR, which, as stated by the Human Rights Committee in its general comment No. 32,1 is an absolute right that is not subject to any exception' 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development: Report of the Special Rapporteur on the independence of judges and lawyers' UNGA A/HRC/11/41.

¹¹⁶ 'The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate'. UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 9: The domestic application of the Covenant (1998) E/C.12/1998/24 para 9. Hereafter, CESCR General Comment No 9.

¹¹⁷ Shelton (n 88 above) 100-106.

¹¹⁸ Shelton (n 88 above) 100.

¹¹⁹ CESCR General Comment No 9 (n 116 above) paras 5-6; Access to justice as a guarantee of economic, social, and cultural rights: A review of the standards adopted by the Inter-American System of Human Rights (n above) paras 10-11;

¹²⁰ This is evidenced by the provisions in certain human right treaties requiring such equivalency between administrative and judicial forums: Article 2(3) of the ICCPR, article 13 of the ECHR; Francioni (n above) 69; Shelton 100.

¹²¹ CESCR General Comment No 9 (n 116 above) paras 3 & 9.

The right of access to justice is not absolute and may be limited depending on the circumstances. The right of access to justice may be limited by legal and practical considerations.¹²² Correspondingly, the entity responsible for giving effect to this right may impose some limitations in the discharge of its obligation. In *Waite & Kennedy v Germany*,¹²³ the European Court confirmed that the right of access to court due to its very nature is subject to limitations since they 'call for regulation by States'.¹²⁴ Accordingly, States are granted the discretion to implement their obligations, even though it might result in the limitation of the right of access to justice. However, the extent to which this right may be limited is itself restricted. To this effect, the European Court held the following:

It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.¹²⁵

As such, any limitation of the right of access to justice and correspondingly, any restriction of the obligation to provide access to remedies must serve a legitimate aim and must not be so disproportionate as to impair the very essence of the right.

As explored above, the limitations read into section 29 of the Immunities Convention have been proven to be so restrictive as to extinguish the right of access to justice altogether. As such, it should be determined whether the UN is bound by the international human rights obligation to provide access to remedies. This human rights obligation imposes a duty to provide access to justice to any individual whose fundamental human rights have been violated. In addition, as

¹²² In *Stubbings & Others v The United Kingdom* (22 October 1996) ECHR 36-37/1995/542-543/628-629 and in the case of *Hennings v Germany* (16 December 1992) ECHR 12129/86, the time limits imposed on certain claims were considered to be legitimate limitations aimed at preventing stale claims from coming to court. In addition, the right of access to court can be limited by practical considerations such as the costs of legal representation or the location of the court. Shelton (n 88 above) 98-99.

¹²³ *Waite & Kennedy v Germany* (18 February 1999) ECHR 26083/94.

¹²⁴ *Waite & Kennedy v Germany* (n 123 above) para 43.

¹²⁵ As above.

discussed, in terms of international human rights law, this obligation cannot be so restricted as to amount to a denial of justice.¹²⁶

International human rights law is state-centric and largely based on multilateral treaties between States. According to the *pacta tertiis* rule, a treaty cannot create obligations on third parties without their consent.¹²⁷ Considering the UN is not a party to human rights treaties,¹²⁸ it cannot be directly bound by the treaties' obligations.¹²⁹ However, the UN can be 'transitively' bound through its Member States treaty obligations.¹³⁰ Indeed, a State cannot circumvent its human rights obligations through an international organisation.¹³¹ This stems from the general principle of law which dictates that a State cannot transfer more rights to an international organisation than it has.¹³² As such, there are ways in which the UN can find itself bound by the same international human rights standards as States, albeit indirectly. As discussed, the treaty provisions of the right of access to court and its corresponding obligation to provide such access reflect general international law. The obligation to provide access to court is both a customary international law norm and a general principle of law.¹³³ In addition, the right of access to court and the corresponding obligation to provide access to justice have developed into a regional *jus cogens* norm within the jurisdiction of the Inter-

¹²⁶ 'Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment'. Article 9 of the 'Draft Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners' (1929) 23.2 *American Journal of International Law (Supplement: Codification of International Law)* 134.

¹²⁷ Article 34 of the VCLT.

¹²⁸ T Dannenbaum 'Translating the standard of effective control into a system of effective accountability: How liability should be apportioned for violations of human rights by member state troop contingents serving as United Nations peacekeepers' (2010) 51 *Harvard International Law Journal* 135.

¹²⁹ K Daugirdas 'How and why international law binds international organisations' (2016) 57.2 *Harvard International Law Journal* 326.

¹³⁰ Daugirdas (n 129 above) 349; F Mégret & F Hoffman 'The UN as a human rights violator? Some reflections on the United Nations' changing human rights responsibilities' (2003) 25 *Human Rights Quarterly* 314, 323.

¹³¹ J Paust 'The UN is bound by human rights: understanding the full reach of human rights, remedies, and nonimmunity' (2010) 51 *Harvard International Law Journal* 302.

¹³² As above.

¹³³ As above; J Powelyn *Conflict of norms in public international law* (2005) 148-149.

American Court.¹³⁴ The UN as an entity endowed with an international legal personality is a subject of international law and is just as bound by the rules of international law as States.¹³⁵ The connection between the UN's international legal personality and its capacity to bear obligations under general international law was settled very early on by the ICJ in the following terms:

In the opinion of the Court, the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane ... What it does mean is that it is a subject of international law and capable of possessing international rights and duties.¹³⁶

This means that the UN possesses human rights obligations under general international law and must adhere to those obligations. This is even included in the UN Charter which requires the UN to promote 'universal respect for, and observance of, human rights'.¹³⁷ As such, for the UN to deny claimants access to justice would be 'a flagrant violation of the purposes and principles of the UN Charter'.¹³⁸ Indeed, it is within the express purposes of the UN to encourage 'respect for human rights and fundamental rights for all'.¹³⁹ Thus, the UN is under the obligation to respect the human right of access to court as it has crystallised into customary international law and into a regional peremptory norm. In point of fact, the UN has never been a persistent objector during the crystallisation of this norm into customary international law status.¹⁴⁰ Moreover, there can be no objection to a peremptory norm of international law.¹⁴¹ As such, the UN is thus under the obligation to provide access to court to a claimant for the violation of

¹³⁴ See n **Error! Bookmark not defined.** above.

¹³⁵ Daugirdas (n 129 above) 326; *Legality of the use by a State of nuclear weapons in armed conflict* ICJ (8 July 1996) (1996) ICJ Reports 226 para 25. Hereafter, *Legality of Nuclear Weapons*.

¹³⁶ *Reparations for Injuries Suffered in the Service of the United Nations* ICJ (11 April 1949) (1949) ICJ Reports 174 at 179. Hereafter, *Reparations for Injuries*.

¹³⁷ Article 55(C) of the UN Charter.

¹³⁸ *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia* ICJ (21 June 1971) (1970) ICJ Reports 16 para 131.k

¹³⁹ Article 1(3) of the UN Charter.

¹⁴⁰ H Lau 'Rethinking the persistent objector doctrine in international human rights law' (2005) 6 *Chinese Journal of International Law* 495.

¹⁴¹ T Meron 'On a hierarchy of international human rights' (1986) 80.1 *American Journal of International Law* 9.

their fundamental human rights. This goes beyond section 29 of the Immunities Convention, which only provides access to remedies for claims of a private law nature.

3.4 Reconciling the UN's obligation to provide access to remedies under the different sources of international law

It is evident from the above that the UN's obligation to provide access to remedies differs in scope depending on the source of the obligation. Indeed, there is a marked divergence in scope between section 29 of the Immunities Convention and the obligation to provide access to remedies under general international law. Indeed, section 29 regulates the UN's obligation to provide access to remedies aspect by, on one hand, requiring it to put appropriate mechanisms in place to hear 'private law' claims. According to the UN's interpretation of what constitutes a private law claim, the nature of claims is determined by the nature of the obligation breached.¹⁴² As such, a claim arising from the breach of a private law obligation is considered to be of private law nature. Conversely, a claim based on an international obligation is considered to be of a public law nature and thus excluded from the scope of section 29. On the other hand, the UN's obligation derived from general international law is wider and demands access to remedies to any person whose human rights have been infringed. Practice demonstrates that by granting access to remedies solely in the discharge of its section 29 obligation, the UN ignores its obligation under general international law. As such, the UN could be in breach of its obligation to provide access to remedies as derived from general international law. Considering the UN does not abide by both obligations simultaneously, the prevailing duty must be established. If the section 29 obligation prevails over its general international obligation then the UN is not in breach of its obligation.

As discussed in the previous chapter, the determination of a prevailing norm in case of conflict is done through derogation. Derogation norms are those rules of international law which dictate the prevailing norm in order to resolve conflicts of

¹⁴² See n 38 and 39 above.

norms of international law.¹⁴³ Derogation norms can be expressly included in a treaty in the form of a conflict clause¹⁴⁴ or derived from rules of customary international law such as the *lex specialis* and *lex posterior* rules.¹⁴⁵

It is already established that UN Charter obligations prevail over any other obligations by virtue of its conflict clause which holds the following:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.¹⁴⁶

This provision, as assessed in the previous chapter, establishes the primacy of UN Charter obligations over any other obligation whether it stems from a treaty or general international law.¹⁴⁷ It should be noted that the primacy of Charter obligations is not without limits; in fact, this primacy does not apply to peremptory norms of international law. As it pertains to peremptory norms, the primacy decreed by article 103 does not create obligations if it would result in a conflict with those *jus cogens* norms.¹⁴⁸ For other norms that do not result in obligations conflicting with a peremptory norm, the primacy of UN Charter as contained in Article 103 remains and article 103 ranks UN Charter obligations

¹⁴³ JB Mus 'Conflicts between treaties in international law' (1998) 45 *Netherlands International Law Review* 210-211.

¹⁴⁴ 'Draft Articles on the Law of Treaties with commentaries' (1996) 2 *Yearbook of the International Law Commission* 214. Hereafter, VCLT Commentary.

¹⁴⁵ The *lex posterior* rule refers to the general international law principle that holds that in case of conflict between two treaties, the latter treaty prevails. The *lex specialis* rule states that the specific treaty prevails over the general one. 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' Report of the study group of the International Law Commission (13 April 2006) A/CN.4/L.682 paras 46-222 (on *lex specialis*) and paras 243-250 (on *lex posterior*). Hereafter, ILC Fragmentation Report; Mus (n 143 above) 212.

¹⁴⁶ Article 103 of the UN Charter.

¹⁴⁷ B Simma *The Charter of United Nations: A Commentary* (2012) 1295; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v United Kingdom and United States* ICJ Provisional Measures (14 April 1992) (1992) ICJ Reports 3 para 39; R Liivoja 'The scope of the supremacy clause of the United Nations Charter' (2008) 57.3 *The International and Comparative Law Quarterly* 585-6.

¹⁴⁸ Draft Conclusion 16 of the ILC peremptory norms of general international law (*jus cogens*): Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading UNGA A/CN.4/L.936. Hereafter, Draft conclusions on *jus cogens*.

higher than any other obligation.¹⁴⁹ Though not contained in the UN Charter, section 29 is nonetheless a Charter obligation. Indeed, Charter obligations need not be expressly contained in the UN Charter. For instance, the directives contained in a UN Security Council resolution are considered to be UN Charter obligations by virtue of the power granted to the Security Council under the UN Charter.¹⁵⁰ Similarly, the obligation contained in section 29 is considered to be a UN Charter obligation as it is contained in a treaty intended to specify the application of article 105(3) of the UN Charter.¹⁵¹ As such, by virtue of being a Charter obligation, the obligation contained in section 29 has *prima facie* primacy over the obligation to provide access to remedies under general international law.

In international law, it is an established principle that specific law (*lex specialis*) prevails over general law (*lex generalis*) in the event of conflict.¹⁵² The second indication of the primacy of section 29 is its *lex specialis* aspect with regard to regulating the UN's obligation to provide access to remedies. Indeed, section 29 is the law specifically providing for the UN's obligation to provide access to remedies under specific circumstances. This is in contrast with the general international law obligation to provide remedies which attach to any international law subject, denoting its *lex generalis* nature.¹⁵³ As such, it is evident that section 29 is the *lex specialis* on the subject matter of the UN's obligation to provide access to remedies. The prevailing effect of *lex specialis* on the general international law obligation to provide access to remedies was confirmed by DARIO in the following terms:

These draft articles do not apply where and to the extent that the ... content or implementation of the international responsibility of an international organisation, ... are governed by special rules of international law. Such special rules of international

¹⁴⁹ Simma (n 147 above) 1295.

¹⁵⁰ 'Decides that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement ... shall deny ...' UN SC Resolution 670 para 3. This resolution decreed the prevalence of its contents over any other member states obligations by virtue of the power granted to the Security Council under articles 25 and 48 of the UN Charter. Thus, the Resolution as a result of the exercise of powers under the UN Charter becomes a Charter obligation subject to the dominance granted by article 103.

¹⁵¹ Reinisch (n 3 above) 9-10.

¹⁵² *ILC Fragmentation Report* (n 145 above) para 56.

¹⁵³ Shelton (n 88 above) 142.

law may be contained in the rules of the organisation applicable to the relations between an international organisation and its members.¹⁵⁴

As such, the scope of an international organisation's obligation to provide remedies under general international law can be restricted by a 'special rule of international law ... contained in the rule of the organisation'. Section 29 is the special rule of international law governing the UN's obligation to provide remedies. A similar situation was observed in the case of *INA Corporation v Iran*¹⁵⁵ wherein a choice had to be made between a treaty standard of compensation and the compensation offered under general international law.¹⁵⁶ The Court in this case found that the treaty regulating compensation was the *lex specialis* 'which in principle prevails over general rules'.¹⁵⁷ It is generally understood that treaty rules prevail over customary international law and general principles of law.¹⁵⁸ This is due to the fact that treaties represent the will of the parties more specifically and accurately.¹⁵⁹ Moreover, section 29 can be considered a 'self-contained regime' of *lex specialis*. Norms regulating the legal consequence of the breach of a primary obligation in international law are secondary norms of international law.¹⁶⁰ Within this system of secondary norms, there is a subsystem

¹⁵⁴ Article 64 of DARIO.

¹⁵⁵ *INA v Government of the Islamic Republic of Iran* Iran-US Claims Tribunal Award no 184-161-1 (1985). Hereafter, *INA v Iran*.

¹⁵⁶ The treaty in question was the Iran–United States Treaty of Amity, Economic Relations and Consular Rights of 15 August 1955. This treaty provided that compensation for expropriation was to be calculated according to the 'net-book value' of a company at the time of expropriation as opposed to the general international law norms on nationalisations which did not provide for full compensation for expropriation. *INA v Iran* (n 155 above) paras 9,11 and 22.

¹⁵⁷ 'Moreover, for the purpose of this case we are in the presence of a *lex specialis*, in the form of the Treaty of Amity, which in principle prevails over general rules' *INA v Iran* (n 155 above) para 24.

¹⁵⁸ 'It is universally accepted that – consideration of *jus cogens* apart – a treaty as *lex specialis* is law between the parties to it in derogation of the general customary law which would otherwise have governed their relations' H Thirlway 'The law and procedure of the International Court of Justice' (1989) 60 *British Yearbook of International Law* 147; *ILC Fragmentation Report* (n 145 above) 44-45.

¹⁵⁹ J Pauwelyn *Conflict of norms in public international law* (2008) 387; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ (27 June 1986) (1986) ICJ Reports 14 para 274 hereafter *Nicaragua case*; *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ (26 February 1969) (1969) ICJ Reports 3 para 72; *Case Concerning the Continental Shelf, Tunisia v Libyan Arab Jamahiriya* ICJ (24 February 1982) (1982) ICJ Reports 18 p 38 para 24.

¹⁶⁰ Ferstman (n 12 above) 69.

of secondary norms prevailing over other secondary norms known as 'self-contained regimes'.¹⁶¹ Self-contained regimes are 'stronger' forms of *lex specialis* which represent a special set of secondary norms prevailing over other secondary norms in the regulation of responsibility.¹⁶² These self-contained regimes represent a departure from the general secondary norms and are the prevailing norms in the determination of the appropriate legal consequence of a breach.¹⁶³ In fact, courts have frequently recognised self-contained regimes as the prevailing 'internal systems' in place that are more appropriate in the determination of the consequence of a violation of a primary norm.¹⁶⁴ Indeed, in the *Case Concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, the ICJ held that the remedies system under diplomatic law as the self-contained regime on the matter prevailed over other secondary norms in general international law.¹⁶⁵ Similarly, in the *Nicaragua* case, the ICJ found that the self-contained regimes in human rights treaties for the protection of human rights prevail over any other forms of ensuring accountability for human rights violations.¹⁶⁶ It is thus accepted that self-contained regimes prevail over all other secondary norms. As such, in addition to being the *lex specialis* of the UN's obligation to provide remedies, section 29 prevails over all other secondary norms as a self-contained regime.

The fact that section 29 is the *lex specialis* and the self-contained regime of the UN's obligation to provide access to remedies does not settle all the questions arising from the gap created by the conflict between section 29 and the general

¹⁶¹ *ILC Fragmentation Report* (n 145 above) para 123.

¹⁶² 'Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point' *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001) UN Doc A/56/10 140.

¹⁶³ *ILC Fragmentation Report* (n 145 above) para 123-124.

¹⁶⁴ As above.

¹⁶⁵ 'The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse' *Case Concerning the United States Diplomatic and Consular Staff in Tehran, United States of America v Iran* ICJ (24 May 1980) (1980) ICJ Reports 3 para 86.

¹⁶⁶ 'When human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided in the conventions themselves'. *Nicaragua* case (n 159 above) para 267-8.

international law obligation to provide access to remedies. Granted, the question of the UN's obligation to provide remedies to claims of a private law character is settled by section 29. This is settled by the fact that section 29 prevails as a Charter obligation, as a *lex specialis*, and as a self-contained regime over the general international law obligation to that effect. However, section 29 is silent on the UN's obligation to provide access to remedies for claims of a public law nature. The concept of *lex specialis* can only be invoked in a case of conflict.¹⁶⁷ It cannot be said that there is a conflict between section 29 and the principles of general international law as it pertains to the obligation to provide remedies to claims of public law nature. Indeed, Section 29 does not explicitly exclude those claims from the UN's obligation to provide remedies, it merely bars them from having access to the mechanisms mandated by this provision. Thus, the fact that section 29 is the *lex specialis* does not settle the aspect of the UN's obligation to provide remedies as it pertains to claims of public law nature. The obligation to provide access to remedies to claims of a public law character falls outside the scope of section 29. As such, it stands to reason that providing access to remedies to public law claims remains within the ambit of general international law.

Indeed, the fact that as a general principle *lex specialis* prevails over *lex generalis* does not render *lex generalis* wholly inapplicable to the subject matter. In fact, general norms can be used to fill in the gaps left by *lex specialis*.¹⁶⁸ Section 29 has left a gap in its regulation of the UN's obligation to provide access to remedies by entirely omitting claims of a public law character. This gap pertaining to claims of a public law character is thus filled by the principles of general international law on the matter. As succinctly put by the Permanent Court of Arbitration:

¹⁶⁷ *ILC Fragmentation Report* (n 145 above) para 57.

¹⁶⁸ 'As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty' *Amco International Finance Corporation v Iran* Iran-US Claims Tribunal Award No 310-56-3 (1987) para 112.

Every international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different way.¹⁶⁹

Considering that section 29 refers expressly to the UN's obligation to provide remedies to claims of a private law character, it stands to reason that its obligation to provide remedies to claims of a public law character remains derived from general international law.

Furthermore, *lex specialis* and self-containing regimes, in particular, are not permitted to deviate from *lex generalis* to the extent of depriving third parties of their rights under general international law.¹⁷⁰ Granted, it is generally accepted that aside from *jus cogens*, general international law principles may be derogated from by way of *lex specialis*.¹⁷¹ However, if there is a conflict between norms of international law, the norm that is more favourable to the human rights of third parties prevails.¹⁷² This is interpreted as precluding derogation by *lex specialis* which would deprive third-party beneficiaries of their rights.¹⁷³ Therefore, section 29 is the *lex specialis* of the UN's obligation to provide remedies to private law nature claims. However, as it pertains to public law nature claims, considering that section 29 makes no provisions for them, the norms of general international law prevail as the norm 'most favourable' to third parties' rights.¹⁷⁴

3.5 Conclusion

The UN has an obligation to provide access to remedies derived both from treaty law and from general international law. Section 29 of the Immunities Convention regulates the UN's obligation to provide remedies in specific instances. This provision compels the UN to provide remedies to claims of a private law character arising from its activities. The UN's interpretation of this ambiguously worded provision has led to further restrictions to its obligation to provide access to

¹⁶⁹ *Georges Pinson case (France v United Mexican States)* Permanent Court of Arbitration (1928) Award of 13 April 1928. As reported in the *ILC Fragmentation Report* (n 145 above) para 179.

¹⁷⁰ *ILC Fragmentation Report* (n 145 above) para 154 (1).

¹⁷¹ *ILC Fragmentation Report* (n 145 above) para 108.

¹⁷² SA Sadat-Akhavi *Methods of resolving conflicts between treaties* (2003) 213-231.

¹⁷³ *ILC Fragmentation Report* (n 145 above) para 108-110, 154.

¹⁷⁴ Sadat-Akhavi (n 172 above) 105.

remedies to third-party claimants. Indeed, section 29 has been interpreted by the UN as offering it a vast discretion to give effect to the obligation by only requiring this implementation to be 'appropriate'. As a result, the UN has imposed several restrictions on its liability including placing financial and temporal limitations on the claims receivable and has excluded claims based on moral damage. Moreover, section 29 does not include claims of a public law character and does not define what constitutes claims of a private law character. Consequently, the UN's categorisation of claims in terms of section 29 has been inconsistent and rather arbitrary. This has led to a large category of private law claims being denied access to remedies thereby leading to the remedy gap in third-party claims against UN peacekeeping missions.

The fact that section 29 caters exclusively for private law claims does not remove public law claims from the ambit of the UN's responsibility. Indeed, under general international law, the UN still has an obligation to provide access to remedies to public law claims. However, because these third-party claims of a public law character are excluded from the scope of section 29, the UN has completely denied them access to any form of remedy. This constitutes a breach of the UN's general international law obligation to that effect. As determined in the previous chapter, the UN is endowed with absolute immunity from national jurisdictions. As such, there is currently no forum with jurisdiction to hold the UN accountable for the breach of its obligation to provide access to remedies to third-party claims of a public law character. As a result, third-party claims of a public law character are left without any form of remedies available to them in the substantive and procedural sense of the term.

It can thus be said that the UN has an obligation to provide remedies to third-party claims of a public law character and is breaching it by refusing to grant these claims of access to remedies. It can further be said that due to the UN's consistent and uncontested interpretation of section 29's permissive wording, the UN is not breaching its obligation to provide remedies to claims of a private law character by imposing further limitations to its liability even though it results in the exclusion of a large category of claims from its section 29 mechanisms. However, these limitations directly contribute to and widen the remedy gap in third-party claims against the UN.

In conclusion, the remedy gap in third-party claims against UN peacekeeping missions results from both an inadequate legal framework and the UN's interpretation and practice.

Chapter 4

The United Nations' alternative dispute resolution mechanisms in practice

4.1 Introduction

As established in the previous chapter, the UN has an obligation to provide access to remedies to third-party claimants. This obligation is derived from section 29 of the Immunities Convention and from general international law. Under section 29, the UN has an obligation to provide access to remedies to third-party claims of a private law character made against the UN. The wording of this provision is, however, vague and ambiguous and has been interpreted by the UN as granting it unfettered discretion to implement its contents. As a result, the UN has interpreted section 29 as granting it the discretion to determine, among other things, the legal nature of a claim. This, as observed above, has led to the exclusion of certain third-party claims from the ambit of section 29 and the denial of access to a forum with jurisdiction as a result. It has been established that the UN's interpretation of section 29 in a manner that excludes a large category of claims contributes to and exacerbates the remedy gap in third-party claims against UN peacekeeping missions. However, the UN has taken steps to implement its treaty obligation to provide access to remedies. To this effect, the UN has concluded agreements with host States and put in place several policies and mechanisms aimed at discharging its obligation to provide 'appropriate' dispute resolution mechanisms as directed by section 29. Despite the presence of these section 29-derived mechanisms, the remedy gap in third-party claims against UN peacekeeping missions persists. Indeed, several commentators point out that it is not just the lack of dispute resolution mechanisms that create the remedy gap but also the inadequacy and ineffectiveness of the available mechanisms.¹ In addition to its treaty obligation, the UN has a wider obligation to

¹ N Shrijver 'Beyond Srebrenica and Haiti: Exploring alternative remedies against the United Nations' (2013) 10 *International Organisations Law Review* 590-593; K Lundahl 'The United Nations and the remedy gap: The Haiti Cholera Dispute' (2013) 88.3/4 *Die Friedens Warte* 80-93.

provide access to remedies under general international law. This obligation, as established, stems from the individuals' right of access to court and includes claims other than those of a private law character. This means that under general international law, the UN has the obligation to provide access to remedies to those third-party claims considered to be of a public law character and those characterised as hybrid claims. The UN, however, has not expressly recognised its wider obligation under general international law.

Thus, this chapter offers a study of the UN's implementation of its obligation to provide access to remedies as derived from section 29 and from general international law. Indeed, an important component of the remedy gap in third-party claims against UN peacekeeping missions is the lack of or ineffectiveness of the UN's alternative dispute resolution mechanisms. Accordingly, this chapter examines the mechanisms put in place by the UN in the discharge of its obligation to provide access to remedies. This entails an assessment of whether the UN has put appropriate dispute resolution mechanisms as mandated by section 29 and whether the UN has mechanisms in place in accordance with its wider obligation derived from general international law. This is so as to identify the underlying factors leading to the UN's available dispute resolution mechanisms being deemed so inadequate as to create a remedy gap.

The first part of this chapter consists of a comprehensive study of the UN's permanent mechanisms of dispute resolution as it pertains specifically to claims against its peacekeeping missions. This includes an in-depth assessment of the scope, procedures, and limitations of these mechanisms. In addition, this section of the study analyses ad hoc mechanisms put in place by UN peacekeeping for specific situations such as lump sum agreements and trust funds. Moreover, a part of the study will assess the dispute resolution mechanisms in territories administered by the UN as part of its peacekeeping mandates. Indeed, various forms of peacekeeping entail, in theory, different approaches to claims made against the missions and lead to a variety of results. The fact that the remedy gap is the overarching issue in third-party claims made against these various forms of peacekeeping missions, including the UN's administration of territory, warrants closer scrutiny. As mentioned above, the UN's unchallenged interpretation of section 29 has led to a large category of claims being excluded

from the scope of section 29. Accordingly, it is understood that if the current dispute resolution mechanisms offered by the UN represent a faithful implementation of its obligation under section 29, as informed by its own interpretation of the provision, it is bound to be a contributing factor to the remedy gap. As such, the purpose of this part of the chapter is to determine whether these mechanisms represent not only an adequate discharge of the UN's treaty obligation to provide access to remedies but also whether these mechanisms are compatible with international standards of fairness and justice required of any administration of justice.²

The second part of the study offers a thorough analysis of the UN policies with regard to the limitations and exclusions of its liability in third-party claims arising from its peacekeeping activities. As established in the previous chapter, the UN has taken steps to restrict its obligation to provide remedies in both a procedural and substantive sense. This section of the study will thus assess whether these restrictions and exemptions are compatible with the UN's obligation to provide access to remedies as derived from section 29 and from general international law.

In essence, this chapter will provide a comprehensive study of the current mechanisms in place and the policies underpinning the said mechanisms. It is research into the lack of or inadequacy of UN alternative dispute resolution mechanisms as a component of the remedy gap. There are, however, significant challenges to this study. Indeed, there is a deliberate scarcity of information on the UN's dispute resolution mechanisms. The UN does not release information on the procedures and claims received by these mechanisms. Most of the information pertaining to these mechanisms is either confidential or subject to a 20-year-release embargo period. This could be motivated by the UN's noted inclination to avoid setting precedents in its settlement of third-party claims. As a result, studies into UN peacekeeping dispute resolution mechanisms rely on archives, internal correspondence, and unpublished reports. Reliance on archives and internal documents may in some instances present information that does not reflect the current practice with great accuracy. However, the aim of this chapter

² F Francioni 'The right of access to justice under customary international law' in F Francioni (ed) *Access to justice as a human right* (2007) 64-65; D Shelton *Remedies in international human rights law* (2015) 16.

is to identify the shortcomings of UN policies and mechanisms which contribute directly to the remedy gap in third-party claims against UN peacekeeping missions. In that regard, the available information is significant enough to provide an informed understanding of the rules and procedures of UN's dispute settlement mechanisms and the impact thereof on third-party claims.

4.2 UN peacekeeping missions' alternative dispute resolution mechanisms

Under section 29 of the Immunities Convention, the UN has an obligation to provide access to remedies to third-party claims of a private law character made against the UN. The UN in compliance with section 29 has established mechanisms of dispute resolution created through SOFAs or SOMAs with its host States or through the UN's own internal policies.³ Section 29 does not specify the mode of dispute resolution that must be put in place by the UN; it only requires them to be 'appropriate'. As section 29 merely directs the UN to 'make provisions' for the settlement of claims made against it, there is no single set mode of dispute resolution prescribed by section 29. Thus, the modes of dispute resolution instituted by the UN can and do vary. Accordingly, as observed in the previous chapter, any mode of dispute resolution by the UN could be deemed appropriate, with the sole caveat that it does not render the UN 'a judge in its own case'.⁴ This section of the study offers an assessment of these mechanisms of dispute resolution offered to third-party claimants by UN peacekeeping missions. There are permanent mechanisms intended to be established in each UN peacekeeping mission area and those ad hoc modes of dispute resolutions established based on the specific claims or specific situations at hand. In addition to these mechanisms (whether permanent or ad hoc), special attention is paid to the dispute resolution mechanisms established by the UN in the territories it administers as part of its peacekeeping mission. As noted in the previous chapter, the UN has not expressly

³ 'Report of the Secretary General on Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946' (24 April 1995) UN Doc A/C.5/49/65 para 16. Hereafter, Procedures in place for implementation of section 29.

⁴ *Manderlier v Organisation des Nations Unies and Etat Belge (Ministre des Affaires Etrangères) Tribunal Civil de Bruxelles* (11 May 1966) No 4553, as reported by P Schmitt on www.ebrary.net (accessed 19 February 2020). Hereafter, *Manderlier* case.

recognised its wider obligation to provide access to remedies under general international law. Under this wider obligation, the UN must provide access to remedies to third-party claims of a public law character and those characterised as hybrid claims. By contrast, third-party claims of a private law character remain within the ambit of section 29 of the Immunities Convention. However, in administered territories, the UN acts as the de facto government.⁵ As the governing authority, the UN peacekeeping mission is expected to provide forums of dispute resolution to all claims and not just those that fall under section 29.⁶ As such, it is important to identify the modes of dispute resolution established by the UN as the administering authority as they might represent, to a certain extent, a discharge of the UN's wider obligation to provide access to remedies under general international law.

4.2.1 UN peacekeeping permanent mechanisms of third-party dispute resolution

Standing claims commission

When the UN sends a peacekeeping mission to an area, it concludes a SOFA or SOMA with the host State.⁷ These SOFAs or SOMAs detail the particulars of the relationship between the UN and its host.⁸ In case no particular SOFA is concluded between the UN and a host, the Model SOFA is usually declared applicable pending the conclusion of a mission-specific SOFA.⁹ As part of this bilateral relationship,

⁵ K Schmalenbach 'Third party liability of international organisations: A study on claims settlement in the course of military operations and international administration' in H Langholdz, B Kondoch & A Wells (eds) *International peacekeeping: The yearbook of international peace operations volume 10* (2006) 45; C Ferstman *International organisations and the fight for accountability: The remedies and reparation gap* (2017) 110.

⁶ J Friedrich 'UNMIK in Kosovo: Struggling with uncertainty' 9 (2005) *Max Planck Yearbook of United Nations Law* 233, 238-244, 270-271.

⁷ At times, the term SOMA is used to denote a civilian deployment while the term SOFA may denote a military deployment. However, the terms SOFA and SOMA are often used interchangeably in international law and by the UN. These terms are also used interchangeably in the present study. T Gill, D Boothby & A Vanheusden 'Status of forces and status of missions' in T Gill (ed) *Leuven Manual on the International Law Applicable to Peace Operations: Prepared by an International Group of Experts at the Invitation of the International Society for Military Law and the Law of War* (2017) 120-121; A Sauri 'Status of Force and Status of Mission Agreements under ESDP: The EU's evolving practice' (2008) 19.1 *The European Journal of International Law* 68.

⁸ Gill (n 7 above) 120.

⁹ Usually, the UN Security Council declares the Model SOFA as applicable in the case of a peacekeeping mission that starts its operations without a mission-specific SOFA. UNGA A/Res/52/12B (19 January 1998) para 7; UNSC Resolution 1320 (2000) para 6; UNSC Resolution 2043

the UN and its host agree to the creation of an SCC to settle any third-party claim of a private law character made against UN peacekeeping mission. A provision on the SCC as the UN's alternative dispute resolution mechanism is included in every SOFA and SOMA concluded between the UN and its host, following the template of the UN Model SOFA.¹⁰ The SCC is the primary mechanism intended to represent the UN's implementation of its treaty obligation to provide access to remedies to claims of a private law nature as derived from section 29 of the Immunities Convention. In addition, the SCC is the sole mechanism established through the legal framework of the relationship between UN peacekeeping missions and its host States.¹¹ None of the other dispute resolution mechanisms intended to settle private law claims against UN peacekeeping missions are provided for in a treaty provision; they are products of the UN's internal policies.¹² The SCC is also a mechanism expressly created to achieve a balance between the UN's absolute immunity and its accountability. Indeed, SCCs are mandated to settle

any dispute or claim of a private law character to which the United Nations peacekeeping operation or any Member thereof is a party and over which the courts of (host country/territory) do not have jurisdiction because of any provision of the present Agreement.¹³

Host States' courts lack jurisdiction over claims made against the UN as a result of its immunity under section 2 of the Immunities Convention. All SOFAs and

(2012) para 7. It may also happen that the Security Council declares a previous SOFA from a terminated mission to be applicable before the conclusion of the mission-specific SOFA. UNSC Resolution 1990 (2011) para 4.

¹⁰ To name a few: Para 51 of the Comprehensive review of the whole question of peacekeeping operations in all their aspects: Model Status of Force Agreement for peacekeeping operations (9 October 1990) UNGA A/45/594. Hereafter Model SOFA; para 54 of the Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations operations in Haiti UNTS 2271/ I-40460. Hereafter, MINUSTAH SOFA; para 55 of the Agreement between Ethiopia and the United Nations Concerning the Status of the United Nations in Ethiopia and Eritrea, New York 23 March 2001 UNTS 2141/1-37352. Hereafter, UNMEE SOMA; para 55 of the Agreement between the United Nations and Sierra Leone concerning the status of the United Nations mission in Sierra Leone UNTS 2118/ 1-36851. Hereafter, UNAMSIL SOFA; para 54 of the Agreement between the government of Libya and the United Nations concerning the United Nations Support Mission in Libya, Tripoli 10 January 2012 UNTC 2815/ I-49384. Hereafter, UNSMIL SOMA; etc.

¹¹ Procedures in place for implementation of section 29 (n 3 above) para 16.

¹² 'Two kinds of procedures presently exist for the handling of third-party claims: the procedure provided for under article 51 of the model status-of-forces agreement and the one established internally by the United Nations' Administrative and budgetary report (n 8 above) para 20.

¹³ UN Model SOFA para 51.

SOMAs concluded between the UN and its host States are subject to the Immunities Convention.¹⁴ SCCs are thus a direct implementation of section 29 of the Immunities Convention which expressly instructs the UN to make 'provisions for appropriate modes of settlement of ... disputes of a private law character to which the United Nations is a party'.¹⁵

Under the Model SOFA, the SCC is intended to be structured as follows:

One member of the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government. If no agreement as to the chairman is reached within thirty days of the appointment of the first member of the commission, the President of the International Court of Justice may, at the request of either the Secretary-General of the United Nations or the Government, appoint the chairman.¹⁶

In terms of composition, all SCCs are intended to be structured in the same manner. Accordingly, the SCC structure and composition as contained in the Model SOFA is repeated verbatim in all subsequent SOFAs.¹⁷ However, the procedures of the SCCs are meant to vary as all commissions are granted the discretion to choose their own procedures. Indeed, in terms of the SOFAs, a commission may 'determine its own procedures, provided that any two members shall constitute a quorum for all purposes'.¹⁸ In line with the set quorum, the Model SOFA and all mission-specific SOFAs provide that 'all decisions shall require the approval of any two members'.¹⁹ This includes decisions on jurisdiction, admissibility, and the merits of a claim.²⁰

¹⁴ UN Model SOFA para 3; MINUSTAH SOFA para 3; UNMEE SOMA para 3; UNAMSIL SOFA para 3, UNMSIL SOMA para 3, etc.

¹⁵ Section 29 of the Immunities Convention.

¹⁶ UN Model SOFA para 51.

¹⁷ As above.

¹⁸ As above.

¹⁹ As above.

²⁰ 'Report of the Secretary-General on the administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: Financing of the United Nations peacekeeping operations' (21 May 1997) UN Doc A/51/903 para 7; K Schmalenbach 'Preserving the Gordian knot: UN legal accountability in the aftermath of Srebrenica' (2015) 62 Netherlands International Law Review 320.

All SCCs present similar features due to the fact that the SOFAs provide for the same composition and structure, the same rules on quorum, and they are all granted the same discretion to adopt their own procedures. However, there are salient differences between the SCCs contained in post-1998 SOFAs and the SCCs contained in SOFAs concluded before 1998. Before 1998, all SOFAs followed the lead of the Model SOFA with regard to the SCCs. As such, all SOFAs had the same provision regarding the SCC which held the following:

any dispute or claim of a private law character to which the United Nations peacekeeping operation or any Member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision of the present Agreement, shall be settled by an SCC to be established for that purpose. ... The awards of the commission shall be final and binding, unless the Secretary-General of the United Nations and the Government permit an appeal to a tribunal.²¹

According to the dispute settlement provision as set in all pre-1998 SOFAs, SCCs were intended as forums of first instance and though the awards were to be considered final and binding, an appeal through a tribunal to be established for that specific purpose was to be permitted under certain circumstances. This appeal tribunal was to be structured in a manner similar to the SCC.²² In 1998, the UN General Assembly adopted new liability policies applying financial and temporal limitations to the UN's liability.²³ Following this resolution, all provisions on SCCs in subsequent SOFAs presented salient differences with the SCC provisions in the SOFAs concluded prior to the UN's resolution on limiting its liability.²⁴ Indeed, in accordance with the UN's 'new' policy on limitation of

²¹ Para 50 of the Memorandum of Understanding in the exchange of letters constituting an agreement on the status of the United Nations Protection Force (UNPROFOR) in the Former Yugoslav Republic of Macedonia, Skopje 14 June 1994 UNTS 1788/1-31078. Hereafter, UNPROFOR SOFA; para 54 of the Agreement between the United Nations and Angola on the status of the United Nations peacekeeping operation in Angola, Luanda 3 May 1995 UNTS 1864/1-31764. Hereafter UNAVEM III SOFA; etc.

²² 'The provisions relating to the establishment and procedures of the claims commission shall apply, *mutatis mutandis*, to the establishment and procedures of the tribunal. The decisions of the tribunal shall be final and binding on both parties' Para 51 of the UN Model SOFA.

²³ Third party liability: Temporal and financial limitations (17 July 1998) UNGA A/RES/52/247, hereafter, Resolution on temporal and financial limitations.

²⁴ K Schmalenbach 'Dispute settlement: Article VIII section 29 General Convention' in A Reinisch & P Bachmayer (eds) *The Conventions on the Privileges and Immunities of the United Nations and its Specialised Agencies: A commentary* (2016) 567.

liability,²⁵ subsequent SOFAs included a provision on limitation of liability.²⁶ This limitation of liability provision adds the condition that all third-party claims against the UN peacekeeping mission have to first be resolved through the UN's internal procedures.²⁷ Consequently, though the SCC was initially intended to be a dispute resolution forum of first instance, the limitation of liability provision changed this by requiring that claims against the UN could only be resolved through the SCC if they could not be settled by the UN's internal procedures. The sole UN internal procedure that handles third-party claims is the local claims review board. Accordingly, all third-party claims would have to first be heard by the local claims review board and could only be brought to the SCC if they could not be satisfactorily resolved by the review boards.²⁸ The portion which provided for an appeal of the SCC decision through a similarly structured tribunal was removed and the SCC decisions were made final and binding. This is because the SCC had effectively been turned into an appeal tribunal as the commission was only empowered to hear claims that could not be settled through the UN's internal procedures. Thus, an appeal tribunal to the SCC, which is an appeal tribunal itself, would be redundant. This was noted by the UNSG in the following recommendation to the General Assembly:²⁹

The appeal to a tribunal, as provided for in article 53 of the model agreement, foresees a very similar procedure and composition to that of the SCC, and may in fact be seen as a duplication of the proceedings in the SCC. It is, accordingly, suggested that the following words be deleted from the penultimate sentence of article 51.

²⁵ Resolution on temporal and financial limitations (n 23 above) para 12; UN Doc A/51/903 (n 20 above) paras 37-40.

²⁶ Para 54 of UNMEE SOMA; para 54 of UNAMSIL SOFA; para 54 of MINUSTAH SOFA, para 54 of the UNSMIL SOMA etc.

²⁷ As above.

²⁸ All provisions on the limitation of liability in post-1998 SOFAs hold the following: 'Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to it, ... which cannot be settled through the internal procedures of the United Nations, shall be settled by the United Nations in the manner provided for in article 55'. Article 55 in all post-1998 SOFAs are a provision on the establishment of an SCC. As above.

²⁹ UN Doc A/51/903 (n 20 above) note 2 p 13.

The portion providing for an appeal tribunal was thus removed and the SCC was effectively converted into an appeal tribunal for claims that could not be resolved by the UN's internal mechanism.

Despite the importance of the SCC as a treaty mechanism in direct implementation of the UN's obligation under section 29 and as an appeal tribunal in post-1998 SOFAs, the SCC was never established by the UN in any of its peacekeeping missions. There is no conclusive explanation as to why the SCCs were never established. According to the UN, one of the reasons for not establishing an SCC was the lack of interest from host States.³⁰ This rather political explanation is relatively dubious for reasons that will be explored below in the study on the local claims review board. Another explanation put forward by the UN was that it considered the establishment of an SCC to be 'problematic' in instances where the host State had no functioning government to participate.³¹ This explanation makes sense considering the composition of the SCC requires a host State with a functional government capable of appointing members. However, the UN has conducted multiple peacekeeping operations in areas with functioning governments and still did not establish an SCC in those States. The UN further argues that due to the local review boards satisfactory handling of dispute resolution of third-party claims, there is no real need for the establishment of an SCC as it would be redundant.³² This argument makes sense to a certain extent. Indeed, post-1998, the SCC changed from a first instance dispute resolution forum to an appeal tribunal only hearing claims that could not be settled by the UN's internal procedures. However, this meant that the UN's internal procedures, namely the local claims review boards, satisfactorily handled all claims without any third-party claimant ever needing to appeal the boards' decisions. Considering that the UN keeps all local claims review boards' cases and rulings confidential, there is no way to independently verify the UN's assertions.³³

³⁰ 'The standing claims commission as envisaged under the model agreement has never been established in the practice of United Nations peacekeeping operations ... This may have been the result of a lack of political interest on the part of host States' A/51/903 (n 20 above) para 8.

³¹ *Procedures for implementation of section 29* (n 3 above) para 17.

³² '[T]he claimants themselves may have found the existing procedure of local claims review boards expeditious, impartial and generally satisfactory'. As above.

³³ T Dannenbaum 'Translating the standard of effective control into a system of effective accountability: How liability should be apportioned for violations of human rights by member states

Moreover, while it would explain why no SCC was established post-1998, it does not explain why there was no SCC prior to the 1998 resolution on limitation of liability. Indeed, under earlier pre-1998 SOFAs, the SCC was still a mechanism of first instance. As such, the explanation that claims were satisfactorily handled at the level of local boards would not be applicable. Moreover, it appears that third-party claimants were not in a position to request the establishment of the SCC³⁴ because third-party claimants are not parties to the agreement between the UN and its host State and, as such, do not derive any rights, procedural or substantive, from the SOFAs.³⁵ While third-party claimants may have an interest in the implementation of the SOFAs as it pertains to the establishment of the SCC, this interest cannot be deemed to rise to the level of an enforceable legal right.³⁶

The fact that a mechanism such as the SCC was never established illustrates the issue with the remedy gap in third-party claims against UN peacekeeping missions. Indeed, this mechanism is still provided for in every SOFA but was never actually deployed. This indicates a certain unwillingness by the UN to effectively settle claims made against its peacekeeping missions. Arguably, the SCC could potentially bridge or, at the very least, alleviate the remedy gap in third-party claims against UN peacekeeping missions, including mass claims. Moreover, this mechanism would represent an appropriate discharge of the UN's treaty obligation to provide access to remedies. However, even if the SCC was to be established there are some notable areas of concern pertaining to the adequacy of the mechanism that warrant closer scrutiny. Indeed, the SCC is touted by the UN as a 'tripartite procedure for the settlement of disputes in which both the Organisation and the claimant are treated on a par'.³⁷ However, based on its structure, the SCC is, in essence, a bilateral negotiation between the UN and its host State.³⁸ In point of fact, though all SCCs are granted the freedom to choose

troops contingents serving as United Nations peacekeepers' (2010) 51.1 *Harvard International Law Journal* 126.

³⁴ Schmalenbach (n 24 above) 558.

³⁵ C Chinkin *Third-parties in international law* (1993) 13-15.

³⁶ Chinkin (n 35 above) 18-19.

³⁷ UN Doc A/51/903 (n 20 above) para 10.

³⁸ 'The standing claims commission under the model agreement provides for a mechanism for the settlement of disputes whereby both parties, namely, the United Nations and the host country, participate on an equal footing' 'Report of the Secretary General on Administrative and budgetary

their own procedures, all SOFAs specify that any two members constitute a quorum and that all decisions require the approval of the two members. This refers to the members appointed by the UN and the host State government. Indeed, the jointly appointed or ICJ-appointed member can be outvoted by the other members on any decision to be made by the commission.³⁹ As such, though technically of a tripartite composition, SCC is, in essence, a bipartite arrangement whereby a third-party claim can be settled by a negotiation between the Members representing the UN and the host State.⁴⁰ Consequently, the claimants' position would be as strong as the protection afforded to them by the host State in its negotiations with the UN mission. This positioning assumes that the host State will automatically act in the best interests of the third-party claimant; this is not always guaranteed.⁴¹ Moreover, assuming the host State is acting in the interest of third-party claimants due to the dominant negotiating power of the UN, there is a strong potential for the balance of power being skewed in favour of the UN. Thus, there is a risk that even if the SCC was to be established, based on its structure, this mechanism might prove to be ineffective in protecting the right of access to justice of third-party claimants. Indeed, the standards of independence of the judiciary and impartiality required in any administration of justice⁴² might not be guaranteed based on the composition of this commission.⁴³ This is, however, all conjecture because, as noted by the UNSG, the effectiveness or ineffectiveness of SCCs as a mechanism for dispute resolution and a potential solution for the remedy gap cannot be determined unless established.⁴⁴

aspects of the financing of the United Nations peacekeeping operations: Financing of the United Nations peacekeeping operations' (20 September 1996) UN Doc A/51/389 para 20. Hereafter, Administrative and budgetary report.

³⁹ Schmalenbach (n 24 above) 558.

⁴⁰ F Mégret 'The vicarious responsibility of the United Nations for "unintended consequences" of peacekeeping operations' in C Chiyuki Aoi, C de Cooning and R Thakur (eds) *Unintended consequences of peace operations* (2007) 262.

⁴¹ Schmalenbach (n 24 above) 558.

⁴² 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development: Report of the Special Rapporteur on the independence of judges and lawyers' UNGA A/HRC/11/41; D Shelton *Remedies in human rights law* (2015) 100-106.

⁴³ Schmalenbach (n 24 above) 557-558.

⁴⁴ 'The standing claims commission as envisaged under the model agreement has never been established in the practice of United Nations peacekeeping operations. There is, therefore, no acquired operational experience against which the effectiveness or ineffectiveness of such a

Local claims review boards

From the first UN peacekeeping missions up until 1990, UN peacekeeping operations were limited in scope and mandate, with the exception of the ONUC⁴⁵ This changed with the end of the Cold War in 1990 when UN peacekeeping missions evolved from smaller observer missions to more expansive and complex missions with wider mandates.⁴⁶ Prior to the drafting of the Model SOFA, though the UN did sometimes conclude SOFAs with some peacekeeping mission State hosts, it was not widespread practice for the UN to enter into mission-specific agreements with host States.⁴⁷ The particulars of the relationship between the UN peacekeeping missions were mostly governed by the UN Security Council resolutions detailing the mandate and scope of activities of UN peacekeeping missions and exchanges of letters constituting an agreement between the UN and its host.⁴⁸ As such, some matters incidental to UN peacekeeping missions, such as dispute resolution for third-party claims against the UN, were not always provided for in a treaty but were instead part of the UN's internal policies. Accordingly, since the inception of UN peacekeeping missions, it has been UN practice to establish an internal local claims review board in peacekeeping mission areas to settle third-party claims made against it in the course of the UN's operations.⁴⁹ The local claims review boards have never been incorporated in any SOFA and as such remain UN policy mechanisms as opposed to SCCs which are treaty mechanisms. Local claims review boards are thus the most long-standing policy mechanism of dispute resolution provided by the UN for the settlement of third-party claims made against its peacekeeping missions. Moreover, considering

procedure can be judged ... the very fact of not invoking the procedure provided for under the model agreement, in itself, is not an indication that the procedure is inherently unrealistic or ineffective' para 8 of A/51/903 (n 39 above).

⁴⁵ 'Comprehensive review of the whole question of peacekeeping operations in all their aspects: Report of the panel on United Nations Peace Operations' UN Doc A/55/305 para 12. Hereafter, Brahimi Report; C Choi, C de Coning & R Thakur 'Unintended consequences, complex peace operations and peacebuilding systems' in C Aoi, C de Coning & Ramesh Thakur (eds) *Unintended consequences of peace operations* (2007) 4-6.

⁴⁶ 'Contemporary issues in UN Peacekeeping and international law: Briefing paper No 1' *United Nations Peacekeeping Law Reform Project School of Law: University of Essex* p 1-2.

⁴⁷ Comprehensive review of the whole question of peacekeeping operations in all their aspects (18 December 1989) UNGA 44/45 para 10.

⁴⁸ The archival records of UN peacekeeping's exchanges of letters can be found on the UN Treaty Series Online https://treaties.un.org/pages/AdvanceSearch.aspx?tab=UNTS&clang=_en.

⁴⁹ Procedures in place for implementation of section 29 (n 3 above) para 17.

that SCCs have never been established, local claims review boards are the sole permanent mechanisms of dispute resolution available for third-party claims against UN peacekeeping missions. It is thus important to examine the local claims review boards in detail to understand why the remedy gap persists despite there being a standing mechanism available to resolve third-party claims against UN peacekeeping missions.

According to the UN, local claims review boards are part of the UN's discharge of its section 29 obligation to provide access to remedies to third-party claims made specifically against UN peacekeeping missions.⁵⁰ Indeed, the review boards are mandated

to examine and recommend settlement of third-party claims for personal injury or death and/or property loss or damage that are attributable to acts performed in connection with official duties by civilian or military members of the mission.⁵¹

This mandate reflects the UN's treaty obligation to provide access to remedies to third-party claims of a private law character. In addition to claims of injury and/or property loss or damage, these review boards may receive claims arising from accidents involving UN vehicles under certain circumstances. Claims arising from such accidents are usually settled by the UN's worldwide insurance for third-party liability through a representative in the area.⁵² However, it may so happen that the UN's insurer delays in sending a representative to the mission area.⁵³ In that instance, until the representative is in office, the local claims review board processes these claims arising out of accidents involving UN vehicles as a forum of first instance and forwards them to the insurance company.⁵⁴ This is in line with section 29 directing the UN to make provision for the settlement of all disputes of a private law character involving the UN.

⁵⁰ Procedures for implementation of section 29 (n 3 above) para 17; Administrative and budgetary report (n 8 above) paras 7-8.

⁵¹ Procedures for implementation of section 29 (n 3 above) para 17.

⁵² As above; Resolution relating to the insurance against third-party risks in motor-cars of the Organisation and of members of the staff (13 February 1946) UN GA Res A/Res/22(I) E.

⁵³ The United Nations Transitional Authority in Cambodia (UNTAC) operated for months without an insurance representative. Procedures for implementation of section 29 (n 3 above) para 17.

⁵⁴ As above.

Local claims review boards are products of the UN's internal policies; this is reflected in the authority and composition of the boards. Indeed, the review boards derive their authority from the UN Controller, as opposed to the SCCs which derive their authority from the SOFA or SOMA.⁵⁵ A local claims review board is mandated to 'act in an advisory capacity to the Controller and ... transmit its recommendation regarding the settlement of each claim to the Controller'.⁵⁶ In terms of composition, unlike the SCC which is intended to be composed of some Members outside the UN, the review boards are wholly internal to the UN. In fact, the boards are exclusively composed of UN staff.⁵⁷ Like the SCCs, each review board may determine its own procedures.⁵⁸ Considering that the review boards' rules of procedure are not published, it is unclear what constitutes a quorum and how the boards decisions are taken. However, the UN does provide some information as to how claims are processed by the review boards; the review boards have the power to review claims and recommend compensation payable to third-party claimants within the financial cap set by the General Assembly resolution to that effect.⁵⁹ Prior to the adoption of the General Assembly resolution limiting the UN's liability, it was the Controller that set the financial limitations to amounts payable to third-party claimants.⁶⁰ When a recommended compensation exceeds the Controllers' cap or the set financial limitations, which happens very often,⁶¹ the review board, via the peacekeeping mission involved, refers the claim to UN headquarters.⁶² This claim is then sent to the Field Operations Divisions in the UN's Department of Peacekeeping Operations which in turn forwards the review board's recommendations to the Director of Peacekeeping Financing

⁵⁵ Procedures in place for the implementation of section 29 (n 3 above) para 17.

⁵⁶ UN Secretariat administrative instructions: Compensation for loss or damage to personal effects attributable to service UN Doc ST/AI/149/Rev.4 para 18.

⁵⁷ Though composition may vary, review boards are typically composed as follows: The Chief Administrative Officer as the boards' chairperson; the Chief of Claims Unit as Secretary (*ex-officio*); a Legal Advisor, a Finance Officer and a General Services Officer as members of the board. Administrative and budgetary report (n 38 above) fn 6 p 13.

⁵⁸ UN Doc ST/AI/149/Rev.4 (n 56 above) para 17.

⁵⁹ As above; Procedures for implementation of section 29 (n 3 above) paras 18-19; Resolution on temporal and financial limitations (n 23 above).

⁶⁰ Procedures for implementation of section 29 (n 3 above) para 18.

⁶¹ Procedures for implementation of section 29 (n 3 above) para 20; Administrative and budgetary report (n 38 above) para 26.

⁶² Procedures for implementation of section 29 (n 3 above) para 18.

Division in the Office of Programme Planning, Budget and Accounts.⁶³ It is this Director who reviews and approves or rejects the recommendations.⁶⁴ Once the recommended settlement is approved, the review boards, through the Claims Unit at field level, then offer the settlement to the claimant in exchange for a release form that indemnifies and holds the UN harmless from 'from any and all claims and causes of action by third parties'.⁶⁵ Throughout this procedure, the claimant is not allowed to make any submissions beyond the initial submission of the claim.⁶⁶ They are merely informed of the outcome of the case and can choose to accept the compensation or reject it with the knowledge that there is no appeal process provided.⁶⁷ Indeed, in post-1998 SOFAs, the SCC is intended to operate as an appeal tribunal for claims that could not be settled by the local claims review board. Considering this mechanism has never been established by the UN, the local claims review boards are the forum of first and last instance as there is no operational appeal mechanism.

Although intended as the UN's discharge of its section 29 obligation, local claims review boards are not in conformity with the content of this treaty obligation. Section 29 does not specify the form that these modes are to take, leaving it up to the UN to decide on a method to resolve claims made against it. Moreover, section 29 does not require the UN to enter into direct negotiations with the claimants. As such, the fact that claimants are not allowed to make submissions throughout the processing of the claims is not what is at issue as section 29 grants the UN vast discretion to implement the content of its obligation. There is, however, a restriction to this seemingly vast discretion. Indeed, as discussed in the previous chapter, in the *Manderlier case*, a Belgian Court found that a mode of dispute resolution which would result in the UN being a 'judge in their own case' cannot be considered as an 'appropriate' mode of dispute resolution under section 29.⁶⁸ The essence of the *Manderlier* critique or restriction is that a dispute

⁶³ Administrative and budgetary report (n 38 above) para 24.

⁶⁴ Procedures for implementation of section 29 (n 3 above) para 19.

⁶⁵ As above.

⁶⁶ Ferstman (n 5 above) 105.

⁶⁷ As above.

⁶⁸ 'The defendant considers quite wrongly that the ... agreement reached between the UN and Belgium ... constitutes the appropriate method of settlement provided for by section 29. The defendant had the claims addressed to it, and in particular those of the plaintiff, examined by its

resolution mechanism cannot be deemed appropriate under section 29 if it results in a complete lack of institutional impartiality. As such, the fact that local claims review boards' composition and claims processing are wholly internal to the UN is incompatible with section 29 requirement that the UN make provision for the establishment of appropriate modes of dispute resolution. Local claims review board are wholly internal to the UN and based on their composition and claim processing, the UN is both a party to the claims and the sole arbitrator of the dispute. This setup is intentional; according to the UN, the local claims review boards are set up in a manner that 'leaves the investigation, processing, and final adjudication of the claims entirely in the hands of the Organisation'.⁶⁹ This is also reflected in the history of UN peacekeeping and its early local claims review board. The UN's first peacekeeping mission, UNEF I, in its SOFA with Egypt, provided for a dispute resolution mechanism called claims commission, akin to the SCCs in contemporary SOFAs.⁷⁰ Just like the SCC, the claims commission was never established. However, its composition was retained in the establishment of the UNEF local claims review board. Indeed, unlike the present-day review boards' procedure, in terms of UNEF board review procedure, prior to a claim being processed by the local claims review board, there were preliminary negotiations between UNEF and its host, Egypt.⁷¹ Egypt, through its liaison office routinely participated in the local claims review boards procedures.⁷² As per the established principles of diplomatic protection in international law⁷³ and the preliminary

own authorities without argument of any kind. It then took a unilateral decision by which ... it believed itself bound to limit its spontaneous intervention. The defendant has thus in reality been a judge in its own case. Such a procedure in no sense constitutes an appropriate method of settlement for deciding a dispute' *Manderlier* case (n 4 above).

⁶⁹ Administrative and budgetary report (n 38 above) para 20.

⁷⁰ 'Disputes or claims of a private law character shall be settled in accordance with the following provisions: ... Any claim made by (i) an Egyptian citizen in respect of any damages alleged to result from an act or omission of a member of the Force relating to his official duties ... shall be settled by a Claims Commission established for that purpose. One member of the Commission shall be appointed by the Secretary-General, one member by the Government of Egypt and a chairman jointly by the Secretary-General and the Government of Egypt. If the Secretary-General and the Government of Egypt fail to agree on the appointment of a chairman, the President of the International Court of Justice shall be asked by either to make the appointment' Article 38 of the UNEF SOFA.

⁷¹ Schmalenbach (n 5 above) 41.

⁷² As above.

⁷³ K Wellens *Remedies against international organisations* (2002) 73-78.

procedure agreed upon with UNEF, Egypt decided to espouse a claim against UNEF on behalf of its citizen thereby granting them diplomatic protection.⁷⁴ This intervention was, however, strongly rejected by the UN. In rejecting Egypt's intervention, the UN Legal Advisor held the following:

The Egyptian Government is not an interested party in any claim by a private individual, so that I trust that there is no implication that UNEF and the Egyptian Government represent opposite sides in a dispute. While your Liaison Headquarters may serve as a channel for claims in appropriate instances, and in helping us arrive at disinterested estimates of any case, it would be a serious matter if it were to take a partisan stand in pressing claims against us.⁷⁵

Consequently, UNEF moved forward in its settlement of the claim without Egypt's involvement.⁷⁶ The UN's rejection of Egypt's intervention had an impact on other claims in other early peacekeeping missions. This is instantiated by Cyprus' withdrawal from the UN Peacekeeping Force in Cyprus (UNFICYP) review boards process and the subsequent changes to the local review boards procedure to exclude host State intervention.⁷⁷ In addition to indicating the intent to have local claims review boards operate without any external input, the UNEF's response to Egypt also disproves the UN's explanation that SCCs were never established due to a lack of interest from the host States. Indeed, the Egypt-UNEF situation demonstrates that a host State's interest in the UN dispute resolution process is not welcomed by the UN.

The UN itself is aware that local claims review boards are structured in a manner that renders the UN a judge in its own case. Indeed, the UNSG arguing for the maintenance of SCCs in SOFAs held that;

The local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organisation, rightly or wrongly, may be perceived as acting as a judge in its own case.⁷⁸

⁷⁴ Schmalenbach (n 5 above) 41-42.

⁷⁵ Letter from WW Cox, UN Legal Advisor to Captain Khamis el Shafay, Egyptian Liaison Headquarters Legal Advisor of 24 August 1957. As reported by Schmalenbach (n 5 above) 41.

⁷⁶ Schmalenbach (n 5 above) 42.

⁷⁷ Schmalenbach (n 5 above) 42.

⁷⁸ A/51/903 (n 20 above) para 10.

Moreover, it cannot be said that the lack of review boards' institutional impartiality is a result of the UN's flawed interpretation of what constitutes an 'appropriate' mode of dispute resolution under section 29. The UN in other circumstances has interpreted its obligation to provide appropriate modes of dispute resolution as requiring it to provide an impartial forum of adjudication in which the equality of the parties was guaranteed.⁷⁹ Indeed, under the Convention on the Privileges and Immunities of Specialised Agencies,⁸⁰ UN agencies have the same obligation as the UN to provide access to remedies for third-party claims. Under section 31 of the Specialised Agencies Immunities Convention 'each specialised agency shall make provision for the appropriate modes of settlement of ... disputes of a private law character to which the specialised agency is a party'. An appropriate mode of dispute settlement under section 31, was interpreted by the UN FAO Agency as follows:⁸¹

Procedures safeguarding the fundamental principles on which judicial proceedings are based both under national legal systems and international law. Such principles include: the independence and impartiality of those charged with adjudicating the dispute, the right of defence, the right of both parties to state their cases, and the practicality of the proceedings and the possibility of having recourse to them at reasonable cost.

Thus, the impartiality of those adjudicating the dispute is a central requirement of the section 31 obligation to provide access to remedies. It is illogical that the same obligation to provide access to remedies would be interpreted and applied differently by UN agencies on one hand and the UN (including UN peacekeeping missions) on the other hand. As such, the local claims review boards, based on their lack of impartiality, are not an adequate discharge of the UN's obligation to provide access to remedies under section 29 because they are not an 'appropriate' mode of dispute resolution as mandated by section 29.

⁷⁹ Schmalenbach (n 24 above) 540.

⁸⁰ Convention on the Privileges and Immunities of Specialised Agencies of 1947, hereafter, Specialised Agencies Immunities Convention.

⁸¹ Letter from the Director-General of FAO to the Permanent Representative of Italy, 19 December 1986 *United Nations Juridical Yearbook* (1986) 157.

As discussed above, the UN agencies' obligation to provide access to remedies under section 31 the Specialised Agencies Immunities Convention is a verbatim reiteration of section 29 under the Immunities Convention. UN agencies understand that, in addition to the impartiality of their proceedings, their obligation to provide access to remedies also requires that the mechanisms of dispute resolution mechanisms in their processing of claims respect international standards of judicial proceedings, namely, fairness and justice.⁸² Accordingly, the obligation to provide access to remedies under section 29 of the Immunities Convention also entails the respect of international law and national laws' standards of administration to justice. Moreover, as discussed in the previous chapter, the UN in its administration of justice must respect the said international standards in accordance with the general principles of law binding on the organisation. Local claims review boards are not judicial bodies but rather administrative tribunals. According to international law standards of adequate access to justice, administrative tribunals must be 'accessible, affordable, timely or prompt, effective, legitimate, predictable, compatible with rights, and transparent. They must also be equitable'.⁸³ Moreover, administrative tribunals are required to provide a process equivalent to that of a judicial forum or, at the very least, be reinforced by a judicial forum in the form of a judicial appeal.⁸⁴ This is the function that would have been filled by the SCC had it been established. As it stands, the local claims review boards do not offer a process equivalent to that of a judicial forum and are not reinforced by a form of judicial appeal.

Furthermore, in addition to the lack of impartiality, local claims review boards have also fallen below the international law standards of adequate access to justice. Indeed, local claims review boards were initially created to handle small-

⁸² As above; Shelton (n 2 above) 58.

⁸³ Shelton (n 2 above) 103.

⁸⁴ This is evidenced by the provisions in certain human right treaties requiring such equivalency between administrative and judicial forums such as article 2(3) of the ICCPR and article 13 of the ECHR; UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 9: The domestic application of the Covenant* (1998) E/C.12/1998/24 paras 3 & 9; Francioni (n 2 above) 69; Shelton (n 2 above) 100.

scale day-to-day claims against UN peacekeeping missions.⁸⁵ Owing to the SCCs never being established, local claims review boards in practice receive all third-party claims against the peacekeeping mission in the concerned area.⁸⁶ As a result, review boards are confronted with very large numbers of claims with varying complex legal issues involved and various amounts sought.⁸⁷ In addition, the review boards' adjudication process is structured in an extremely bureaucratic and time-consuming manner.⁸⁸ This is instantiated by the lengthy procedure used to resolve claims that exceed the set financial cap, as discussed above.⁸⁹ This has created a significant backlog in the processing of claims to the extent that some claims are never processed at all.⁹⁰ The unreasonable delays of local claims review boards have rendered the mechanism inefficient, as admitted by the UN.⁹¹ As such, local claims review fall short of the international law requirement of prompt and timely administration of justice.⁹² Local claims review boards also fall short of other fundamental international law standards of administration of justice, namely transparency and accessibility, as the review boards proceedings and records are kept confidential.⁹³ As a result, the rulings of the review boards are unpredictable as they are not predicated on any known precedent. It is surmised that because of the UN's noted avoidance of creating precedents in its handling of third-party claims, the proceedings and rulings are kept confidential.⁹⁴

⁸⁵ D Shrager 'UN peacekeeping operations: Applicability of international humanitarian law and responsibility for operations-related damage' (2000) 94.2 *The American Journal of International Law* 409.

⁸⁶ Procedures for implementation of section 29 (n 3 above) para 17.

⁸⁷ Administrative and budgetary report (n 38 above) para 26.

⁸⁸ Procedures for implementation of section 29 (n 3 above) paras 17-19; Administrative and budgetary report (n 38 above) paras 26-31.

⁸⁹ Procedures for implementation of section 29 (n 4 above) paras 18-19; Administrative and budgetary report (n 38 above) para 24.

⁹⁰ Administrative and budgetary report (n 8 above) paras 26-27.

⁹¹ 'The increasing number and complexity of claims that have arisen from recent major United Nations operations have taxed the ability of the Organisation to deal with claims efficiently and promptly' Administrative and budgetary report (n 8 above) para 26.

⁹² Shelton (n 2 above) 103.

⁹³ 'Board of Inquiry reports shall be confidential, internal documents of the United Nations and, as a rule, shall not be made available to outside entities. The release of a Board of Inquiry report to a Government to be used for its official purposes shall be approved by United Nations Headquarters in New York'. Directives for disciplinary matters (n 142 above) section 22.

⁹⁴ Lundahl (n 1 above) 92.

Moreover, access to local claims review boards is not always guaranteed to third-party claimants. Indeed, although review boards are meant to be established at the start of each peacekeeping mission, this is not always applied by the UN. In practice, the UN only establishes review boards 'when the need arises'.⁹⁵ This means that prior to the establishment of a review board, a claimant would need to approach the peacekeeping mission using general channels of communications to notify the head of the mission.⁹⁶ It is then up to the mission to determine whether the claim brought forward warrants the establishment of a review board.⁹⁷ According to one UN document, a claim warrants the establishment of a review board if it alleges 'acts of serious misconduct or acts that have the potential to damage the image, credibility, or integrity of the United Nations'.⁹⁸ If the claim meets the threshold for the establishment of a review board, the claimant then has to wait for the board to be fully operational in order to have their claim settled. This evidently leads to further delays in the settling of the third-party claims. In fact, UNMIK and KFOR operated for two years without establishing a local claims review board.⁹⁹ Most importantly, for the purpose of understanding the remedy gap, there is no guarantee that the sole standing mechanism of third-party dispute resolution will, in fact, be established.

Local claims review boards are dispute resolution mechanisms that are somewhat efficient in the handling of small-scale, day-to-day third-party claims against UN peacekeeping missions. However, for the reasons outlined above, this mechanism is not an appropriate implementation of the UN's section 29 obligation to provide remedies. Moreover, based on their composition or structure and processing of claims, local claims review boards do not adhere to general international law standards of justice administration. As such, these boards do not represent an

⁹⁵ Administrative and budgetary report (n 38 above) para 25.

⁹⁶ Section 11 of Directives for disciplinary matters involving civilian police officers and military observers DPKO/CPD/DDCPO/2003/001-DPKO/MD/03/00994. Hereafter, Directives for disciplinary matters.

⁹⁷ A review board is only established after a preliminary investigation to that effect is concluded. Directives for disciplinary matters (n 96 above) Sections 11-15.

⁹⁸ 'Acts of serious misconduct or acts that have the potential to damage the image, credibility or integrity of the United Nations shall require the convening of a mission headquarters Board of Inquiry' Directives for disciplinary matters (n 96 above) section 15.

⁹⁹ Ombudsperson Institution in Kosovo, First Annual Report, addressed to Mr. Hans Haekkerup, Special Representative of the Secretary-General of the United Nations 10.

adequate discharge of the UN's obligation to provide remedies under both section 29 and general international law. This, in turn, affects third-party claimants' access to justice leading to the remedy gap.

4.2.2 Ad hoc mechanisms of dispute resolution of third-party claims against UN peacekeeping

Lump sum agreements

A lump sum agreement is an ad hoc mechanism of dispute resolution that has historically only been employed once by the UN.¹⁰⁰ As such, the following assessment will be done through the lens of this sole application of the mechanism by the UN. This is to determine whether lump sum agreements as an alternative dispute resolution mechanism represent an adequate discharge of the UN's obligation to provide access to remedies under section 29. Moreover, this is to assess the potential of this mechanism as an existing tool under international law that could bridge the remedy gap.

In the early 1960s, the ONUC received thousands of claims from European immigrants who had incurred damage to persons and property as a result of ONUC operations.¹⁰¹ The UN, in the resolution of these mass claims, negotiated a settlement with the immigrants' States of nationality espousing their claims.¹⁰² Though the negotiations were multilateral, the ensuing agreements were made bilaterally with each State of nationality. In terms of these settlement agreements, the UN paid lump sums to the claimants' states of nationality who, in turn, distributed the compensations to individual claimants. These settlements were the result of the UN accepting liability for the damage committed by its peacekeepers that did not arise out of operational necessity, as per UN policy on liability.¹⁰³ These lump sum agreements were confirmed by the UN as a discharge

¹⁰⁰ Administrative and budgetary report (n 38 above) para 34-37.

¹⁰¹ Administrative and budgetary report (n 38 above) para 36.

¹⁰² This agreement was made between the UN and the states of Belgium, Luxembourg, Switzerland, Greece, and Italy. 'In espousing the claims of their nationals, the Governments of Belgium, Greece, Italy, Luxembourg and Switzerland agreed on a lump-sum amount in final settlement of all claims against the United Nations for damage to persons or property arising from the United Nations Operation in the Congo' Administrative and budgetary report (n 38 above) para 36.

¹⁰³ 'It is pointed out that, under these principles, the United Nations does not assume liability for damage to persons or property which resulted solely from military operations or which, although caused by third parties, has given rise to claims against the United Nations; such cases are

of its obligation to provide access to remedies under section 29, in the following terms:¹⁰⁴

[T]he Secretariat received a number of claims from Belgian citizens as well as from individuals of various other nationalities alleging that they had suffered injury or damage to property by acts of United Nations personnel which gave rise to liability on the part of the Organisation. It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organisation was legally liable. This policy is in keeping with generally recognised legal principles and with the Convention on Privileges and Immunities of the United Nations.

In the *Manderlier case*,¹⁰⁵ following the complaint of an individual recipient of the lump sum agreement, a Belgian Court held that the settlement of a mass claim against ONUC through a lump sum agreement was not an 'appropriate' method of dispute settlement as required by section 29.¹⁰⁶ According to the Court, the UN,

had the claims addressed to it, and in particular those of the plaintiff, examined by its own authorities without argument of any kind. It then took a unilateral decision by which ... it believed itself bound to limit its spontaneous intervention. The defendant has thus in reality been a judge in its own case.¹⁰⁷

The *Manderlier* standard of what constitutes an 'appropriate' mode of under section 29 is accepted as a restriction on the vast discretion accorded to the UN by the provision.¹⁰⁸ As such, a mechanism that results in the UN being a judge in its own case cannot be considered as appropriate under section 29. This is instantiated by the above analysis of local claims review boards. However, the

therefore excluded from the proposed compensation' 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, 1 *United Nations Juridical Yearbook* (1965) 39.

¹⁰⁴ Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics (Document S/6597) *United Nations Juridical Yearbook* (1965) 41.

¹⁰⁵ *Manderlier v Organisation des Nations Unies and Etat Belge (Ministre des Affaires Etrangères) Tribunal Civil de Bruxelles* (11 May 1966) No 4553, as translated and reported by P Schmitt on www.ebrary.net (accessed 19/02/2020). Hereafter, *Second-hand report of the Manderlier case*.

¹⁰⁶ As above.

¹⁰⁷ As above.

¹⁰⁸ Schmalenbach (n 24 above) 540.

characterisation of lump sum agreements as a mechanism wherein the UN ends up as a judge in its own case is not correct for two reasons. First, section 29 does not require a specific mode of dispute resolution and it does not require the UN to enter into direct negotiation with claimants.¹⁰⁹ Therefore, the fact that the claimants were not involved in lump sum negotiations does not make the mechanism as a mode of dispute resolution inappropriate under section 29. This was also acknowledged by the Belgian Court when it held that:

[I]t is for the United Nations, and for it alone, to set up the courts which would produce an appropriate method of settlement for the disputes which it may have with third parties.¹¹⁰

Second, the Court overlooked the fact that the lump sum settlement offered to the claimants as a mode of dispute resolution was the result of a negotiation between the UN and the claimants' states of nationality exercising diplomatic protection.¹¹¹ As such, though this lump sum agreement as a mode of dispute resolution did not involve the claimants, it was not entirely internal to the UN as the UN had to negotiate with States. In fact, the UN initially rejected the claims and only agreed to compensate the claimants after strong intercession from the claimants' states of nationality.¹¹² Owing to this negotiation, it cannot be said that the UN in this particular instance was a judge in its own case. As such, it is submitted that a lump sum agreement as a dispute resolution mechanism represents an adequate discharge of the UN's treaty obligation to provide access to remedies.

Some aspects of this lump sum agreement as a mechanism of dispute resolution fall short of the international law standards of administration of justice or access to justice. Indeed, the lump sum agreement does not offer claimants a process equivalent to a judicial process. Moreover, third-party claimants were not included

¹⁰⁹ Schmalenbach (n 24 above) 541.

¹¹⁰ *Second-hand report of the Manderlier case* (n 105 above).

¹¹¹ Schmalenbach (n 24 above) 540; Administrative and budgetary report (n 38 above) paras 34,36.

¹¹² 'The UN disputed the facts but after intercessions by the Belgian Government it declared itself prepared to 'accept financial liability where the damage is the result of action taken by agents of the United Nations in violation of the laws of war and the rules of international law' *Second-hand report of the Manderlier case* (n 105 above).

in the process beyond their initial submissions to the UN.¹¹³ However, as was held in the *Waite & Kennedy case*, access to court can be restricted or limited so long as it is not to such an extent that it would impair the essence of the right.¹¹⁴ The ONUC lump sum settlement is considered as having been generally successful in holding the UN liable while securing the rights of third-party claimants.¹¹⁵ Indeed, in the lump sum agreement with Belgium alone, of the 581 Belgians that received compensation, only one claimant, Manderlier, sought to have the settlement reviewed by a court.¹¹⁶ Manderlier did not take issue with the lump sum agreement mechanism itself but rather with the fact that he deemed the compensation he received too low.¹¹⁷ Therefore, even though the lump sum agreement limited the claimants' right of access to court to a certain extent, these limitations did not impair the essence of the right as the claimants were granted access to justice.

Though employed only once by the UN as an alternative mode of third-party dispute resolution, lump sum agreements present considerable advantages to the UN, especially with regard to the settlement of mass third-party claims. Indeed, through this mechanism, the UN is able to settle multiple claims at once without having to negotiate with each claimant.¹¹⁸ In addition, lump sum settlements allow the UN to limit its liability both in the financial and temporal sense.¹¹⁹ The UN's financial liability is limited as the amount agreed upon through the UN's negotiation with the relevant State is considered as the full and final settlement of all claims.¹²⁰ Furthermore, this mechanism allows the UN to bypass the lengthy

¹¹³ '[T]he claims submitted were investigated by the competent services of ONUC and at United Nations Headquarters in order to collect all of the data relevant to determining the responsibility of the Organisation. ... On this basis, all individual claims submitted by Belgian nationals, as well as those submitted by nationals of other countries, were carefully scrutinised and a list of cases was established by the Secretariat with regard to which it was concluded that compensation should be paid' Letter from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics (n 104 above)

¹¹⁴ *Waite & Kennedy v Germany* (18 February 1999) ECHR 26083/94 para 43.

¹¹⁵ Administrative and budgetary report (n 38 above) para 36; Dannenbaum (n 33 above) 128.

¹¹⁶ Letter from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics (n 104 above); *Second-hand report of the Manderlier case* (n 105 above).

¹¹⁷ *Second-hand report of the Manderlier case* (n 105 above).

¹¹⁸ Administrative and budgetary report (n 38 above) para 35.

¹¹⁹ As above.

¹²⁰ As above.

and costly procedure of negotiating settlements with individual claimants and distributing the compensation awards. Indeed, the State negotiating on behalf of its nationals becomes the one in charge of distributing the settlements to the various claimants.¹²¹ As such, the UN is spared the onerous process of determining property ownership of a multitude of claimants.¹²² Moreover, if concluded with a peacekeeping mission host State, the lump sum agreement mechanism allows the UN to deduct any amount owed by the State to the UN peacekeeping missions from the lump sum.¹²³ Lump sum agreements also limit the UN's liability in a temporal sense as it removes the issue of claims continuing to be submitted against the UN after the mission has concluded.¹²⁴ Accordingly, such claims could not be submitted against the UN peacekeeping mission after the end of lump sum negotiations with the relevant State. This aspect was especially relevant in the period before the adoption of the resolution on the temporal limitations to the UN's liability.¹²⁵

However, there are some downsides to lump sum agreements as a mode of third-party dispute resolution. Indeed, lump sum agreements are wholly reliant on the willingness and capacity of the State to enter into these agreements.¹²⁶ There are instances of host States without a functioning government which makes negotiations impossible.¹²⁷ There can also be instances of host States with governments that are unwilling or unable to espouse claims on behalf of their nationals.¹²⁸ There is also the added concern that a cash-strapped host State

¹²¹ Administrative and budgetary report (n 38 above) paras 34-35.

¹²² Administrative and budgetary report (n 38 above) para 35.

¹²³ Administrative and budgetary report (n 38 above) paras 12& 35; Contribution Agreement between the United Nations and Participating State Contributing Resources to the United Nations Peacekeeping Operations 9 July 1996) UN Doc A/50/995.

¹²⁴ Administrative and budgetary report (n 38 above) para 35.

¹²⁵ Resolution on temporal and financial limitations (n 23 above) para 8.

¹²⁶ Administrative and budgetary report (n 38 above) para 37.

¹²⁷ Somalia, for example, hosted various UN peacekeeping missions without a functioning government. It was considered as having 'failed' to protect the interests of its nationals precisely due to the lack of a government. M Gibney, K Tomaševski & J Vedsted-Hansen 'Transnational state responsibility for violations of human rights' (1999) 12 *Harvard Human Rights Journal* 280.

¹²⁸ Haiti's government has been deemed as both unwilling and unable to espouse claims on behalf of Haitian due to the asymmetrical relationship between Haiti and MINUSTAH. R Pavoni 'Choleric notes on the Haiti Cholera Case' (2015) 19 *Questions of International Law* 40-41; Administrative and budgetary report (n 38 above) para 37.

might not distribute the money to its nationals.¹²⁹ Furthermore, the UN makes it a point that an added advantage of the lump sum agreement is the fact that the UN can deduct from the compensation, the money owed to it by the host State.¹³⁰ Indeed, at the start of a peacekeeping mission, the host State, through its SOFA with the UN, has the duty to provide the UN with premises and utilities for UN offices.¹³¹ Often, the host State is unable or unwilling to provide these resources to the UN missions. The UN is then placed in a position of having to negotiate rent with private entities or merely seizing property and reimbursing the owner(s).¹³² The UN considers itself owed the amount spent in compensation or in renting the property that should have been given to them by the host State free of charge.¹³³ Consequently, the UN would want to deduct that amount from any agreed upon lump sum. This would result in a situation wherein the UN only pays a fraction of the agreed upon lump sum, leaving it to the State to make up for the shortfalls. It is safe to assume that a State that was unable or unwilling to secure suitable premises and utilities for the UN will also be unable or unwilling to assume that shortfall. This could result in the third-party claimants not receiving their due compensation.

Despite these potential challenges, the lump sum agreement could bridge the remedy gap to a large extent. Indeed, mass claims like the *Haiti Cholera Dispute* and the *Srebrenica* case could find an avenue of redress. This mode is not limited to mass claims either; it can be used to settle all remaining claims against the UN at the winding down of peacekeeping operations. The UN has expressed the challenges inherent in settling those claims that come in at the end of the peacekeeping operation.¹³⁴ A lump sum agreement for remaining claims at the

¹²⁹ Dannenbaum (n 33 above) 128.

¹³⁰ Administrative and budgetary report (n 38 above) para 35 & note 8.

¹³¹ Para 16 of UN Model SOFA.

¹³² Administrative and budgetary report (n 38 above) paras 9-12.

¹³³ As above.

¹³⁴ In an audit on the liquidation of peacekeeping missions, the office of the Internal Oversight Services noted the following: 'The efficient handling of claims against the Organisation by a local claims review board affects the timely completion of a liquidation. OIOS found that some missions did not promptly process claims during the operating stage of the mission, resulting in an additional burden during liquidation when other tasks should have been given priority'. 'Report of the Secretary-General on the activities of the Office of Internal Oversight Services: Audit of the liquidation of peacekeeping missions' (23 September 1993) UN Doc A/54/394 para 63.

end of each mission would solve that issue. Moreover, the UN would be considered as adequately discharging its section 29 obligation to provide access to remedies. The same cannot be said of the local claims review boards as the sole standing mechanism of third-party claims resolution.

UN Haiti Cholera Response Multi-Partner Trust Fund

The UN Haiti Cholera Response Multi-Partner Trust Fund is a UN initiative aimed at addressing the impact of the cholera outbreak in Haiti. In 2016, in response to the *Haiti Cholera Dispute*, then UN Secretary-General Ban Ki Moon apologised to the Haitian people and expressed that the UN had a 'moral responsibility' for the cholera outbreak.¹³⁵ Accordingly, to mitigate the effects of cholera on the Haitian people, the UN launched the UN Haiti Cholera Response Multi-Partner Trust Fund.¹³⁶ The objectives of this Trust were double-pronged. The first was to reduce or cut incidences of cholera through a variety of development programmes and the second was to provide material support to the affected communities, individuals, and their families.¹³⁷ Within the second objective of the Trust Fund, it was stated that there would be a provision for 'a meaningful fixed amount per cholera death'.¹³⁸ The UN was very careful in the phrasing of this element of the Trust Fund and did not term it as compensation resulting from its legal responsibility. However, the UN Haiti Trust Fund is, in effect, a UN remediation policy and the sole plan in place that results in the cholera victims receiving some kind of compensation. As such, the present section of this thesis examines if this ad hoc mechanism represents to any extent the UN's discharge of its obligation to provide access to remedies under section 29 and/or general international law.

The UN Haiti Trust Fund, though not an acknowledgement of the UN's legal responsibility, is a direct response to the central facts of the *Haiti Cholera*

¹³⁵ 'UN's Ban apologises to people of Haiti, outlines new plan to fight cholera epidemic and help communities' (1 December 2016) *UN News Global Perspective Human Stories* <https://news.un.org/en/story/2016/12/546732-uns-ban-apologizes-people-haiti-outlines-new-plan-fight-cholera-epidemic-and> (accessed 29/07/2021).

¹³⁶ *Terms of Reference for UN Secretary-General's Haiti Cholera Response Multi-Partner Trust Fund* (6 April 2021) <http://mptf.undp.org/factsheet/fund/CLH00> (accessed 07/08/2021) para 5. Hereafter, UN Haiti Trust Fund TOR.

¹³⁷ As above.

¹³⁸ Fn 135 above; *A new approach to Cholera in Haiti: Report by the Secretary-General* (22 November 2016) UN Doc A/71/620 para 54.

Dispute.¹³⁹ According to the UN's characterisation of claims receivable under section 29, the claim from the *Haiti Cholera Dispute* 'would necessarily include a review of political and policy matters'.¹⁴⁰ This claim was thus dismissed by the UN as 'not receivable pursuant to section 29' of the Immunities Convention.¹⁴¹ As such, the Haiti Trust Fund cannot be inferred as a section 29 mechanism as it is not a claim of a private law character.

Though not recognised by the UN, it was determined in the previous chapter that under general international law, the UN has an obligation to provide access to remedies to claims of a public law nature and hybrid claims. However, the Trust Fund cannot be considered as access to remedies under general international law, either. Indeed, in terms of the structure of the UN Haiti Trust Fund, the material assistance package to communities and individuals affected by the cholera outbreak is contingent on receiving sufficient funds from donors.¹⁴² This is incompatible with the international law principle of reparations as a binding legal consequence to an internationally wrongful act committed by a subject of international law.¹⁴³ Moreover, though the UN Haiti Trust Fund is part of the UN's policy of remediation of the effects of cholera on victims,¹⁴⁴ based on its voluntary donation basis, it cannot be considered a mode of dispute resolution by any stretch. Indeed, in addition to not acknowledging the dispute or claimants in any sense, this Trust Fund, as mentioned above, is based on a moral obligation not a legal one.¹⁴⁵

¹³⁹ UN Haiti Trust Fund TOR (n 136 above) para 1; UN Doc A/71/620 (n 138 above) para 4.

¹⁴⁰ Letter from the United Nations under Secretary-General for Legal Affairs, Patricia O'Brien to the Director of the Institute for Justice and Democracy in Haiti, Brian Concannon (15 July 2013). <http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf> (accessed 7 August 2021).

¹⁴¹ As above.

¹⁴² UN Haiti Trust Fund TOR (n 136 above) para 9; Ferstman (n 5 above) 109.

¹⁴³ Articles 28 and 31 of ARS and DARIO; [T]he Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make adequate reparation'. *Chorzow Factory (Germany v Poland)* PCIJ (13 September 1928) PCIJ Series A No 17 para 73; Ferstman (n 5 above) 109.

¹⁴⁴ UN Doc A/71/620 (n 138 above) paras 36-59.

¹⁴⁵ UN Doc A/71/620 (n 138 above) para 7.

4.3 Third-party dispute resolution mechanisms in UN-administered territories

The UN, as part of its peacekeeping operations, has administered various territories over the years.¹⁴⁶ The UN has been and is currently administering three territories: the UN Buffer Zone in Cyprus (UNBZC) since 1974,¹⁴⁷ the UN Disengagement Observer Force Zone in the Golan Heights (UNDOF Zone) since 1974,¹⁴⁸ and recently, to a limited extent, the UNMIK since 1999.¹⁴⁹ In terms of past territorial administrations, the UN instituted the following territorial administrations missions: the UN Temporary Executive Authority in Western New Guinea (UNTEA),¹⁵⁰ the UN Transitional Authority in Cambodia (UNTAC),¹⁵¹ the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES),¹⁵² and the UNTAET.¹⁵³ The UN's administration of territories differs from mission to mission depending on the UN peacekeeping mission's mandate. It can range from administering a sizeable territory with a significant population in a quasi-governmental position (UNMIK, UNTAET) to administering a small buffer zone between two or more hostile States (UNDOF, UNBZC).¹⁵⁴ In its administration of some of these territories, the UN acts as the de facto government with all the incumbent powers and obligations.¹⁵⁵ Consequently, unlike other forms of UN peacekeeping, there is no host State government that is distinct from the UN with which to enter into dispute resolution agreements. In addition, as discussed in the previous chapters, the UN retains its absolute immunity even in those instances where it acts as the governing authority of a certain territory. This results in a situation wherein a 'government' is legally

¹⁴⁶ E de Wet 'The direct administration of territories by the United Nations and its Member States in the post-Cold War era: Legal bases and implications for national law' (2004) 8 *Max Planck United Nations Yearbook* 296-204.

¹⁴⁷ UN Security Council Resolution 353 (1974).

¹⁴⁸ UN Security Council Resolution 350 (1974).

¹⁴⁹ UN Security Council Resolution 1244 (1999).

¹⁵⁰ Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (1962) 274 UNTS 6311; UN DOC GA/Res/1752.

¹⁵¹ UN Security Council Resolution 745 (1992).

¹⁵² UN Security Council Resolution 1037 (1996).

¹⁵³ UN Security Council Resolution 1272 (1999).

¹⁵⁴ J Friedrich 'UNMIK in Kosovo: Struggling with uncertainty' (2005) 9 *Max Planck United Nations Yearbook* 238.

¹⁵⁵ Schmalenbach (n 5 above) 45; Ferstman (n 5 above) 109.

immune to its own actions within its territory. As such, it is very important to assess the alternative dispute resolution mechanisms put in place by the UN as the governing authority of a territory.

Ideally, the UN as the state-like governing authority would put in place a judicial mechanism resembling a domestic court system.¹⁵⁶ This was the approach taken initially by the UN in its administration of Western New Guinea. For the seven-month duration of its administration of the territory, the UN mirrored its predecessor, the League of Nations,¹⁵⁷ and allowed claimants to sue the UN before local courts.¹⁵⁸ In terms of this setup, local courts were given jurisdiction over civil and criminal matters involving the UN and its officials.¹⁵⁹ However, this situation remained unique and was never repeated by the UN in its subsequent territorial administrations. Instead, the UN relied on local claims review boards to settle third-party claims made against it.¹⁶⁰ As such, the challenges posed by these review boards in other peacekeeping operations are also present in the UN territorial administrations. For instance, the UNTAC review board was notoriously backlogged and took a very long time to process claims.¹⁶¹ Moreover, UNMIK only established a review board two years after the start of its operations.¹⁶²

In addition to the general challenges posed by review boards, there is also the added element of the UN being the administrative authority and the organ in charge of settling claims made against itself. Indeed, the use of review boards in instances where the UN is the administrative authority results in a situation whereby a 'government' does not have a court system and instead relies on an administrative board internal to the government. This internal board operates

¹⁵⁶ Schmalenbach (n 5 above) 45.

¹⁵⁷ After the First World War, the Saar region in Germany was placed under the international administration of the League of Nations until 1935. Public and private liability claims against the League were under the jurisdiction of local courts. Schmalenbach (n 5 above) 47.

¹⁵⁸ Schmalenbach (n 5 above) 47.

¹⁵⁹ As above.

¹⁶⁰ Schmalenbach (n 5 above) 45-46.

¹⁶¹ Mégret (n 40 above) 262.

¹⁶² Ombudsperson Institution in Kosovo, First Annual Report, addressed to Mr Hans Haekkerup, Special Representative of the Secretary-General of the United Nations (n 99 above) 10; Mégret (n 40 above) 262.

without granting 'the plaintiff' an opportunity to make any submissions or have any impact on the process.

In addition to local claims review boards, UNMIK and UNTAET were endowed with an ombudsperson institution with the authority to investigate claims of human rights abuses by the UN administering authorities.¹⁶³ The UNTAET's Ombudsperson Institution was, however, never fully operational. Indeed, though an ombudsperson was appointed for UNTAET, they had no specific mandate nor established offices and, as such, remained inoperative until the end of UNTAET's mission in East Timor.¹⁶⁴ The UNMIK mission's Ombudsperson Institution, established in 2000, was empowered to investigate claims of human rights violations emanating from UNMIK's abuse of authority.¹⁶⁵ However, the powers of the Ombudsperson were severely limited. Indeed, the Ombudsperson was the only one empowered to hear complaints related to incidents that arose after its establishment in 2000, despite the fact that UNMIK had been operating since 1999.¹⁶⁶ In addition, the Ombudsperson was only empowered to receive complaints involving UNMIK's civilian administration to the exclusion of its military force, KFOR.¹⁶⁷ Moreover, the Ombudsperson could not issue any compensatory orders to claimants as the Ombudsperson was only empowered to issue recommendations to UNMIK.¹⁶⁸ Practice demonstrates that the Ombudsperson's recommendations were often not implemented by UNMIK.¹⁶⁹

In response to calls for the establishment of a human rights court,¹⁷⁰ UNMIK established the Human Rights Advisory Panel which, similar to the

¹⁶³ On the establishment of the Ombudsperson institution in Kosovo of 30 June 2000 UNMIK Regulation 2000/38.

¹⁶⁴ M Benzing 'Midwifing a new State: The United Nations in East Timor' (2005) 9 *Max Planck United Nations Yearbook* 338-339; F Rawski 'To waive or not to waive: Immunity and accountability in peacekeeping operations' (2002) 18 *Connecticut Journal of International Law* 116 fn 67.

¹⁶⁵ Section 3 of UNMIK Regulation 2000/38.

¹⁶⁶ As above.

¹⁶⁷ As above; On the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo of 18 August 2000 UNMIK Regulation 2000/47 section 2.

¹⁶⁸ Section 4 of UNMIK Regulation 2000/38.

¹⁶⁹ 'ICCPR Concluding observations of the human rights committee: Kosovo (Serbia)' (14 August 2006) UN Doc CCPR/C/UNK/CO/1 paras 3, 10; Ferstman (n above) 110; R Everly 'Reviewing governmental acts of the United Nations in Kosovo' 8.1 (2007) *German Law Journal* 32.

¹⁷⁰ The Council of Europe called for the establishment of a human rights court based on the European Court's processes and case law capable of offering redress and compensation. *European*

Ombudsperson, was empowered to hear claims of human rights violations by UNMIK.¹⁷¹ Much like the Ombudsperson Institution, the Advisory Panel had a temporal limitation on its jurisdiction; it was only empowered to hear claims based on events that occurred after its establishment in 2005.¹⁷² Moreover, the Panel was similarly not empowered to investigate any complaint involving KFOR or its members.¹⁷³

The Ombudsperson Institution and the Human Rights Advisory Panel, though they received complaints of human rights violations, cannot be considered as the UN's discharge of its obligation to provide access to remedies to third-party claimants under either section 29 or general international law. Indeed, the Ombudsperson Institution and the Advisory Panel do not have the authority to grant remedies to claimants; they may only issue recommendations to UNMIK.¹⁷⁴ These recommendations are not binding on UNMIK as they are only advisory in nature.¹⁷⁵ Moreover, these institutions are expressly not intended to be dispute resolution mechanisms for third-party claims. Indeed, third-party claims are intended to be settled by an SCC.¹⁷⁶ Considering that the claims commission has never been established, these claims are instead processed by the local claims review board.¹⁷⁷ Third-party claims do not fall within the scope of the Ombudsperson's functions. The same applies to the Human Rights Advisory Panel as UNMIK held that

Commission for Democracy through Law (Venice Commission): Opinion on human rights in Kosovo, Establishment of possible mechanisms (11 October 2004) Opinion No 280/ 2004 CDL-AD (2004)033 paras 104,106.

¹⁷¹ On the establishment of the Human Rights Advisory Panel of 23 March 2006 UNMIK Regulation 2006/12.

¹⁷² Section 2 of UNMIK Regulation 2006/12.

¹⁷³ Section 1(2) of UNMIK Regulation 2006/12; Section 2 of UNMIK Regulation 2000/47.

¹⁷⁴ Section 1(3) of UNMIK Regulation 2006/12; Section 4 of UNMIK Regulation 2000/38.

¹⁷⁵ As above.

¹⁷⁶ 'Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from "operational necessity" of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for' Section 7 of UNMIK Regulation 2000/47.

¹⁷⁷ Ferstman (n 5 above) 111.

any complaint that is or may become in the future the subject of UN Third-Party Claims process ... shall be inadmissible for reasons that UN Third-Party Claims process ... are available avenues.¹⁷⁸

Thus, even though these mechanisms are empowered to hear human rights complaints, they are not dispute resolution mechanisms for third-party claims. They are merely advisory bodies that receive individual complaints and submit their findings and non-binding recommendations to UNMIK.

In essence, in UN-administered territories, third-party claimants are in the same situation as third-party claimants in other forms of UN peacekeeping operations. On one hand, this means that third-party claimants in UN-administered territories experience the same challenges in getting access to remedies as claimants in territories with governments hosting UN peacekeeping missions. On the other hand, the implication is that the UN in its administration of territories, discharges its obligation to provide access to remedies to third-party claimants in the same manner as its other forms of peacekeeping operations despite the fact that it operates as the governing authority of these territories.

4.4 UN policies on limitation and exemption of third-party liability

UN peacekeeping missions (and the UN in general) operate on a system of limited liability.¹⁷⁹ In terms of this system, the UN limits its liability by setting out financial and temporal limitations and by exempting itself from liability altogether under certain circumstances.¹⁸⁰ As a result, some third-party claimants' access to remedies is either limited to a certain extent or excluded altogether due to these policies. Under section 29, the UN has an obligation to provide access to remedies to third-party claims of a private law character. As such, the following section examines whether these exemptions of liability are compatible with section 29, considering these policies deny access to remedies to certain third-party claims

¹⁷⁸ On implementing UNMIK Regulation 2006/12 on the establishment of the Human Rights Advisory Panel (17 October 2009) UNMIK/DIR/2009/1 section 2(2).

¹⁷⁹ Mégret (n 40 above) 256.

¹⁸⁰ Administrative and budgetary report (n **Error! Bookmark not defined.** above) paras 38-44. 'Third party liability: temporal and financial limitations' (17 July 1998) UNGA A/RES/52/247, hereafter, Resolution on temporal and financial limitations. Procedures in place for implementation of section 29 (n **Error! Bookmark not defined.** above) paras 23,24.

of a private law character. In addition, as discussed above, under general international law, the right of access to remedies can be subject to limitations. However, these limitations may not be so restrictive as to impair the very essence of the right. Therefore, this section will also determine whether these limitations of liability do, in fact, impair the essence of the right of access to remedies. In essence, this section of the study assesses whether these policies of limitation and exemption of liability are compatible with the UN's obligation to provide access to remedies to third-party claimants as derived from section 29 of the Immunities Convention and from general international law.

The UN is exempt from liability altogether if the claim made against the peacekeeping mission arose from the following circumstances: acts arising out of operational necessity,¹⁸¹ unauthorised acts by UN troops,¹⁸² and those acts committed by off-duty peacekeeping members.¹⁸³ In addition to these exemptions of liability, the UN limits its liability in the financial sense by capping the amounts payable in compensation.¹⁸⁴ The UN also limits its liability in the temporal sense by imposing a prescription time of six months on claims receivable.¹⁸⁵ Exemptions of liability impact claimants' right to remedy in the procedural sense as it curtails access whereas limitations of liability impact the right to remedy in the substantive sense as it limits the compensation payable.¹⁸⁶ As such, it should be determined whether these limitations to the right to remedy are permissible under general international law and whether they are in line with the UN's treaty obligation to provide access to remedies.

¹⁸¹ Administrative and budgetary report (n **Error! Bookmark not defined.** above) para 15.

¹⁸² Mégret (n 9 above) 257.

¹⁸³ As above.

¹⁸⁴ 'The amount of compensation payable for injury, illness or death of any individual ... shall not exceed a maximum of 50,000 United States dollars, provided, however, that within such limitation the actual amount is to be determined by reference to local compensation standards'. Resolution on temporal and financial limitations (n 180 above) para 9(d).

¹⁸⁵ 'The Organisation will not pay compensation in regard to such claims submitted after six months from the time the damage, injury or loss was sustained, or from the time it was discovered by the claimant, and in any event after one year from the termination of the mandate of the peacekeeping operation, provided that in exceptional circumstances, ... the Secretary-General may accept for consideration a claim made at a later date' Resolution on financial and temporal limitation (n **Error! Bookmark not defined.** above) para 8.

¹⁸⁶ Shelton (n 2 above) 16.

Nothing in the wording of section 29 expressly precludes the UN from adopting policies of limitation and exemption of liability. Indeed, section 29 merely directs the UN to 'make provisions' for the settlement of third-party claims. As discussed, this wording grants vast discretion to the UN to implement section 29 as it sees fit. Accordingly, the UN interprets section 29 as imposing a 'qualified duty' on the Organisation.¹⁸⁷ This means that the UN may impose some conditions and restrictions to its duty to provide access to remedies as part of this vast discretion to 'make provision' for the settlement of third-party claims.¹⁸⁸ However, under general international law these conditions and restrictions of liability cannot be so limiting as to impair the essence of the third-party claimants' right of access to remedies. As such, even though these restrictions of liability are compatible with the UN's obligation under section 29 as they are not expressly prohibited by the provision, they cannot fall so far below international standards of justice administration that they impede third-party claimants' access to justice. In that regard, based on accepted practice in international law, these exemptions and limitations of liability by the UN are compatible with the international standards of administration of justice. Indeed, placing financial and temporal limitations on claims is standard practice in international law. It is accepted practice in international law that the financial liability of an entity responsible for harm may be limited.¹⁸⁹ The practice of capping financial liability is based on the need to protect these entities from the 'paralysing' effects of unlimited liability.¹⁹⁰ The objective of this practice is thus to avoid placing unlimited liability on the entity responsible.¹⁹¹ In fact, as explicitly referred to by the UN,¹⁹² several international conventions include a provision limiting financial liability by placing a cap on the

¹⁸⁷ Schmalenbach (n 24 above) 537.

¹⁸⁸ International liability for injurious consequences arising out of acts not forbidden by international law (international liability in case of loss for transboundary harm arising out of hazardous activities): Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) prepared by the Secretariat (24 June 2004) UN doc A/CN.4/543 paras 605-623. Hereafter, International liability survey.

¹⁸⁹ As above.

¹⁹⁰ 'The provisions on limitation of compensation have been carefully designed ... to protect industries from an unlimited liability that would paralyse them financially and discourage their future development' International liability survey (n 189 above) para 605.

¹⁹¹ International liability survey (n 189 above) para 605.

¹⁹² Administrative and budgetary report (n **Error! Bookmark not defined.** above) para 39.

compensation payable.¹⁹³ The UN is thus justified in its placing of a cap on the compensations payable to third-party claimants.¹⁹⁴ Likewise, the UN is justified in placing temporal limitations on claims against UN peacekeeping missions. Indeed, a temporal limitation is essentially an exoneration of liability as a result of prescription.¹⁹⁵ Prescription is an established practice in international law and in national laws. It is settled practice to place statutes of limitations on liability for certain damages and/or offences in any given legal regime.¹⁹⁶ In international law, this practice takes the form of a prescription provision incorporated in third-party liability conventions.¹⁹⁷ These prescription provisions are similar to the UN policy on temporal limitations as they also provide for the expiration of a claim after a certain period from the date of the incident or from the time it was discovered by the claimant.¹⁹⁸

The UN's policies of exemptions from liability, just like its policies limiting its liability, are in line with the generally accepted practice in international law. Indeed, the UN's concept of policy of exemption from liability for acts arising out of operational necessity is akin to the concept of military necessity, an accepted notion in international humanitarian law. The UN describes operational necessity as 'necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates'.¹⁹⁹ The UN's description of operational necessity and the circumstances that need to be taken into account by the peacekeeping force commander when incurring damage to property confirm the notion that operational necessity is the peacekeeping equivalent of military

¹⁹³ Article 11 of Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952; Article 7 of the Convention on Third Party Liability in the Field of Nuclear Energy of 1960; Article 6 of the United Nations Convention on the Carriage of Goods by Sea of 1978; Article 22 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929; Article 5 of International Convention on Civil Liability for Oil Pollution Damage of 1965, etc.

¹⁹⁴ 'Although the ceiling of compensation and the modalities of establishing the financial limitation of the Organisation must be further studied, the principle of limitation on financial liability has been recognised in international practice' Administrative and budgetary report (n **Error! Bookmark not defined.** above) para 39.

¹⁹⁵ International liability survey (n 189 above) para 668.

¹⁹⁶ International liability survey (n 189 above) paras 668-683.

¹⁹⁷ As above.

¹⁹⁸ As above.

¹⁹⁹ Administrative and budgetary report (n **Error! Bookmark not defined.** above) para 13.

necessity.²⁰⁰ In international humanitarian law, the concept of operational necessity is in essence a concept akin to military necessity in that it legitimises actions that would otherwise be unlawful in non-combat situations.²⁰¹ Military necessity exempts the responsible party from liability.²⁰² Likewise, excluding liability for the private acts of off-duty peacekeepers is standard practice in the general principles of the law of liability.²⁰³ As it pertains to the UN's policy of excluding liability for unauthorised acts, generally, the unauthorised acts of an agent or organ of an international organisation are attributable to the organisation.²⁰⁴ As such, the UN took care to only be technically exempt from liability. Indeed, the UN is exempt from liability as it forwards liability to the troop contributing States for damage resulting from gross negligence and wilful misconduct of the Member State's troops.²⁰⁵ In practice, the UN provides compensation to claimants then seeks recovery from the Member State.²⁰⁶ Though it does so as a claims intermediary and not as the entity liable, the UN does provide access to remedies for third-party claims arising from the unauthorised acts of UN peacekeepers.²⁰⁷ As such, this technical exemption from liability cannot be said to impair the claimants' right of access to remedies. Thus, the UN's policies of exemption of liability are on a par with general international law principles on the liability of subjects of international law. Accordingly, it cannot be said that these policies of exemption from liability extinguish third-party claimants' right of access to remedies. Moreover, considering the fact that the UN was never liable under those circumstances in the first place, it cannot be said to have an obligation to provide access to remedies to those claims.

²⁰⁰ Administrative and budgetary report (n **Error! Bookmark not defined.** above) para 14.

²⁰¹ Shraga (n **Error! Bookmark not defined.** above) 410; K Lundahl 'The United Nations and the remedy gap: Haiti Cholera Dispute' (2013) 88.3/4 *Die Friedens-Warte: Journal of International Peace and Organization* 84.

²⁰² As above.

²⁰³ Draft articles on the responsibility of international organisations, with commentaries (2011) UN Doc A/66/10 61. Hereafter, DARIO with commentaries.

²⁰⁴ Article 8 of DARIO.

²⁰⁵ Article 9 of the Contribution Agreement between the United Nations and Participating State Contributing Resources to the United Nations Peacekeeping Operations (n **Error! Bookmark not defined.** above).

²⁰⁶ As above.

²⁰⁷ As above.

4.5 Conclusions

It has been claimed by several commentators that the remedy gap in third-party claims against UN peacekeeping missions is double-pronged. On one hand, there is the UN's near-absolute immunity from courts which places an insurmountable procedural bar on the claimants' access to court. On the other hand, the UN's alternative dispute resolution mechanisms are inefficient and are underpinned by the UN's own policies and interpretation of section 29, which leads to the exclusion of a large category of claims. Within the second prong of the remedy gap, the present chapter has established a crucial element that is the main contributor to the remedy gap. Indeed, this study determined that though they are contributing factors, it is not the inefficiency of the UN's alternative remedies or the UN's interpretation of section 29 that leads to the remedy gap. In fact, the main reason for the remedy gap is the fact that the UN has no dispute resolution mechanism in place as part of the discharge of its obligation to provide access to remedies as derived from section 29 and general international law.

The UN has never expressly acknowledged its wider obligation to provide access to remedies under general international law and, as such, has never established any dispute resolution mechanism in discharge of the said obligation. The UN is unequivocally under a treaty obligation to provide access to remedies derived from section 29 of the Immunities Convention. The vague wording of section 29 and the UN's subsequent uncontested interpretation of the provision have led to a large category of claims being excluded from the ambit of section 29. However, even those claims that fall within the scope of section 29 are not accorded an appropriate mode of dispute resolution as directed by the provision. Indeed, the UN has no standing mechanism of dispute resolution that would be considered 'appropriate' according to the standards of section 29. The only standing alternative mechanism of dispute resolution provided by the UN is the local claims review board, an internal administrative forum that offers compensation to a select category of claims. The present study has detailed the numerous reasons why this mechanism cannot be considered an adequate discharge of the UN's treaty obligation to provide access to remedies through 'appropriate' modes of dispute resolution. The sole standing mechanism that could theoretically be considered an appropriate discharge of the UN's section 29 obligation is the SCC.

This commission, however, was never established by the UN. The fact that the SCC is provided for in all the SOFAs concluded by the UN does not constitute a discharge of its section 29 obligation. The only other mechanism that could potentially be considered an appropriate dispute resolution mechanism under section 29 is the lump sum agreement mechanism. However, as established above, this mechanism has only been employed once by the UN. Thus, it is evident that the second prong of the remedy gap is not the inefficiency of the UN's alternative mechanism or by the UN's interpretation of section 29. The remedy gap in third-party claims against UN peacekeeping mission is directly caused by the fact that the UN has made no provision for the appropriate settlement of claims against it as directed by section 29. It can thus be concluded that the UN is in violation of its obligation to provide access to remedies as derived from section 29 and from general international law.

Chapter 5

Diplomatic protection by the UN host State in the resolution of third-party claims against UN peacekeeping missions

5.1 Introduction

As observed in the previous chapters, the remedy gap, aptly dubbed a 'Gordian Knot' by Schmalenbach,¹ is a seemingly intractable issue. At one end of this issue, the UN's immunity from national jurisdictions is nearly absolute, qualified only by an express waiver. This immunity cannot be restricted by any measure short of amending the Immunities Convention. At the other end of the issue, as established in the previous chapter, the UN has failed to discharge its obligation to provide access to remedies as derived from section 29 of the Immunities Convention and general international law principles. This is due to the fact that the UN has no appropriate mechanism of dispute resolution as mandated by section 29 and does not acknowledge its general international law obligation to provide access to remedies. One of the main objectives of this study is to find existing tools under international law that could potentially bridge the remedy gap. As such, focusing on the UN and third-party claimants as the sole actors within this remedy gap issue is useful for the determination of the components of the remedy gap but does not offer resolutions. Moreover, this framework of analysis does not consider the host State as a relevant actor in the resolution of the remedy gap in third-party claims. In the chapter on the UN's obligation to provide access to remedies, it was determined that claims which entail a review of the UN's policy (public law claims and so-called 'hybrid' claims) and fall outside the scope of the UN's section 29 obligation to provide access to remedies are expected to be pursued by the host state through diplomatic channels. This chapter thus assesses the potential of UN peacekeeping mission host States and

¹ K Schmalenbach 'Preserving the Gordian Knot: UN legal accountability in the aftermath of Srebrenica' (2015) 62 *Netherlands International Law Review* 313-328.

this diplomatic avenue available to the mission host States as a subject of international law and a party to the peacekeeping agreement.

As discussed in the previous chapter, although only used once, the lump sum agreement is the sole mode of dispute resolution employed by the UN that could be considered 'appropriate' under section 29. This lump sum agreement resulted from states exercising diplomatic protection over their nationals by negotiating a settlement with the UN.² These claims were espoused by the claimants' states of nationality which subsequently negotiated with the UN on behalf of their nationals.³ This exercise of diplomatic protection resulted in a lump sum agreement through which the UN offered compensation to the claimants. Thus, to find existing tools under international law to bridge this gap, this chapter will assess diplomatic protection as an existing tool under international law that could be used to bridge the remedy gap.

The first section of this chapter consists of a general study of diplomatic protection under international law. This entails an overview of the history, legal basis, and theories surrounding this concept. The second section of this chapter applies these general principles of diplomatic protection to the specific context of a UN peacekeeping mission host State through a study of the legal framework of diplomatic protection as a process that can be undertaken by the host State in the resolution of third-party claims against UN peacekeeping missions. This consists of an inquiry into whether diplomatic protection can be used in claims against the UN as an international organisation, how diplomatic protection can be used to ensure third-party claimants' access to remedies, and the legal and political challenges to the use of diplomatic protection as a tool to bridge the remedy gap. The final section of this chapter will provide concluding remarks on diplomatic protection as a potential tool to bridge the remedy gap.

² 'Report of the Secretary General on Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: Financing of the United Nations peacekeeping operations' (20 September 1996) UN Doc A/51/389 paras 34-37. Hereafter, Administrative and budgetary report.

³ 'Exchange of letters constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, New York' 20 February 1965, 1 *United Nations Juridical Yearbook* (1965) 39.

5.2 Diplomatic protection in international law

Diplomatic protection refers to any process diplomatic, judicial, administrative, or otherwise, undertaken by a state in the protection of the rights of its national(s) on the international plane.⁴ This process entails a state espousing the claim of its national for the violation of the national's rights caused by the internationally wrongful act of another State.⁵ While there are recorded attempts at codifying diplomatic protection,⁶ this mechanism is more strongly entrenched in customary international law.⁷ Owing to the stronger mechanisms of individual rights protection present in human rights treaties, diplomatic protection is now a rarely used mechanism of dispute resolution.⁸ Consequently, it is often argued that this mechanism has become somewhat obsolete.⁹ However, before the advent of these treaties, diplomatic protection was one of the few mechanisms available for the protection of individual rights in the international sphere.¹⁰ Accordingly, this mechanism was frequently applied by States in the protection of their nationals abroad.¹¹

⁴ Article 1 of 'The Draft Articles on Diplomatic Protection with commentaries' Report of the International Law Commission on the work of its fifty-eighth session (2006) UN Doc A/61/10 Hereafter, ILC Draft Articles on Diplomatic Protection with Commentaries.

⁵ J Salmon (ed) *Dictionnaire de droit international public* (2001) 904.

⁶ ILC Draft Articles on Diplomatic Protection (n 4 above); Article 1 of the Institute for International Law's Resolution on international responsibility of states for injuries on their territories to the person or property of foreigners of 1927 as reported in *Yearbook of the International Law Commission* (1956) 2 227; Article 1(1) of the 1960 Draft Convention on the International Responsibility of States for Injuries to Alien as reported in LB Sohn & RR Baxter 'Responsibility of states for injuries to the economic interests of aliens' (1961) 55.3 *American Journal of International Law* 548.

⁷ 'It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State' *The Mavrommatis Palestine Concessions* PCIJ (30 August 1924) (1924) PCIJ Series A No 2 at 12. Hereafter, *The Mavrommatis Concessions* case.

⁸ 'First Report on Diplomatic Protection, by Mr. John R. Dugard, Special Rapporteur' (7 March and 20 April 2000) ILC Commission Doc A/CN.4/506 and Add. 1 Paras 11-17. Hereafter, ILC Special Rapporteur's First Report on Diplomatic Protection; J F Flauss 'Protection diplomatique et protection internationale des droits de l' homme' (2003) 13.1 *Swiss Review of International and European Law* 8-9; RB Lillich 'The diplomatic protection of nationals abroad: An elementary principle of international law under attack' (Editorial Comments) (1975) 69 *American Journal of International Law* 359-365.

⁹ As above.

¹⁰ As above.

¹¹ As above.

Owing to the fact that individuals had little standing and rights in international law,¹² the concept of diplomatic protection was traditionally based on the legal fiction that an injury to a national is an injury to the State itself.¹³ This legal fiction is also called the *Mavrommatis* fiction, in reference to its definition by the PCIJ in the *Mavrommatis* case, describing it as follows:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law.¹⁴

The relationship between a State and its national is a mutually beneficial one whereby the State protects its nationals in exchange for the national's allegiance.¹⁵ The *Mavrommatis* fiction essentially recognises a State's right to protect the fundamental rights of its nationals as part of the allegiance bargain between the State and its nationals.¹⁶ Diplomatic protection is thus regarded as a corollary of the personal jurisdiction of the state over its population, when elements of that population, while in foreign territory, have suffered injury in violation of international law.¹⁷

As such, nationality is an important precondition for the exercise of diplomatic protection by a State. Nationality is not the sole precondition for the exercise of diplomatic protection; the genesis of diplomatic protection is understood to be a claim between a foreign national whose rights have been infringed and the host

¹² As above.

¹³ ILC First Report on Diplomatic Protection (n 8 above) para 36.

¹⁴ *Mavrommatis Concessions* case (n 7 above) p 12.

¹⁵ *Reparations for injuries suffered in the service of the United Nations* ICJ (11 April 1949) (1949) ICJ Reports 174 at 182. Hereafter, *Reparations for Injuries*; 'Anyone who mistreats a citizen directly offends the State. The sovereign of that State must avenge its injury, and if it can, force the aggressor to make full reparation or punish him, since otherwise the citizen would simply not obtain the main goal of civil association, namely, security' Vattel E 'Le droit des gens, ou Principes de la loi naturelle: appliqués à la conduite et aux affaires des nations et des souverains (1802) As reported in the Preliminary Report on Diplomatic Protection, by Mr. Mohamed Bennouna, Special Rapporteur' (4 February 1998) ILC Doc A/CN.4/484 para 6 Hereafter, ILC Special Rapporteur's Preliminary Report on Diplomatic Protection.

¹⁶ S Garibian 'Vers l'émergence d'un droit individuel à la protection diplomatique' (2008) 54 *Annuaire Français de Droit International* 121.

¹⁷ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) para 10.

State responsible for the said infringement. As such, for a State to exercise diplomatic protection for its national, there is an additional requirement that the national must have exhausted the available local remedies within the host State.¹⁸ This is because diplomatic protection at its core is about invoking the responsibility of the host State. According to the rules on state responsibility, 'The responsibility of a state may not be invoked if ... effective local remedies have not been exhausted'.¹⁹ It is an entrenched rule of customary international law that there can be no claim of denial of justice if available and effective local remedies have not been exhausted by the claimant.²⁰ Thus, diplomatic protection is customarily only applied by a State espousing the claim of its national whose rights were infringed by the internationally wrongful act of the host State which resulted in denial of justice for the claimant. Following the allegiance relationship between a State and its national, the State assumes the injury as its own and thus invokes the responsibility of the host State. In short, for a state to exercise diplomatic protection, a claimant must be the national of the State and must have exhausted all the available local remedies.

The Mavrommatis fiction is not the sole basis of diplomatic protection in international law. Indeed, it is argued that diplomatic protection currently has another basis in addition to the legal fiction of injury to the State: the legal reality of the rights of the individual on the international plane.²¹ This argument is based on the fact that before the advent of human rights treaties, there was no protection of individuals' rights on the international plane. As such, the Mavrommatis fiction was intended to provide this protection to individuals.²² Considering individual rights have gained prominence in international law, the

¹⁸ 'Second Report on Diplomatic Protection, by Mr. John R. Dugard, Special Rapporteur' (28 February 2001) ILC Doc A/CN.4/514. Hereafter, ILC Special Rapporteur's Second Report on Diplomatic Protection.

¹⁹ Article 44 of the Articles on the responsibility of States for internationally wrongful acts (2001). Hereafter, Articles on State responsibility.

²⁰ CF Amerasinghe *Local remedies in international law* (2004) 97. See also, AA Cançado Trindade *The application of the rule of exhaustion of local remedies in international law: Its rationale in the international protection of individual rights* (1983).

²¹ ILC Special Rapporteur's preliminary report on Diplomatic Protection (n 15 a15bove) para 2.

²² A Vermeer-Kunzli 'As if: The legal fiction in diplomatic protection' (2007) 18.1 *European Journal of International Law* 38.

concept of diplomatic protection has now expanded to reflect this 'new' reality.²³ This new reality is evidenced by the recent ICJ case of *Sadio Diallo* in which the Guinean State confirmed the fact that it was applying diplomatic protection against the Democratic Republic of Congo on the basis of the direct rights of its national, among other rights, without resorting to the fiction of injury to the State.²⁴ In fact, it has even been argued that owing to the prominence of the individual in international law as resulting from international human rights treaties, the Mavrommatis fiction as a basis of diplomatic protection is now somewhat obsolete.²⁵ The legal fiction has been the subject of criticism precisely because it supplants the existing legal reality of a claim by an individual.²⁶ Scelle pointedly criticised the legal fiction stating:

Not only does the fictitious personality of the State swallow up the real personality of the individual, but the result of this legerdemain is that the original and real subject of law is completely eliminated, and the initial legal relationship is replaced by a political relationship.²⁷

As such, it is argued that the basis of contemporary diplomatic protection no longer rests solely on the fictional injury to the State but can also be based on real injury to the individual.

There is a significant legal consequence of this basis of diplomatic protection that is absent in the Mavrommatis, fiction-based protection. Indeed, if diplomatic protection is directly based on the rights of the individual, then there is a

²³ 'Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights'. *Case Concerning Ahmadou Sadio Diallo, Republic of Guinea v Democratic Republic of Congo, Preliminary Objections* ICJ (24 May 2007) (2007) ICJ Reports 582 para 39. Hereafter, *Sadio Diallo* case.

²⁴ 'Guinea ... states that it "is taking up the cause of one of its nationals and is acting to enforce his direct rights as an individual and as shareholder and executive officer of companies which he founded ... and of which he is the sole or principal owner, to the exclusion of distinct rights which these companies may have against the DRC" *Sadio Diallo* case (n 23 above) para 29.

²⁵ ILC Special Rapporteur's First Report on Diplomatic Protection (n 8 above) para 17.

²⁶ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) paras 22-29; Lillich (n 8 above); Garibian (n 16 above) 123-124.

²⁷ G Scelle *Règles générales du droit de la paix* (1933) 660-661, as reported in the ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) para 26.

procedural requirement that the injured individual be involved in the process.²⁸ This requirement is not present in the diplomatic protection based on the legal fiction of injury to the State. Evidently, if the State considers itself the injured party, then it is not required to include the original claimant in the process.²⁹ Throughout the history of diplomatic protection, this led to a situation whereby powerful states would use diplomatic protection over their injured aliens to apply political pressure on other states.³⁰ This political powerplay was done without the participation of the injured national beyond the national's initial request for diplomatic protection.³¹ Thus, as a result of the legal fiction of injury to the state, the claimants rights become 'irrelevant' as the State becomes the sole claimant.³² Conversely, a diplomatic protection mechanism based on the rights of the individual cannot proceed without the consent and participation of the injured individual.³³ This is based on the fact that the State acts as an agent to the injured individual as opposed to the *Mavrommatis* fiction whereby the State acts as the injured party and sole claimant.³⁴ It essentially comes down to the question of whether, by initiating a diplomatic protection process, the state is enforcing its own rights or those of its national.³⁵ ILC Special Rapporteur Mohamed Benounna noted that the state as an agent of its national is the more progressive view which

²⁸ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) paras 49-51.

²⁹ Third Report on Diplomatic Protection, by Mr John Dugard, Special Rapporteur (7 March and 16 April 2002) ILC Doc A/CN.4/523 and Add.1 paras 119-122. Hereafter, ILC Special Rapporteur's Third Report on Diplomatic Protection.

³⁰ The 'Calvo doctrine' came as a response to the abuse of diplomatic protection by the US and European states against Latin American states. In terms of this doctrine, the foreign national contractually waives their right to seek diplomatic protection from their State of nationality in respect to any dispute based on the contract. ILC Special Rapporteur's Third Report on Diplomatic Protection (n 2929 above) para 119.

³¹ If the State of nationality decides to bring a claim, it has a choice of means of settlement of the dispute between it and the territorial State ... When all is said and done, the manner in which the individual himself is ultimately compensated is of little importance from the standpoint of international law. ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) para 20.

³² As above; 'The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant' *Mavrommatis Concessions* case (n 7 above) p 12.

³³ ILC Special Rapporteur's Third Report on Diplomatic Protection (n 2929 above) para 119.

³⁴ *Case Concerning the Barcelona Traction, Light and Power Company Limited* ICJ (5 February 1970) (1970) ICJ Reports 3 para 35. Hereafter, *Barcelona Traction* case.

³⁵ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) paras 54.

takes into account the 'progressive development and adoption of custom' regarding the rights of individuals on the international plane whereas the position of the state enforcing its rights places an emphasis on old tradition and unduly extrapolates on sovereignty to the point of 'resorting to a fiction'.³⁶ However, he left the question unanswered in his preliminary report on diplomatic protection.³⁷ In the subsequent first report, ILC Special Rapporteur John Dugard remarked that there are many elements that point to the rights of the individual being the basis of diplomatic protection and places the state as an agent of the individual. Special Rapporteur Dugard held the following:

[I]t is true that the intervening State in effect acts as the agent of the individual in asserting his or her claim. ... This is borne out by two rules in particular: first, the rule that requires the individual to exhaust local remedies before the alien's State may intervene; and, secondly, the rule of continuous nationality that requires the individual to be a national of the protecting State both at the time of injury and at the time of presentation of the claim. Moreover, judicial decisions make it clear that in assessing the quantum of damages suffered by the State, regard will be had to the damages suffered by the individual national.³⁸

The ILC Rapporteur, however, maintained the validity of the Mavrommatis fiction as the accepted basis of diplomatic protection.³⁹ This halfway position of acknowledging the rights of the State and implicitly those of the individual accords with the emerging theory that diplomatic protection now has a mixed basis resting on both the rights of the State and the rights of the individual.⁴⁰ In terms of this theory, diplomatic protection is a mechanism meant to protect the rights of the State and those of the individual, simultaneously. In espousing this theory, one scholar, Garibian, argues that these two bases of diplomatic protection are complementary rather than adversarial and would prevent diplomatic protection from becoming entirely obsolete.⁴¹ Garibian further explains this complementarity

³⁶ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) para 50.

³⁷ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 1515 above) paras 50-54.

³⁸ ILC Special Rapporteur's First Report on Diplomatic Protection (n 8 above) para 19.

³⁹ ILC Special Rapporteur's First Report on Diplomatic Protection (n 8 above) para 21-23.

⁴⁰ Garibian (n 16 above) 127; Scelles (n 27 above) 660; ILC Special Rapporteur's First Report on Diplomatic Protection (n 8 above) paras 70-72.

⁴¹ Garibian (n 16 above) 128.

by contrasting the traditional diplomatic protection system with the human rights system. According to her, the international human rights system has one overarching purpose: the protection of individuals' rights against abuse by states.⁴² This system effectively places the individual in direct confrontation with a state.⁴³ Garibian thus argues that diplomatic protection could work in tandem with the human rights system by offering the individual's State of nationality as a complementary shield against the State. To this effect, she argues this mixed-base theory would in turn prevent diplomatic protection from falling into complete obsolescence.⁴⁴

Garibian's theory on the mixed basis of diplomatic protection has yet to garner some form of official support. There is no judicial or quasi-judicial process that has expressed a firm position on the complementarity of the mixed-base theory with human rights protection mechanisms.⁴⁵ However, it cannot be denied that the change in status for individuals in international law has definitely affected the basis of diplomatic protection. While the legal fiction of injury to the State remains the uncontested basis of diplomatic protection, there are enough argumentative tools to reason that diplomatic protection has evolved or should evolve beyond the need of a legal fiction of injury to the State to rest on the legal reality of injury to the individual. Though ILC Special Rapporteurs maintain the Mavrommatis fiction as the accepted basis for diplomatic protection, the ILC's codification of diplomatic protection has not yet been ratified and entered into force. As such, diplomatic protection as a secondary norm of international law remains entrenched in the realm of general international law and more specifically customary international law. This means that as a customary international law norm, diplomatic protection is subject to the constant development inherent in that source of international law. The *opinio iuris* and state practice on the matter point to a development of diplomatic protection into a concept that is based on

⁴² Garibian (n 16 above) 127-130.

⁴³ As above.

⁴⁴ As above.

⁴⁵ Flauss (n 8 above) 11.

the rights of the individual.⁴⁶ However, as it stands, the Mavrommatis fiction is the sole universally accepted basis of diplomatic protection.

5.3 Diplomatic protection by a UN peacekeeping mission host State

5.3.1 Legal framework of diplomatic protection by a UN peacekeeping mission host State

As established above, diplomatic protection is a State-centric concept in international law. Practice demonstrates that diplomatic protection was historically employed by States in the resolution of disputes. Accordingly, most definitions of diplomatic protection only speak of this mechanism as a process between two States: the State whose nationals' interests were injured abroad and the State responsible for the injury. This does not mean, however, that diplomatic protection is solely applicable to States. International organisations are now prominent subjects of international law. Accordingly, some definitions of diplomatic protection have evolved to reflect this reality. The *Encyclopaedia of International Law* defines diplomatic protection as 'the protection given by a subject of international law to individuals, i.e., natural or legal persons, against a violation of international law by another subject of international law'.⁴⁷ This definition by referring to 'subjects' of international law as opposed to just States is a tacit recognition of international organisations as relevant actors in the diplomatic protection process.

As it pertains to the UN specifically, there is a precedent to the UN being on both ends of diplomatic protection as the entity seeking to initiate a diplomatic protection process and as the entity on the receiving end of diplomatic protection. The *Reparation for Injuries* Advisory Opinion was based on the UN's request to espouse claims on behalf of its agents and officials.⁴⁸ The UN sought to determine

⁴⁶ ILC Special Rapporteur's First Report on Diplomatic Protection (n 8 above) paras 64-69.

⁴⁷ B Rudolf (ed) *Encyclopaedia of public international law* (1992).

⁴⁸ The questions put to the court were as follows: ' i. In the event of an agent of the United Nations in the performance of his duties suffering injuries in circumstances involving the responsibility of a state, has the United Nations, as an Organisation, the capacity to bring an international claim against the responsible *de iure* or *de facto* government with a view of obtaining the reparation due in respect of the damage caused to (a) the United Nations, (b) to the victim or to the person entitled through him? ii. In the event of an affirmative reply on point I(b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?' *Reparation for Injuries* (n 15 above) 175.

whether it could exercise a function akin to diplomatic protection which at the time was solely exercised by States.⁴⁹ In addition, the UN sought the Court's opinion on the potential of competing claims by the UN and the State of which the victim was a national if it was found that the UN can espouse the claim of the victim through diplomatic protection channels. The ICJ found that the UN can espouse claims on behalf of its agents and officials but was explicit in refusing to characterise the UN's espousal of claims of its agents as 'diplomatic protection'.⁵⁰ This is because of the important differences between traditional diplomatic protection by States and the protection granted by an international organisation to its agents.⁵¹ Accordingly, the UN's espousal of its agents' claims was characterised as 'functional protection' to account for the fundamental differences in the legal relationship between a State and its nationals on one hand and an international organisation and its employees on the other.⁵² Functional protection operates in a manner similar to diplomatic protection, with the specificities required of an international organisation–employee relationship. Thus, the UN as an international organisation can extend diplomatic or rather functional protection to its agents.

The fact that the UN can extend a form of diplomatic protection to its agents and officials conclusively established that the UN as an international organisation is capable of applying the traditionally State-centric concept of diplomatic protection. For the purpose of this study, it is more relevant to establish whether the UN can be on the receiving end of diplomatic protection. As discussed in the previous chapter, the lump sum agreement is an ad hoc mode of dispute resolution employed only once by the UN in the resolution of third-party claims made against the ONUC.⁵³ The lump sum agreement was identified in the previous

⁴⁹ *Reparations for Injuries* (n 15 above) p 181.

⁵⁰ *Reparations for Injuries* (n 15 above) p 181-184.

⁵¹ 'It is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organisation on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and nationals' *Reparations for Injuries* (n 15 above) p182.

⁵² 'Upon examination of the character of the functions entrusted to the Organisation and of the nature of the missions of its agents, it becomes clear that the capacity of the Organisation to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter'. *Reparations for Injuries* (n 15 above) p 184.

⁵³ Administrative and budgetary report (n 2 above) para 36.

chapter as the sole mode of dispute resolution employed by the UN that represents an adequate discharge of the UN's obligation to provide access to remedies.⁵⁴ This lump sum agreement came about as a result of diplomatic protection exercised by several European States espousing the claims of their nationals.⁵⁵ The UNSG referred the lump sum agreement as a mode of dispute resolution resulting from diplomatic protection, in the following terms:

A lump sum settlement of claims, by which the Organisation negotiates a settlement directly with the Government acting on behalf of its nationals ... Under this mode of settlement, the Government (normally of the host State) in the exercise of its right to diplomatic protection of its nationals, espouses their claims, aggregates and submits them to the United Nations and negotiates on their behalf a lump sum amount in settlement of the claims.⁵⁶

The Secretary-General then described the single instance of the UN resolving third-party claims through a lump sum agreement and recommended that the UN resort more to that mode of dispute settlement.⁵⁷ This was an express recognition that diplomatic protection can be used to settle claims against UN peacekeeping missions and has been used once in the past with the UN's approval. Essentially, a State can use diplomatic protection to settle claims against UN peacekeeping missions. Though a State hosting a UN peacekeeping mission has yet to use diplomatic protection to conclude a lump sum agreement with the UN, it is legally permitted to do so.

5.3.2 Outcomes and challenges of the resolution of third-party claims through diplomatic protection

Diplomatic protection cannot in and of itself resolve claims against the UN. It is not a mechanism of dispute resolution but rather a process that leads to dispute resolution through the creation of such a mechanism. A lump sum agreement is one such mechanism that results from the exercise of diplomatic protection. As discussed in the previous chapter, though only employed once, the lump sum

⁵⁴ See chapter 4 above.

⁵⁵ The governments of Belgium, Switzerland, Luxembourg, Greece, and Italy espoused claims against ONUC. Administrative and budgetary report (n 2 above) para 36.

⁵⁶ Administrative and budgetary report (n 2 above) para 34.

⁵⁷ Administrative and budgetary report (n 2 above) paras 34-37.

agreement is the sole mechanism that represents an appropriate discharge of the UN's treaty obligation to provide access to remedies. As such, the diplomatic protection is a process that can lead to a mechanism of dispute resolution such as a lump sum agreement. Diplomatic protection can occur even within the framework of an existing mechanism of dispute resolution. Indeed, the SCC, though never established, is structured as a negotiation between the UN and the host State. The commission is to be composed of a UN-appointed member, a host State-appointed member, and a jointly appointed or ICJ-appointed member. Based on the commission's rules on quorum, the proceedings of the SCC essentially amount to a negotiation between the UN and the host State. It is within those negotiations that the host State can espouse the claims of its nationals in the exercise of its right of diplomatic protection.

Diplomatic protection by a host State can lead to the resolution of those third-party claims against the UN that would otherwise be without a forum of adjudication. This would effectively bridge the remedy gap in third-party claims against the UN. Despite this potential, diplomatic protection has never been used by a host State in the protection of the rights of its nationals with claims against the UN peacekeeping missions. The Haitian government, for example, has held several consultations with the UN regarding the cholera crisis.⁵⁸ The focus of these talks, however, has been on post-pandemic reconstruction and not on remedies to the victims.⁵⁹ As such, these interventions by the Haitian government cannot be considered an exercise of diplomatic protection since they do not consist of a formal espousal of a claim by Haiti, either on the basis of the Mavrommatis fiction or on the contemporary basis of the direct individual rights of Haitians. Similarly, there is no record of Bosnia and Herzegovina attempting to obtain redress for the Mothers of Srebrenica through the diplomatic avenue recommended by the UN for claims that entail a review of their policies and mandate. As noted by the UNSG, the resolution of third-party claims through diplomatic protection 'is largely dependent on the State's willingness to espouse the claims of its

⁵⁸ UN Doc A/71/PV.64; UN Doc A/71/PV.91; 'New approach to Cholera in Haiti: Report of the Secretary-General' (3 May 2017) UN Doc A/71/895; 'The new United Nations approach to Cholera in Haiti, adopted by the General Assembly on 13 July 2017' (18 July 2017) UN Doc A/Res/71/161 B.

⁵⁹ As above.

nationals'.⁶⁰ Therein lies the main challenge to the concept of diplomatic protection by a UN host State as a tool that could bridge the remedy gap in third-party claims against the UN: it is wholly reliant on the willingness and ability of the State. The following will analyse and address these challenges.

The unwillingness of a host State to espouse the claims of its nationals can be due to a myriad of reasons. A probable reason for this unwillingness is the inegalitarian feature inherent in the concept of diplomatic protection. There is a certain level of political power needed to exercise diplomatic protection. This political power influences the willingness of the State to espouse the claims of its nationals and the willingness of the party at the receiving end to engage in the process of diplomatic protection. Historically, powerful States have used diplomatic protection to strong-arm weaker States into a particular position.⁶¹ This foreign intervention in the affairs of host States under the guise of diplomatic protection was noted by the ICJ in the *Barcelona Traction* case in the following terms:

The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.⁶²

This abusive exercise of diplomatic protection to interfere in the domestic affairs of states was mostly done by the United States against Latin American States.⁶³ Foreign investors (mostly US citizens) in their dispute with a host State used to request diplomatic protection from their home State.⁶⁴ The home State would then strong-arm the host State into capitulating to the demands of the foreign investors, regardless of the merits of the investors' claims.⁶⁵ In response to this,

⁶⁰ Administrative and budgetary report (n 2 above) para 37.

⁶¹ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 1515 above) paras 7-9, 29.

⁶² *Barcelona Traction* case (n 34 above) *Separate Opinion of Judge Padilla Nervo* p 246.

⁶³ BM Cremades 'Resurgence of the Calvo Doctrine in Latin America' (2006) 7.1 *Business Law International* 53; ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) para 8-9.

⁶⁴ ILC Special Rapporteur's Third Report on Diplomatic Protection (n 29 above) paras 119-158.

⁶⁵ As above.

Latin American States mounted a legal response in the form of the Calvo doctrine,⁶⁶ which contractually limited the rights of foreign investors by placing them in the same position as nationals of the host State. The Calvo clause was a contractual provision added into the investment contracts which stipulated that foreign investors could only seek redress before the local courts of the host State.⁶⁷ This effectively placed foreign investors on the same footing as the nationals of the host State. Moreover, it ensured that foreign investors with claims made a genuine effort to exhaust local remedies.⁶⁸ This response by Latin American States illustrates the fact that diplomatic protection is the tool of politically-stronger States against weaker ones. However, it also demonstrates that States with relative political weakness can find legal tools to challenge the abuse of diplomatic protection by other States. In peacekeeping missions, by the mere fact of needing a peacekeeping mission, the UN host State is in a position of relative weakness in terms of political strength. This in turn affects the State's capacity to exercise diplomatic protection against the UN. This is evidenced by the fact that diplomatic protection in third-party claims against UN peacekeeping missions has only been historically applied by European States and never by the peacekeeping mission host States.⁶⁹ There was, however, a single attempt by Egypt to espouse the claims of its nationals and of stateless Palestinians on Egyptian territory.⁷⁰ As discussed at length in the previous chapter, the UN peacekeeping mission in Egypt (UNEF) had a local claims review board.⁷¹ The UNEF local claims review board's composition and procedure differed significantly from contemporary local claims review boards. One notable difference is that prior to the settlement of a claim by the review board, there were preliminary negotiations between UNEF and Egypt.⁷² There was no treaty framework for this

⁶⁶ As above.

⁶⁷ BM Cremades 'Disputes arising out of foreign direct investment in Latin America: A new look at the Calvo doctrine and other jurisdictional issues' (2004) 59.2 *Dispute Resolution Journal* 80.

⁶⁸ ILC Special Rapporteur's preliminary report on diplomatic protection (n 15 above) para 28.

⁶⁹ Administrative and budgetary report (n 2 above) paras 36-37.

⁷⁰ K Schmalenbach 'Third party liability of international organisations: A study on claims settlement in the course of military operations and international administration' in H Langholdz, B Kondoch & A Wells (eds) *International peacekeeping: The yearbook of international peace operations volume 10* (2006) 41; See chapter 4 of this study.

⁷¹ As above.

⁷² As above.

negotiation and for the local claims review boards. The UNEF SOFA called for the creation of 'ad hoc arrangements defining certain of the conditions necessary for the effective discharge of the functions of the United Nations Emergency Force ... in Egypt'.⁷³ The local claims review and its process of preliminary negotiations can be considered part of these ad hoc arrangements. Within this framework of the review board's preliminary negotiations, Egypt exercised diplomatic protection by espousing the third-party claims of its nationals against UNEF. UNEF rejected this espousal by Egypt on the basis that it understood Egypt's role in these negotiations as assisting the UN to 'arrive at disinterested estimates of any case'.⁷⁴ UNEF, in its rejection of Egypt's espousal of claims, held that on the basis of Egypt's role in the review boards' settlement negotiations, Egypt could not take a partisan stand.⁷⁵ However, even though Egypt acted within the framework of the local claims review board's procedure, it was exercising diplomatic protection as derived from customary international law. The Mavrommatis fiction as the traditional basis of diplomatic protection directly contradicts the UN's viewpoint. Under this fiction, an injury to the rights of claimants is an injury to the host State itself. As such, should the host State choose to espouse a national's claim, its status changes to that of an injured party in the claim, a decidedly partisan stance. The UN, in describing Egypt as merely an accessory to the claim, was compounding the role of Egypt within the specific framework of a local claims review board with Egypt's right to exercise diplomatic protection in general. As a result, the UN came to the conclusion that Egypt was not permitted to take a partisan stand. This demonstrates that the limitation of diplomatic protection as a dispute resolution mechanism for claims against UN peacekeeping missions is not just that it is entirely dependent on the willingness of the host State as stated by the UN.⁷⁶ The willingness of the UN to accept the intervention of the host State in espousing the claims of its nationals against peacekeeping missions is also an important factor to consider. However, practice subsequent to the UNEF-Egypt

⁷³ 'Exchange of letters constituting an agreement between the United Nations and the government of Egypt concerning the status of the United Nations Emergency Forces in Egypt, New York' 8 February 1957 UNTC I-3704. Hereafter, UNEF SOFA.

⁷⁴ Letter from WW Cox, UN Legal Advisor to Captain Khamis el Shafay, Egyptian Liaison Headquarters Legal Advisor of 24 August 1957. As reported by Schmalenbach (n 70 above) 41.

⁷⁵ As above.

⁷⁶ Administrative and budgetary report (n **Error! Bookmark not defined.** above) para 37.

matter demonstrates that the UN is, at face value, willing to accept a host State's espousal of the third-party claims of its nationals. The lump sum agreement between the UN and several European countries based on mass third-party claims against ONUC occurred after the fact of the UNEF-Egypt situation. In point of fact, the UNSG touted the merits of the lump sum agreement as a mechanism that could address the remedy gap in third-party claims against UN peacekeeping missions, especially as it pertains to mass claims.⁷⁷ A lump sum agreement is a mechanism resulting from a State exercising diplomatic protection. It can thus be said that the UN is amenable to diplomatic protection as a mode of dispute resolution for third-party claims against its peacekeeping missions. As such, while the willingness of the UN is a factor to consider, it is the willingness of the host State that is essential to the exercise of diplomatic protection.

Diplomatic protection is wholly reliant on the willingness of the host State because there is no obligation on States to initiate or engage in diplomatic protection. ILC Special Rapporteur Benounna confirmed the legal nature of diplomatic protection as the discretionary right of a State 'which has complete latitude to accept or reject it without being required to justify its decision in any way whatsoever'.⁷⁸ This view is echoed by the ICJ in the *Barcelona Traction* case, which held the following:

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. ... the State enjoys complete freedom of action.⁷⁹

The legal nature of diplomatic protection as the right of a State is due to the Mavrommatis fiction underpinning the concept. The legal fiction of injury to the State supplants entirely the legal reality of injury to the national abroad. As a result, the State becomes the sole claimant with its own right to action completely separate and different from the individual's initial right to action.⁸⁰ As mentioned

⁷⁷ Administrative and budgetary report (n **Error! Bookmark not defined.** above) paras 34-37.

⁷⁸ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 1515 above) para 19.

⁷⁹ *Barcelona Traction* case (n 34 above) para 79.

⁸⁰ Fn 31 above.

in the *Barcelona Traction* case, 'the claim of the State is not identical with that of the individual or corporate person whose cause is espoused'.⁸¹ The claim of the individual is only relevant for the purpose of estimating the compensation due to the State.⁸² As such, if diplomatic protection is based solely on the right of the State, it stands to reason that, as a basic principle of law, the holder of a right can choose to exercise their right at their discretion. It was argued above that the contemporary basis for diplomatic protection has evolved or should evolve past the need for a legal fiction to rest on the reality of individual rights. This contemporary basis of diplomatic protection could potentially lead to diplomatic protection as a State obligation. As argued above, diplomatic protection that rests on the rights of the individual presents some features that differ from the Mavrommatis fiction-based diplomatic protection. Diplomatic protection based on the rights of the national injured abroad, places the protecting State in the position of an agent representing its nationals' interests.⁸³ This essentially means that the State is representing the legally protected interests of its nationals.⁸⁴ As discussed above, if a State is protecting the rights of its nationals and not its own rights, then the injured national must be involved in the diplomatic protection process. Consequently, should the individual opt for a different mechanism of dispute resolution or abandon their claim altogether, their State of nationality cannot proceed with diplomatic protection as they would no longer have the mandate from the person they represent.⁸⁵ This change in status for the claimant and the protecting State in the contemporary basis of diplomatic protection points to a change in the status of diplomatic protection itself. This change could arguably result in the status of diplomatic protection eventually changing from a discretionary right of a State to a State obligation. However, the practice of

⁸¹ *Barcelona Traction* case (n 34 above) para 79.

⁸² 'The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure ... The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State' *Factory at Chorzow (Germany v Poland)* PCIJ (26 July 1927) (1928) PCIJ Series A No 17 p 28. Hereafter, *Chorzow Factory* case.

⁸³ *Barcelona Traction* case (n 34 above) para 35; ILC Preliminary report on diplomatic protection (n 15 above) para 50.

⁸⁴ As above.

⁸⁵ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) para 51.

diplomatic protection based on the rights of individuals is recent and thus fairly limited. The Mavrommatis fiction is still the sole universally accepted basis of diplomatic protection. As such, diplomatic protection is at present the discretionary right of a State and there is no legal basis for third-party claimants to compel their State of nationality to espouse their claims.

Owing to its discretionary nature as a State right, diplomatic protection cannot be subjected to judicial review.⁸⁶ Even the mechanisms that are born out of the exercise of diplomatic protection are not open to judicial review.⁸⁷ This means that third-party claimants cannot sue their State for failing to espouse their claims against the UN through diplomatic protection. Moreover, should the UN host State decide to exercise diplomatic protection in the form of negotiation for a lump sum agreement or any other choice of legal remedies such as the above-mentioned SCC, the third-party claimants cannot have these diplomatic protection outcomes reviewed in court. This could explain why Manderlier sued the UN and not Belgium over the lump sum agreement that resulted from Belgium's exercise of diplomatic protection.⁸⁸ Since there is no individual right to diplomatic protection, it is the exclusive right of States. As it stands, there is no human rights convention that grants individuals the right to diplomatic protection by their State.⁸⁹ This right cannot be read into any substantive or procedural rights in any international or regional human rights conventions.⁹⁰ There are some rights incidental to diplomatic protection accorded to individuals by the European human rights system. Those rights, however, do not entitle the individual to diplomatic protection.⁹¹ For instance, on the basis of article 6(1) of the European Convention

⁸⁶ ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) para 46.

⁸⁷ As above.

⁸⁸ *Manderlier v Organisation des Nations Unies & Etat Belge (Ministre des Affaires Etrangères) Tribunal Civil de Bruxelles* (11 May 1966) No 4553, as reported by P Schmitt on www.ebrary.net (accessed 19 February 2020). Hereafter, *Manderlier case*. It should be noted that Manderlier did sue Belgium as well on appeal. However, the suit against Belgium specifically regarded the amount received as a result of the lump sum agreement concluded by Belgium and not Belgium's exercise of diplomatic protection in the form of a lump sum agreement.

⁸⁹ Flauss (n 8 above) 25; ILC Special Rapporteur's Second Report on Diplomatic Protection (n above) para 77.

⁹⁰ ILC Special Rapporteur's First Report on Diplomatic Protection (n above) para 79; J Kokott 'The duty to protect and to ensure human rights under the Inter-American System of Human Rights' in E Klein (ed) *The duty to protect and to ensure human rights* (2000) 274-275.

⁹¹ ILC preliminary Report on Diplomatic Protection (n 15 above) paras 45-48.

on Human Rights and article 1 of its first Protocol,⁹² the European Court found that individuals had the right to a share of compensation obtained from an agreement resulting from their State's exercise of diplomatic protection.⁹³ Similar arrangements were made in the 1950s by France, the UK, and the United States when those States set up commissions to distribute compensation received from Eastern European countries after World War II.⁹⁴ This indicates that a State concluding a compensation agreement as a result of the exercise of its right to diplomatic protection gives rise to an individual right to a share of the compensation under the European Convention on Human Rights. The individuals whose claims were espoused by their State of nationality thus have a right to a share of the compensation received by the State. They do not, however, have a right to directly invoke diplomatic protection or to have the lump sum agreement itself subjected to judicial review; this remains strictly the right of a State. Considering that there is no individual right to diplomatic protection found in international human rights law and general international law, there is no basis for diplomatic protection as an international obligation of a State. As such, diplomatic protection can only be an obligation of States if the States consent to such an obligation by incorporating it in their domestic legislation. There are some States that have included in their constitutions some measure of responsibility for their nationals abroad that is akin to diplomatic protection.⁹⁵ Some States offer support to their nationals abroad in their constitutions with stronger terms like 'guarantees', 'duty', or 'entitlement'.⁹⁶ However, this constitutional responsibility is formulated not as a legal obligation but more as a moral duty, superseded by

⁹² Article 6 of the European Convention on Human Rights provides for the right to fair trial whereas article 1(1) of the first Protocol to the Convention speaks of the right to protection of property.

⁹³ *Beaumont v France* ECHR (24 November 1994) Ser A 296-B.

⁹⁴ ILC Preliminary Report on Diplomatic Protection (n 15 above) para 46.

⁹⁵ 'The People's Republic of China protects the legitimate rights and interests of Chinese nationals residing abroad and protects the lawful rights and interests of returned overseas Chinese and of the family members of Chinese nationals residing abroad' Article 50 of the Constitution of the People's Republic of China; 'The Russian Federation shall guarantee its citizens protection and patronage abroad' Article 61(2) of the Constitution of the Russian Federation. For more examples constitutional guarantees of protection of nationals abroad, see ILC Special Rapporteur's First Report on Diplomatic Protection (n above) paras 80-93.

⁹⁶ As above; 'It shall be the duty of the State to protect citizens residing abroad as prescribed by Act' article 2(2) of the Constitution of the Republic of Korea; 'It is the duty of the state to protect the rights and interests of citizens resident abroad' Article 31 of the Constitution of Guyana.

the national interests of the State.⁹⁷ It is not clear if these constitutional guarantees give rise to a right enforceable in the courts of those States.⁹⁸ These constitutional guarantees of protection of nationals abroad are arguably about the State's obligation to extend consular services to the said nationals rather than an obligation to exercise diplomatic protection.⁹⁹ This very limited practice is not indicative of a development of the legal nature of diplomatic protection from being the discretionary right of States to being an individual right. As such third-party claimants cannot compel their State to espouse their claims and protect their interests against the wrongful actions of the UN peacekeeping mission because there is no individual right to diplomatic protection under international law and there is scant evidence of such a right in national laws.

Although there is no individual right to diplomatic protection, the concept of individual rights is very relevant to the discourse on the willingness of a State to espouse the claims of its nationals. The human rights of individuals on the international plane impose corresponding obligations on the State to realise them. In turn, these corresponding obligations when breached entail the international responsibility of the State.¹⁰⁰ It has been established above that there is no individual right to diplomatic protection in international law. However, fundamental rights that give rise to obligations to protect them could arguably lead to an indirect obligation to exercise diplomatic protection. ILC Special Rapporteur Dugard briefly evaluated how the breach of fundamental norms of international law, such as *jus cogens*, can possibly lead to a change in the nature of diplomatic protection.¹⁰¹ He assessed whether diplomatic protection can be required of a State if its nationals are harmed in the breach of a *jus cogens* norm. To that effect, Special Rapporteur Dugard held the following:

⁹⁷ ILC Special Rapporteur's First Report on Diplomatic Protection (n 8 above) para 81-85; ILC Special Rapporteur's Preliminary Report on Diplomatic Protection (n 15 above) para 48; Article 51 of the Constitution of the People's Republic of China.

⁹⁸ ILC Special Rapporteur's First Report on Diplomatic Protection (n 8 above) para 80.

⁹⁹ LT Lee *Consular law and practice* (1991) 124.

¹⁰⁰ Articles 3 & 4 of the the Articles on the responsibility of States for internationally wrongful acts (2001) hereafter ARS.

¹⁰¹ ILC Special Rapporteur's First Report on Diplomatic Protection (n 8 above) para 89.

Today there is general agreement that norms of *jus cogens* reflect the most fundamental values of the international community and are therefore most deserving of international protection. It is not unreasonable therefore to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*. If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.¹⁰²

Dugard's statement is not a conclusive finding that the violation of a *jus cogens* norm can change the nature of diplomatic protection from the discretionary right of a State to an obligation. It is rather a suggestion that an argument could be made that if the fundamental rights of nationals abroad are violated in the breach of *jus cogens* norms, a State can be obligated to exercise diplomatic protection. More notably, Dugard's argument is based on obligations derived from human rights treaties. Human rights treaties impose obligations on States to protect individuals against the violation of the rights contained therein and to ensure the provision of adequate means of redress when those rights are violated. According to Dugard, if a claimant's fundamental rights as contained in a human rights treaty are violated by another State engaged in the grave breach of *jus cogens* norms, then, based on the State's treaty obligation to provide adequate means of redress, the claimant's State of nationality could arguably be obliged to espouse the claims.

The focus of this portion of the study is precisely about how fundamental individual human rights can to a certain extent affect the discretionary nature of diplomatic protection and even absent the violation of a *jus cogens* norm. It should be determined whether the individual rights of third-party claimants and the corresponding obligations of the State can be used to overcome the challenge of the unwillingness of States in the espousal of claims against the UN. Invoking

¹⁰² As above.

the breach of the obligations of a UN host State is one such measure that could indirectly compel the state to exercise diplomatic protection.

As expanded upon in the third chapter of this study, the right of access to justice is a fundamental right firmly established in international law. This right is contained in multiple international and regional human rights treaties and has crystallised into customary international law.¹⁰³ It has also been discussed at length how this right entails a corresponding obligation on the States to realise it. Under the obligation to realise the right of access to justice, the State has both a negative duty to not obstruct access to justice on its territory and a positive duty to implement mechanisms designed to give effect to the right.¹⁰⁴ The State hosting a UN peacekeeping mission still has an obligation to provide access to justice to individuals on its territory derived from human rights treaties and customary international law. This entails the duty to ensure individuals' access to justice is not obstructed and the duty to put in place mechanisms to give effect to individuals' access to justice. This obligation remains irrespective of the UN's concurrent obligation to provide access to remedies to third-party claimants. By entering into a hosting agreement with the UN, the host State pledges to respect and abide by the immunity of the UN in its courts.¹⁰⁵ Individuals' access to justice is then limited to the alternative dispute resolution mechanisms provided by the UN. This represents a restriction of the individuals' right of access to justice and not a transfer of the State's obligations to realise access to justice, which is in line with the rule of non-transferability of obligations by a State.¹⁰⁶ This rule comes from the international law principle of non-circumvention of State obligations through an international organisation.¹⁰⁷ Non-circumvention of obligations refers to the international law principle that States cannot evade their obligations by

¹⁰³ See Chapter 3 of this study.

¹⁰⁴ As above.

¹⁰⁵ Paras 3 & 4 of the 'Comprehensive review of the whole question of peacekeeping operations in all their aspects: Model Status of Force Agreement for peacekeeping operations' (9 October 1990) UNGA A/45/594. Hereafter Model SOFA.

¹⁰⁶ E Leinarte 'The principle of independent responsibility of the European Union and its member States in the international economic context' (2018) 21 *Journal of International Economic Law* 174-176.

¹⁰⁷ As above; 'Third Report on Responsibility of International Organisations by Giorgio Gaja, Special Rapporteur' (13 May 2005) UN Doc A/CN.4/553 para 35-36. Hereafter, ILC Special Rapporteur's Third Report on the Responsibility of International Organisations.

creating or acting through an international organisation.¹⁰⁸ Evidently, a way for a State to evade obligations would be to transfer the said obligations to an international organisation thereby absolving itself of the responsibilities attached thereto. To avoid this specific circumvention, the rule of non-transferability holds that a State can transfer its sovereign powers to an international organisation, but it cannot transfer its obligations.¹⁰⁹ The jurisdiction of a State's courts over claims arising from acts that occurred on its territory is part of the sovereign powers of a State.¹¹⁰ As such, the host State's compliance with the UN's immunity from the jurisdiction of its national courts must be considered as a transfer of sovereign powers of courts' jurisdiction rather than a transfer of the State's obligation to ensure access to justice on its territory. Thus, a State hosting a UN peacekeeping mission retains its obligation to provide access to justice regardless of its arrangements with the UN.

Considering the host State retains the obligation to provide access to justice, it can restrict the individual's right of access to justice. It is accepted that the fundamental rights of individuals may be restricted. However, the right cannot be restricted to such an extent that the essence of this right is altogether extinguished.¹¹¹ Moreover, under the principle of non-circumvention of obligations, when States transfer power to international organisations, they are required to ensure that they provide equal protection of fundamental rights.¹¹² This is done to avoid having a State take measures that regress the human rights standards that it generally provides. In international human rights law, the rule of non-retrogression specifically addresses this issue of regression in the protection of human rights.¹¹³ In terms of this rule, a State that has taken

¹⁰⁸ As above; *Waite & Kennedy v Germany* (18 February 1999) ECHR 26083/94 para 67; *Matthews v the United Kingdom* (18 February 1999) ECHR 24833/94 para 32.

¹⁰⁹ As above.

¹¹⁰ M Dean & OL Larsson 'Sovereignty and sovereign powers in global governmentality' in J Busse (ed) *The Globality of Governmentality: Governing an Entangled World* (2021).

¹¹¹ 'It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired' *Waite & Kennedy v Germany* (n above) para 43.

¹¹² *Waite & Kennedy v Germany* (n above) para 63; *Matthews v UK* (n above) para 64.

¹¹³ BTC Warwick 'Unwinding retrogression: Examining the practice of the Committee on Economic, Social and Cultural rights' (2019) 24.1 *Human Rights Law Review*; S Samtani 'International law, access to courts and non-retrogression' (2020) 10 *Constitutional Court Review*.

progressive steps in the realisation of human rights may not take legal measures that would undermine the existing legal protection.¹¹⁴ In addition, the State must rectify any situation that results in the retrogression of existing legal standards.¹¹⁵ The non-retrogression rule is in step with the requirement of progressive realisation of human rights. In terms of this rule, as States take steps towards the realisation of human rights, there must be safeguards to ensure there is no retrogression.¹¹⁶ Considering the progressive realisation of human rights concerns socio-economic rights, the concept of non-retrogression is mostly applied to those rights.¹¹⁷ However, there have been instances of a broader application of the rule of non-retrogression extending to other rights such as the right to water, health, social security, labour rights, environment, equality, and non-discrimination.¹¹⁸ Sound arguments have been made that the wide application of this rule also extends to the right of access to justice.¹¹⁹ It is thus argued that when a State concludes a SOFA with the UN without ensuring the implementation of the provisions guaranteeing claimants' right of access to justice, the host State is effectively retrogressing its human rights standard regarding access to remedies.

It has already been established that the UN has no appropriate mechanism in place as mandated by its section 29 obligation. It has also been established that as the UN does not recognise its wider obligation to provide access to remedies under general international law, it has no mechanism in place to discharge that obligation. The sole mode of dispute resolution for third-party claims expressly provided for in the SOFA is the SCC. Though this commission represents an

¹¹⁴ *CESCR General Comment No. 3: The nature of states parties' obligations* (art 2, para 1, of the Covenant) (14 December 1990) UN Doc E/1991/23 para 9, hereafter General Comment No 3; Samtani (n 113 above) 218.

¹¹⁵ General Comment No 3 (n 114 above) para 9; Warwick (n 113 above) 467-468; Samtani (n 113 above) 217.

¹¹⁶ As above.

¹¹⁷ Articles 2, 13(b) & (c), 14 and 22 of International Covenant on Economic, Social and Cultural Rights of 1966. Hereafter, ICESCR.

¹¹⁸ 'Human Rights Council: Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque' (11 July 2013) UN Doc A/HRC/24/44 paras 13-17; *Jorge Odir Miranda Cortez v El Salvador* (20 March 2009) IACHR No. 27/09 paras 105-106; *Five Pensioners v Peru* (28 February 2003) IACHR Series C No 98 para 147; *Dismissed Employees of Petroperu & Others v Peru* (23 November 2017) IACHR Series C No 344 para 196; For more national and international case law on the wide application of the non-retrogression principle, see Samtani (n 113 above) 219.

¹¹⁹ Samtani (n 113 above) 219-225.

appropriate mode of dispute resolution under section 29 at face value, it has never been established by the UN in any of its peacekeeping missions. So, when the UN does not provide these mechanisms or when the provided mechanism does not accept a vast category of third-party claims, the claimants' right of access to justice is effectively extinguished. As such, when a host State concludes a SOFA with a UN peacekeeping mission, agreeing to respect the UN's jurisdictional immunity from the host State's courts with the knowledge that the UN will not put in place appropriate alternative mechanisms of dispute resolution, the State is essentially extinguishing the right of access to justice. Granted, the right of access to justice is only extinguished for individuals with claims against the UN. However, the host State can still be deemed to be breaching its human rights obligation to provide access to remedies. This is because the state did not ensure equal protection of rights when it transferred sovereign powers to the UN and the State for those claimants. The State thereby regressed its human rights standards by not ensuring adequate access to justice to a category of individuals on its territory. It is thus argued that absent an individual right to diplomatic protection or conversely an obligation on the State to exercise diplomatic protection, invoking the breach of the host State's international obligation to provide access to justice can be a strategy to overcome the challenge of the host State's unwillingness to exercise diplomatic protection. Instead of attempting to secure a judicial review of the host State's decision regarding its exercise of diplomatic protection for which there is no legal basis, it is proposed that third-party claimants base their claim on the host State's breach of the obligation to provide access to justice. This violation of the host State's obligations can be invoked in the national courts of the host State or in regional courts and other human rights treaty mechanisms permitting individual complaints. It is in essence an indirect way to compel a State to exercise diplomatic protection or else be in breach of its international and national obligation to provide access to remedy. It could, at the very least, lead to a judicial review of the host State's refusal to exercise diplomatic protection.

While the above addresses the State's willingness to exercise diplomatic protection, the host State's inability to do so remains an intractable challenge. Diplomatic protection, as discussed, entails a State espousing the claims of its nationals. This presupposes the existence of a functioning government capable of

espousing the claims. In the context of peacekeeping, this is not always guaranteed. There have been UN peacekeeping missions in conflict areas without a functioning central government. The UN missions in Somalia, UNOSOM I and UNOSOM II, both started their operations after the collapse of Somalia's central government.¹²⁰ It is fairly evident that there can be no exercise of diplomatic protection without a government to espouse the claim on behalf of third-party claimants.¹²¹ UN peacekeeping missions also operate in contested areas claimed by several States simultaneously. The UN Mission for the Referendum in Western Sahara (MINURSO) operates in the contested area of Western Sahara simultaneously claiming its own independence as a sovereign nation and being claimed by Morocco as part of its territory.¹²² Its legal status remains undetermined although it is considered by the UN as a 'non-self-governing territory'.¹²³ Moreover, the case of conflicting governments or multiple States claiming sovereignty over a single territory would raise challenging questions about the State with the right to espouse the claims. It would also raise questions about the nationality of the claimants, which is an important precondition to the exercise of diplomatic protection.¹²⁴ ILC Special Rapporteur Dugard briefly assessed the aforementioned situation of people living in territories administered by States that do not exercise sovereignty over the territories.¹²⁵ Dugard noted some instances of diplomatic protection being used by the administering State on behalf of the people living in those protectorates, mandates, or trust territories.¹²⁶ In those instances, the administering State exercised protection based on the institutional relationship between the administering State and the territory under administration.¹²⁷ Dugard, however, did not discuss the potential issues this institutional arrangement between the administering State and the administered territories could pose to the exercise of diplomatic protection. This is due to the fact that there is very little practice on the matter that could inform on the

¹²⁰ UNSC Resolution 751 (1992); UNSC Resolution 814 (1993).

¹²¹ Administrative and budgetary report (n **Error! Bookmark not defined.** above) para 37.

¹²² UNSC Resolution 690 (1991).

¹²³ Chapter XI of the UN Charter.

¹²⁴ 'Fifth Report on Diplomatic Protection, by Mr John Dugard, Special Rapporteur' (4 March 2004) ILC Doc A/CN.4/538 p46. Hereafter, ILC Fifth Report on Diplomatic Protection.

¹²⁵ As above.

¹²⁶ As above.

¹²⁷ As above.

potential challenges. However, it is clear that in a situation where an administering State is in conflict with the territory under administration, the possibility of an institutional agreement between the two regarding diplomatic protection would be slim. In short, the fact that a State's espousal of claims requires a functioning government is challenging in light of the realities of some peacekeeping missions.

5.4 Conclusions

In short, diplomatic protection is a process that involves the UN host State in the resolution of third-party claims against UN peacekeeping missions. Espousing the claims of third-party claimants is a tool that can be used by host States to address the remedy gap in third-party claims against UN peacekeeping missions. This tool also serves to ensure the protection fundamental rights of its nationals in keeping with the international human rights rule on non-retrogression. Diplomatic protection as it stands, however, is the discretionary right of a state. As such, host States cannot be compelled to espouse the claims of its nationals in dispute with the UN. Moreover, the nature of diplomatic protection requires a functioning State or government capable of espousing claims. As such this tool's value is limited to peacekeeping missions operating in an area with a functioning government. Despite these limitations, diplomatic protection as a tool presents great potential to bridge the remedy gap in third-party claims against UN peacekeeping missions.

Chapter 6

Conclusions and recommendations

6.1 On the immunity of UN peacekeeping missions

UN peacekeeping missions derive their jurisdictional immunity from article 105 of the UN Charter as specified and supplemented by section 2 of the Immunities Convention. The UN's immunity under these instruments is absolute and may only be limited by an express waiver. This is confirmed by the text, context, and purpose of section 2 of the Immunities Convention. In addition to the content of section 2, practice subsequent to this treaty shows that the UN's immunity has been consistently interpreted as absolute in scope since the entry into force of the Convention. Indeed, the UN's immunity is so thoroughly absolute that it even binds States that are not parties to the Convention, albeit in an indirect manner through subsequent agreements. Moreover, the UN still benefits from absolute immunity even in territories it administers as part of its peacekeeping missions. This is notable because the main rationale for the UN's immunity is to protect its functional independence from undue interference by its Member States through their judiciary. When a UN peacekeeping mission is administering a territory, the UN acts as the *de facto* government of the territory. As such, the threat of undue interference by a Member State judiciary is non-existent. However, even in the absence of such a potential threat, the UN's immunity remains resolutely absolute thus rendering the UN immune to its own jurisdiction in those territories. Hence, the UN's immunity is absolute and unconditional regardless of the nature of its peacekeeping activities. The unconditionality of the UN's immunity refers to the fact that the UN retains its immunity from national jurisdictions regardless of whether it provides alternative mechanisms of dispute resolution as mandated by section 29 of the Immunities Conventions.

There is no international or regional court with jurisdiction over the UN which grants direct access to individuals. The ICJ as an international forum of dispute resolution that has been used in matters involving the UN can only hear

contentious cases if they involve States. When it comes to the UN, the ICJ can only hear matters submitted by the UN in a request for an advisory opinion of the court on a legal question. As such, there is no judicial forum, international or national, independent of the UN that has jurisdiction to hear a third-party claim against the UN.

The UN's immunity contributes to the remedy gap in the sense that third-party claims without access to the UN's alternative dispute resolution mechanisms cannot be heard by national courts. This means that should there be adequate alternative modes of dispute resolution, the UN's immunity would not be a factor in the denial of justice of third-party claims against the UN. Admittedly, restricting the UN's immunity and subjecting the Organisation to the jurisdiction of national courts would resolve the remedy gap in third-party claims against the UN. However, based on the findings of this study, the curtailing of the UN's immunity is not recommended for the following reasons: First, there is no basis to argue for an interpretation of the UN's immunity under the UN Charter or the Immunities Convention that would restrict it in scope. An in-depth study of the UN's immunity under both instruments confirmed that the UN can only be subjected to the jurisdiction of national courts if it expressly waives its immunity. As such, the UN's immunity cannot be restricted by any measure short of amending the UN Charter and the Immunities Convention. The aim of this study is to provide effective and feasible recommendations aimed at bridging the remedy gap in third-party claims against UN peacekeeping missions. In this regard, recommending the amendment of the Immunities Convention is not sound as there are no reasonable prospects of seeing the Immunities Convention amended to curtail the UN's immunity.

Secondly, it is important that the UN's immunity be maintained in its current scope if the Organisation is to be protected from undue interference by Member States through their courts. Despite the procedural hurdles on claims, the rationale behind the UN's expansive immunities is legitimate. Restricting the UN's immunities would create more issues than it would address. Indeed, a restriction of the UN's immunity may, on the one hand, address the remedy gap to a certain extent but on the other it would place the UN in a very precarious situation. Member States' judiciaries would have the authority to review UN policies and

issue court orders to the UN. This, in addition to the potential of undue interference in the affairs of the UN, would place the Member States whose judiciaries review UN policies in a position of superiority over other Member States. Regardless of the impartiality, transparency, and overall effectiveness of a State's judiciary, the fact of the matter remains that submitting the UN to the jurisdiction of a Member State's court would lead to one Member State being able to alter or otherwise influence UN policy through its courts. This is in conflict with the agreed upon procedure of an equal vote by Member States in the UN General Assembly.

Thirdly, following this thesis' study on the UN's immunity and its obligation under international law to provide access to alternative mechanisms of redress, there is no reason to recommend a curtailing of the UN's immunity. Granted, the UN's immunity is absolute and unconditional and this contributes to the remedy gap to a certain extent. However, the remedy gap can be addressed without curtailing the UN's immunity. Indeed, though section 2 of the Immunities Convention grants absolute and unconditional immunity to the UN, section 29 of the Convention, which provides for the UN's obligation to provide alternative dispute resolution mechanisms to third parties with claims against the UN, is understood as the necessary supplement to section 2. Section 29 is intended to mitigate the effects of section 2 on claims and to prevent the substantive matter of a claim from being extinguished as a result of the procedural bar placed by the UN's immunity. Should the UN's obligation to provide access to remedies under section 29 and under general international law be implemented in an appropriate and adequate manner by the UN, its immunity from national jurisdictions would be irrelevant. The scope of the UN's immunity only contributes to the remedy gap; it does not create the remedy gap. As such, based on the findings of this study, it is proposed that solutions be found within the current framework of the UN's immunities. Essentially, it is argued that the immunity of the UN needs not be restricted to address the remedy gap.

However, if the UN's immunity must be addressed as a component of the remedy gap, it is recommended that the UN adopts a general policy of immunity waiver when the interests of justice so demand. The issue with the UN's immunity is that it gives a sense of impunity when third-party claims are extinguished due to the

lack of a forum with jurisdiction. This sense of impunity has seriously eroded the credibility of the Organisation as a whole, especially in the Global South where most UN peacekeeping missions operate. As such, it is recommended that the UN should adopt a general policy of waiver of immunity if maintaining its immunity in a particular case would result in denial of justice. Denial of justice in this context refers to a legitimate claim against the UN that is not granted access to any mechanism of dispute resolution. The discourse below offers detailed recommendations regarding the UN's alternative modes of dispute resolution. Should these recommendations be implemented by the UN, there would be no denial of justice for third-party claimants. However, following the implementations of these recommendations, in the rare cases where a legitimate claim is still without a forum with jurisdiction, then the UN should have an express policy of immunity waiver. It should be noted that the UN already has a policy of waiving the immunities of its officials if the interests of justice so demand. For the purpose of bridging the remedy gap, it is recommended the UN expands this policy to include the waiver of the immunity of the UN itself. This general policy of immunity waiver is especially recommended for those territories administered by the UN as the de facto government. In those territories, the justice system is administered by the UN thereby removing the threat of undue interference by a Member State. Considering that the rationale of the UN's immunity is not applicable, the UN should waive its immunity at the start of its administration of a territory and reinstate it once the territory is sovereign. Territories recently administered by the UN as a governing authority, namely Timor-Leste and Kosovo, have already gained their independence. However, there are many third-party claims that were extinguished due to the UN's immunity from its own jurisdiction. The *Kosovo Lead Poisoning* case is but one example of tort claims arising from the UN's administration of territory. To resolve such claims, it is recommended that the UN should either waive its immunity with regard to the claims that arose during its administration or provide those claims with the alternative dispute resolution mechanism recommended below.

The recommendation of a general policy of immunity waiver for a specific purpose is not unrealistic. In fact, this recommendation is based on the early practice of the UN. As discussed in the second chapter of this study, in the early days of the UN, the Organisation routinely waived its immunity for insurance purposes. For

the insurer of the UN to defend against any suit brought against the UN, it needed the UN to waive its immunity. Accordingly, the UN routinely waived its immunity so its insurer could defend suits on its behalf. While express waiver was required in each and every case, it was so routine for insurance claims that the UN could be considered as having a general policy of immunity waiver for that specific purpose. As such, it is entirely feasible that following its past practice, the UN can adopt a policy to waive its immunity for specific cases. This recommendation is, however, not without its own shortcomings; it is entirely dependent on the UN's willingness to waive its own immunity. Indeed, the glaring issue with this recommendation is that the UN is aware that its immunity results in denial of justice for those third-party claims not granted access to its alternative mechanism of dispute resolution. The UN is also aware that it can waive its immunity for a specific purpose and has done so in the past. Yet, it has never waived its immunity purely in the interests of justice, even in instances where it is obvious that a legitimate claim would be extinguished as a result. It can only be surmised that the UN is not willing to waive its immunity and expose itself to liability. Considering that the UN cannot be compelled to waive its immunity, this recommendation, while practical, reasonable, and viable, cannot be achieved without the UN's willingness to commit to addressing the remedy gap.

6.2 On the UN's alternative modes of dispute resolution

The remedy gap in third-party claims against UN peacekeeping missions can be addressed without restricting the UN's immunity under section 2. This is because the UN has an obligation to provide access to remedies to third-party claims derived from multiple sources of international law. Indeed, section 29 of the Immunities Convention compels the UN to provide access to alternative mechanisms of redress to third-party claims of a private law character. In addition to section 29, the UN has an obligation to provide access to remedies derived from general international law. It is precisely because of what this obligation to provide access to remedies entails that it is argued that the remedy gap can be addressed without unduly curtailing the UN's immunity.

Under section 29 of the Immunities Convention, the UN has a duty to provide appropriate alternative mechanisms of dispute resolution to third-party claims of a private law nature. This provision is intended to mitigate the effects of the UN's

immunities on third-party claims. As such, this provision imposes a direct obligation on the UN to provide access to alternative avenues of redress to those third-party claims that cannot be heard by a court due to the UN's immunity. However, as observed in the third chapter of this study, section 29 is broadly and vaguely worded. As a result, the UN has interpreted the provision as granting it the discretion to implement this obligation as it sees fit. In fact, the UN's unilateral interpretation of its treaty obligation is the one factor that directly creates and exacerbates the remedy gap. As observed in this study, the UN interprets its treaty obligation in a manner that excludes a host of claims. Section 29 is expressly about providing access to remedies to claims of a private law character. Accordingly, the exclusion from section 29 mechanisms of claims that do not qualify as private law claims is in line with the provision's content. However, the UN's unilateral characterisation of claims has been inconsistent at best and has not aided in the clarification of what constitutes a claim of a private law character with a great deal of specificity. This issue is especially emphasised when it comes to third-party claims arising out of peacekeeping activities.

Third-party claims emanating from the UN's peacekeeping missions do not fit neatly into the private-public law distinction established in the early days of the Immunities Convention. As observed, tort claims arising out of peacekeeping activities can be based on both the violation of the UN's Charter-mandated functions and on the UN's violation of the national laws of its host State. As a result, claims of a so-called 'hybrid' character have been excluded from the ambit of section 29 mechanisms. This has led to the exclusion from the scope of section 29 of mass third-party claims. Mass third-party claims at the crux of this study such as the *Haiti Cholera Dispute* and the *Mothers of Srebrenica* case illustrate the issue of the characterisation of claims as hybrid, thus excluding them from the ambit of section 29 and leaving them without a forum of dispute resolution. The exclusion of these claims as a result of the UN's unilateral characterisation of claims is what creates the remedy gap in third-party claims against UN peacekeeping missions.

In addition to the characterisation of claims, the UN has interpreted section 29 in a manner that excludes even more claims by imposing temporal and financial limitations. As a result, claims that exceed these limitations are excluded from

the scope of section 29. This exacerbates the remedy gap as private law claims that are otherwise receivable under section 29 are excluded from the scope of the provision on the sole basis of the UN's policies of limitation of liability. It can thus be concluded that the wording of section 29 of the Immunities Convention and the UN's subsequent interpretation thereof are the root causes of the remedy gap in third-party claims against UN peacekeeping missions.

The UN's restrictive interpretation of its obligation to provide access to remedies under section 29 creates a remedy gap for those claims excluded from the scope of section 29. For those claims falling within the UN's interpretation of the scope of its obligation under section 29, the UN has been found to exacerbate and thus widen the remedy gap as well. This is due to the fact that the UN has no standing mechanism of dispute resolution that can be considered appropriate as mandated by section 29. The UN's SCC, though, provided for in all SOFAs, has never been established. The local claims review boards have been found to fall below almost all standards of adequate administration of justice. In addition, they are very slow and notoriously backlogged, leading to multiple claims never being settled. Owing to this, local claims review boards as a dispute resolution mechanism cannot be considered as an appropriate mechanism under section 29. The lump sum agreement as a dispute resolution mechanism has been found to be an appropriate implementation of section 29. This agreement also presents several advantages in the resolution of mass third-party claims. However, it is an ad hoc mechanism that was only employed once by the UN in the 1960s.

Under general international law, the UN has an obligation to provide access to remedies to third-party claims. This obligation comes from the human right of access to justice which binds the UN as a subject of international law and transitively through its Member States' human rights obligations. In terms of the application of derogation norms, the UN's obligation to provide access to remedies to third-party claims of a private law character is regulated by section 29 which prevails over general international law. However, claims of a public law character and claims characterised as hybrid remain within the scope of the UN's general international law obligation. The UN has not acknowledged in any shape or form this general international law-derived obligation to provide access to remedies to third-party claims of a public law character. As a result, it has no policy or

mechanism in place to address those claims. The UN can thus be said to be in breach of its general international law obligation to provide access to remedies. This breach leads to third-party claims of public law or of a hybrid character being denied access to forums of dispute resolution as the UN has never created any mechanism of dispute resolution for such claims. The UN's non-recognition of its general international law obligation to provide access to remedies is what creates the remedy gap in third-party claims of a public law character or claims considered as hybrid.

As can be gauged from the above, the remedy gap in third-party claims against UN peacekeeping mission is due to the following factors: First, an inadequate legal framework that is too vague about the UN's treaty obligation to provide access to remedies; second, the UN's inconsistent and exclusionary interpretation of section 29; third, the UN's inadequate discharge of its treaty obligation which amounts to a breach of the said treaty obligation; and last, the UN's disregard for its obligation to provide access to remedies under general international law. All these factors conspire to exclude a large category of claims from having access to a mechanism of dispute resolution. This lack of access to remedies is exacerbated by the UN's immunity from national courts which renders these claims without access to a forum with jurisdiction. As such, the UN's jurisdictional immunity becomes an obstacle for third-party claimants after the failure of the UN to adequately discharge its obligation to provide access to remedies. It is thus proposed that the remedy gap issue be addressed at the level of the UN's interpretation and discharge of its obligation to provide access to remedies.

To address the issue of the inadequate legal framework, namely the text of section 29 and the UN's exclusionary interpretation thereof, the following is recommended. It is proposed that an official interpretation of the contents of section 29 be issued by the UN. This means that there is a need to clearly state what section 29 entails. A treaty provision can be interpreted through its text, context, and purpose. While the purpose of section 29 is clear, the text and context are not. When the text and context of a provision are unclear, the practice subsequent thereto can be used as an additional means to interpret the provision. However, as the UN is the sole bearer of the obligation contained in section 29, it is only the practice of the UN that can be used to interpret the provision. UN

practice of section 29 is inconsistent and uncertain. This is due to the fact that the UN's interpretation of section 29 is unclear. Indeed, the UN merely explains the mechanisms it puts in place in the discharge of its section 29 obligation without elaborating on what this specifically entails. For instance, the UN has not issued clarification as to how it interprets the requirement that its alternative modes of dispute resolution be 'appropriate'. Moreover, the distinction between private and public law disputes remains unclear because the UN merely rejects claims as being of a public law character without elaborating on how it arrived at that conclusion. As such, it is recommended that the UN issues an official interpretation of section 29. This interpretation needs to be comprehensive and needs to rest on the UN's practice as evidence of its interpretation. This means that the UN will have to detail its past practice with regard to its characterisation of third-party claims made against its peacekeeping missions. This will require the UN to publish information it usually holds confidential or keeps under a 20-year release embargo. The release of the UN's official interpretation of section 29 will provide more certainty as to what claims fall within the scope of its treaty obligation and what claims are excluded.

It was concluded that the UN's alternative modes of dispute resolution cannot be deemed 'appropriate' as mandated by section 29. To address this, it is recommended that the UN establishes the SCC provided for in each SOFA. Indeed, it was established in this study that local claims review boards are, in fact, not handling third-party claims so efficiently that there is no need for an SCC as asserted by the UN. It was also further established that the UN's claim that host States showed no interest in the establishment of the commission was not entirely accurate. The UN discouraged the sole recorded attempt by a host State to participate in the resolution of third-party claims against UN peacekeeping missions. This recorded attempt refers to the UNEF-Egypt situation as discussed in the study. As such, the UN should establish the SCC as local claims review boards have proved to be unable to handle the volume of third-party claims against the peacekeeping missions. Local claims reviews are still a useful internal process that enables the UN to resolve smaller day-to-day claims. As such, they should be maintained to operate as initially intended. The SCC would thus be the forum of appeal for claims that could not be resolved by the review boards and a forum of adjudication of claims that exceed the scope and mandate of the review

boards such as mass tort claims. This would result in the UN having mechanisms that could be considered 'appropriate' under section 29. Indeed, the review boards as administrative bodies would be reinforced by a judicial appeal in the form of the SCC. This is in keeping with the international law standards of fairness and justice in judicial proceedings.

It was concluded that the UN does not have mechanisms in place to discharge its general international law obligation to provide access to remedies. To address this breach of the UN's obligation, it is recommended the SOFAs be amended to include a provision on diplomatic protection by a host State for its nationals with public law or hybrid claims against the UN. The UN does not grant access to remedies to third-party claims of a public law character and the so-called hybrid claims because they are considered as entailing the review of its constitutional functions. This is because the UN Charter does not grant any direct rights to individuals. Consequently, individuals do not have the legal standing for the judicial review of UN Charter-based functions and policies. Indeed, hybrid and public law claims can only be pursued by Member States through diplomatic channels and other international law processes. The diplomatic protection process has been identified as one such process. The diplomatic protection process can lead to the resolution of public law claims and hybrid claims. It is recommended that the SOFA includes a provision on the modalities of negotiations between the UN and the host State relating to the access to remedies of third-party claimants with claims of a public law or hybrid character. Diplomatic protection can lead to a lump sum agreement which has been found to be an appropriate mechanism of dispute resolution for mass claims. The addition of diplomatic protection in the SOFA would be greatly beneficial to all parties involved. For the UN, it would allow the Organisation to settle mass third-party claims in a speedy and cost-effective manner. Diplomatic protection would allow the host States to ensure the maintenance of its standards of human rights protection in line with the norm of non-retrogression of human rights. Indeed, it was established that host States are in breach of their human rights obligations when they conclude SOFAs with the UN with the knowledge that it will result in the extinction of some claimants' right of access to justice. For third-party claimants, the inclusion of diplomatic protection in the SOFA would permit them to overcome the challenge of the discretionary nature of diplomatic protection. Under international law and the

national laws surveyed in the fifth chapter of this study, States cannot be compelled to exercise diplomatic protection. A State's refusal to exercise diplomatic protection cannot be brought under judicial review. If a State was to espouse claims of its nationals, the manner in which it exercises diplomatic protection cannot be judicially reviewed either. However, including diplomatic protection in the SOFAs as a mode of dispute would give rise to an enforceable right by third-party claimants.

To conclude this study, it is reiterated that the remedy gap in third-party claims against UN peacekeeping missions is created and maintained by the UN through its policies and practice. As such, it is the responsibility of the UN to address this issue. The recommendations provided, if implemented, would resolve or at the very least greatly alleviate the issue of the remedy gap. The continued denial of justice of vulnerable communities by the very entity that was intended to protect them is contrary to the objectives and the very *raison d'être* of the UN. The current situation is untenable and, if it continues unresolved, it will have long-lasting damaging impacts on the UN and its peacekeeping missions.

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