The third-party liability of international organisations: towards a 'complete remedy system' counterbalancing jurisdictional immunity

Henquet, T.S.M.

3 SECTION 29(A) OF THE GENERAL CONVENTION

3.1 Introduction

In addressing the first research question of this study, the aim of this chapter is to interpret Section 29(a) of the General Convention and, on the basis of available information, assess the UN's implementation thereof in light of the international organisations law framework governing third party remedies and against the broader backdrop of the rule of law. As this chapter concludes at the outset, Section 29 of the General Convention is binding on the UN; however, shortcomings in the implementation thereof have no bearing on the UN's entitlement to immunity from jurisdiction.

Upon providing an overview of the UN's implementation of Section 29(a), the chapter discusses the constituent elements of that provision, notably the terms 'private law character' and 'appropriate modes of settlement'. The travaux préparatoires of Section 29 of the General Convention, considered in the context of the former element, reveal that the provision was conceived as the counterpart to the UN's immunity under Article II, Section 2 of the General Convention.

This chapter concludes that the UN's implementation of Section 29(a) of the General Convention, is problematic. Not only is this implementation detrimental to third-party claimants, it also insufficiently protects the UN from national court interference.

This chapter is structured as follows. It begins by discussing the binding character of the General Convention, including Section 29, for the UN (section 3.2). Next follows a largely descriptive overview of the UN's practice under Section 29(a) (section 3.3). After introducing the key documents from which that practice can be gleaned, the overview is broken down per category of dispute. This is complemented by a more extensive introduction to the three case studies of the UN's alleged third-party liability, which were briefly introduced in chapter 1: the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic. Next follows a discussion of the UN's implementation of Section 29(a) (section 3.4). After general observations, the discussion turns to the interpretation of the terms 'private law character' and 'appropriate modes of settlement', respectively, and their implementation in practice. The analysis concerning the former includes a consideration of the travaux préparatoires and the aforementioned case studies. As to the latter, the critical appraisal of the various 'modes of settlement' currently used by the UN includes the nascent liability regime for third-party claims in connection with peacekeeping operations.

3.2 The UN is bound by the obligation under Section 29 of the General Convention

Two related issues require discussion at the outset. First, the General Convention is binding on the UN (subsection 3.2.1). Second, where the UN reneges on its obligation under Section 29 of the General

Convention, it incurs international responsibility towards the states parties to the General Convention. However, it does *not* in consequence forfeit its entitlement to immunity from jurisdiction under Section 2. That is, its jurisdictional immunity is not conditional on the UN's compliance with its obligations under Section 29 (subsection 3.2.2).

3.2.1 The General Convention is binding on the UN

Article 105 of the UN Charter reads as follows:[348]

> '(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
>
> (2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
>
> (3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.'

In furtherance of the latter part of Paragraph 3, during its first session, on 13 February 1946, the UNGA approved the General Convention in resolution 22A(I) and 'proposed it for accession by each member of the United Nations'.[349] The Convention was registered with the Secretary-General on 14 December 1946. Under Section 31, States can become parties to the treaty by way of accession only. As of 8 November 2021, the General Convention had 162 states parties.[350]

While only UN member states can accede to the General Convention,[351] the terms of the treaty suggest it was intended to be binding on the UN. Thus, for example, Section 35 provides (emphasis added):

> 'This convention shall continue in force as <u>between the United Nations and every Member</u> which has deposited an instrument of accession 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.'

Furthermore, of particular relevance for present purposes, as seen, Section 29 clearly imposes an obligation on the UN (emphasis added):

> 'The United Nations <u>shall make</u> 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

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[348] For an introduction to the General Convention, including its relationship to Art. 105 of the UN Charter and its binding nature for the UN, see generally A. Reinisch, 'Introduction to the General Convention' in A. Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (2016), 3.
[349] Preamble, para. 3.
[350] <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en> accessed 21 December 2021.
[351] Arts. 31-33 of the General Convention.

> Nations is a party;
> b. disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.'[352]

Likewise, Section 30 refers to differences arising out of the interpretation or application of the convention 'between the United Nations on the one hand, and a Member on the other hand'.[353]

The drafting history of the General Convention (discussed more fully below) confirms the understanding that the UN is bound by the General Convention. At one stage, the convention was being negotiated within a sub-committee of the Sixth Committee of the UNGA. According to the subcommittee's first report:

> 'The general convention on immunities and privileges of the United Nations is in a sense a convention between the United Nations as an Organization on the one part and each of its Members individually on the other part. The adoption of a convention by the Assembly would therefore at one and the same time fix the text of the convention and also import the acceptance by the United Nations as a body on their side of that text.'[354]

Though unable to accede to the General Convention, the UN's consent to be bound by it, in combination with the terms of the treaty, may be deemed to be enshrined in the UNGA approving it and proposing it for accession by UN member states.[355]

There is an unresolved issue, as explained by Reinisch: 'While the UN itself and many legal scholars seem to lean towards the view that the UN is a party to the General Convention, some have regarded it as only a third party beneficiary.'[356] In the *Reparation for Injuries* advisory proceedings before the ICJ, counsel for the UN argued:

> 'The United Nations has authority to enter into other international agreements. Thus, by virtue of Article 105, it is a Party to the Convention on Privileges and Immunities of the United Nations, which

[352] According to Schmalenbach 'there are reasonable and convincing grounds to enshrine the duty of the UN to make available an alternative dispute settlement within the UN Charter itself: Art. 105 para 3 UN Charter indicates that the entire General Convention is perceived as determining the details of the application of paras 1 and 2'. Schmalenbach (2016), para. 2 (fn. omitted).
[353] Another example is Section 20 of the General Convention which stipulates that the UNSG 'shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course justice and can be waived without prejudice to the interests' of the UN (emphasis added).
[354] UN Doc. A/C.6/17 (1946), para. 5 (emphasis added). Cf. Reinisch (2016, 'Introduction'), para. 36.
[355] According to Reinisch: 'The fact that the UN Secretary-General registered the General Convention *ex officio* was also taken as an indication that the UN is a party to the Convention.' Reinisch (2016, 'Introduction'), para. 39 (fns. omitted). Cf. Art. 11(2) of the 1986 VCLT (not yet in force) ('Means of expressing consent to be bound by a treaty'): 'The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.'
[356] Reinisch (2016, 'Introduction'), para. 34.

> binds the United Nations as an Organization, on the one part, and each of its Members individually, on the other part.'[357]

In its *Reparation for Injuries* Advisory Opinion, however, the ICJ did not clarify the UN's status under the General Convention. It merely stated regarding the international legal personality of the UN: 'The 'Convention on the Privileges and Immunities of the United Nations of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35)'.[358] Neither did the ICJ resolve the matter in its 1989 advisory opinion in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*.[359] This notwithstanding, as Reinisch stated, 'it seems clear that the UN is bound by the provisions of the General Convention.'[360]

3.2.2 Failure to implement Section 29 of the General Convention and jurisdictional immunity

According to the travaux préparatoires of the General Convention, as will be seen in this chapter, Section 29 of the General Convention was conceived as the counterpart to the UN's immunity from jurisdiction, under Section 2 of the General Convention. In that light, the question explored in this sub-section is whether the UN's failure to implement Section 29 has a bearing on its entitlement to jurisdictional immunity.

3.2.2.1 Whether the UN's entitlement to immunity is conditional on its compliance with Section 29 of the General Convention

If the UN would fail to implement its obligation to make 'provisions for appropriate modes of settlement' under Section 29, this would amount to an internationally wrongful act. The UN would incur international responsibility towards the states parties to the General Convention.[361] The question arises

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[357] *Reparation for Injuries Suffered in the Service of the United Nations*, 1949, Pleadings, Public Sittings held at the Peace Palace, The Hague, on March 7th, 8th and 9th and April 11th, 1949, the President, M. Basdevant, presiding, verbatim record <icj-cij.org/en/case/4/oral-proceedings> accessed 21 December 2021, at 71 (emphasis added).

[358] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at 179.

[359] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, [1989] ICJ Rep. 177, para. 33 ('The United Nations is itself intimately, and for the most part directly, concerned with the operation of the General Convention. Section 30 was therefore so framed as to take in also the settlement of differences between the United Nations and a State party to the General Convention. If such a difference arises, "a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties." This provision pursues the same intent as expressed in the first sentence of Section 30; the particular nature of the proceeding contemplated is attributable to the status as an international organization of one of the parties to the difference.'). Cf. Reinisch (2016, 'Introduction'), at 13, paras. 40-41.

[360] Reinisch (2016, 'Introduction'), para. 42.

[361] The UN would not incur such responsibility towards private claimants. Cf. Schmalenbach (2016), para. 10 ('the aggrieved parties who benefit from an alternative dispute settlement mechanism have no direct legal claim under Art. VIII Section 29 General Convention against the UN').

whether as a consequence of such failure, the UN would forfeit its right to immunity from jurisdiction under Section 2 of the General Convention.

Sections 2 and 29 of the General Convention are closely linked. As explained by Schmalenbach: 'Section 29 General Convention is the flip side of and the necessary supplement to Art. II Section 2 (immunity of the UN)'.[362] That being so, the ordinary meaning of the terms of the General Convention, considered in their context and in the light of the treaty's object and purpose,[363] does not suggest that the UN's entitlement to immunity is conditional on its implementation of Section 29.

The main purpose of the General Convention, considering its title and preamble, is to specify the UN's privileges and immunities in furtherance of Article 105 of the UN Charter.[364] Article II, Section 2 provides for the 'immunity from every form of legal process' which the UN 'shall enjoy'. Section 2 sets forth a single, precisely worded exception to the UN's immunity: 'except in so far as in any particular case it has expressly waived its immunity'. There is no textual support for an exception to the immunity where the obligation 'to make provisions for appropriate modes of settlement' under Section 29 is not implemented.[365]

Neither do the travaux préparatoires of the General Convention support that the UN's entitlement to immunity is conditional on its implementation of Section 29 of the General Convention.[366] As further discussed below, the link between Section 2 and Section 29 of the General Convention goes back to the resolution proposed by the International Labour Office on the status, immunities, and other facilities to be accorded to the ILO, which laid the basis for the General Convention. The explanatory commentary to Article 18(2) of the 'suggested text of proposed resolution', which would evolve into Section 29 of the General Convention, states:[367]

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[362] Schmalenbach (2016), para. 1 (emphasis added).
[363] Cf. Art. 31(1) of the VCLT.
[364] Art. 105(1) of the UN Charter qualifies the UN's immunity in functional terms ('such privileges and immunities as are necessary for the fulfilment of its purposes'), whereas under Section 2 of the General Convention its immunity is cast in rather absolute terms ('immunity from every form of legal process'). On the relationship between both standards, see De Brabandere (2010), at 88 ('Despite allegations that the Convention should be considered as undermining the standard of functional necessity contained in Article 105 of the Charter by expanding the organization's immunity to absolute immunity, we suggest that the Convention should instead be regarded as a reliable interpretation of Article 105.')
[365] Indeed, Art. II, Section 2 contains a 'crystal clear provision . . . according to which, there is no room for domestic courts to examine the necessity for immunity in each case'. Y. Okada, 'Interpretation of Article VIII, Section 29 of the Convention on the Privileges and Immunities of the UN', (2018) 15 *International Organisations Law Review* 39, at 44. See also the reasoning in *Georges v. United Nations*, No. 15-455-cv (2d Cir., 18 August 2016), at 18 ('we hold that the UN's fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity').
[366] Cf. Art. 32 of the VCLT.
[367] In a 'General Note' accompanying the draft text, the Office stated: 'It must never be forgotten that the special

> 'The arrangements suggested in this paragraph are designed as a counterpart for the immunities of the Organisation and its agents. The nature and effect of these immunities are frequently misunderstood. The circumstances in which international immunity operates to except the person enjoying it from compliance with the law are altogether exceptional. Such immunity is not a franchise to break the law, but a guarantee of complete independence from interference by national authorities with the discharge of official international duties.'[368]

Other than confirming the close link between immunity and alternative remedies, according to Schmalenbach:

> 'Given the sparsity of historical material, the attempt to find support for the (un)conditionality claim in the travaux préparatoires is virtually tantamount to speculation. Yet it is noteworthy that the Preparatory Committee was emphatic about the fact that Art. 105 UN Charter already obliges member States to respect the organization's immunity irrespective of any implementing action by the General Assembly under Art. 105 para 3 UN Charter, which strongly argues against an early conditionality concept.'[369]

Indeed, the Executive Committee of the Preparatory Committee recommended

> 'that the Preparatory Commission instruct the Executive Secretary to remind the Members of the United Nations that, under Article 105 of the Charter, the obligation to accord to the United Nations, its officials and representatives of its Members all privileges and immunities necessary for the accomplishment of its purposes, operates from the coming into force of the Charter and is therefore applicable even before the General Assembly has made the recommendations referred to in paragraph (3) of the Article, or the conventions there mentioned have been concluded.'[370]

As to the ICJ, its advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* disconnected immunity from alternative remedies altogether. The issue before the Court, in sum, was whether a Special Rapporteur of the UN Commission on Human Rights was entitled to jurisdictional immunity under Section 22 of the General Convention before the courts of Malaysia in connection with lawsuits for defamation. In concluding that the Special Rapporteur was entitled to immunity, the Court pointed out

> 'that 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 officia1 capacity.
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> The United Nations may be required to bear responsibility for the damage arising from such acts. However, as 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 settled in accordance

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status and immunities accorded to the Organisation and those acting on its behalf carry with them corresponding responsibilities.' International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 197.

[368] Ibid., at 219 (emphasis added).

[369] Schmalenbach (2016), para. 9 (fns. omitted).

[370] PC/EX/113/Rev.1 (1945), at 69, para. 2 (emphasis added).

> with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.'[371]

In *Mothers of Srebrenica*, contrary to *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, alternative remedies were absent. According to the ECtHR in *Mothers of Srebrenica*,[372] this was of no consequence for the UN's entitlement to immunity:

> 'There remains the fact that the United Nations has not, until now, made provision for "modes of settlement" appropriate to the dispute here in issue. Regardless of whether Article VIII, paragraph 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case, this state of affairs is not imputable to the Netherlands. Nor does Article 6 of the Convention require the Netherlands to step in'.[373]

As for the Dutch Supreme Court in *Mothers of Srebrenica*, whilst noting that Section 29 of the General Convention had not been implemented,[374] it did not question the UN's entitlement to immunity.[375]

The District Court for the Southern District of New York in *Georges et al.*, one of the Haiti cholera cases, dismissed the claims holding that 'nothing in the text of the [General Convention] suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29.'[376] On appeal, the Court of Appeal for the Second Circuit

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[371] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), para. 66 (emphasis added). According to the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel before the ICJ: 'By determining that the words spoken by Mr. Cumaraswamy were performed during the performance of the mission for the United Nations, the words complained of are now the responsibility of the United Nations. It follows that any private plaintiff who considers himself harmed by the publication of those words may submit a claim to the United Nations which, if the suits in national courts are withdrawn, will attempt to negotiate a settlement with the plaintiffs; if this is not possible, the United Nations will make provision for an appropriate means of settlement, for example, by submission of the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules'. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1998/17, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 14 (emphasis added).

[372] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 155 refers to *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*).

[373] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 165.

[374] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3 ('Contrary to the provisions of article VIII, § 29, opening words and (a) of the Convention, the UN has not made provision for any 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.')

[375] To the contrary, the Supreme Court stated: 'That immunity is absolute'. Ibid., para. 4.3.6.

[376] *Delama Georges, et al. v. United Nations*, *et al.*, No. 13-cv-7146 (JPO) (S.D.N.Y., 9 January 2015), at 5. The reference to 'CPIUN' is to the Convention on the Privileges and Immunities of the UN, i.e., the General Convention. For an early judicial decision rejecting the notion that immunity is conditional on the availability of

similarly ruled:

> 'The principal question presented by this appeal is whether the UN's fulfillment of its obligation under Section 29 of the [General Convention] to "make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character to which the [UN] is a party," as well as "disputes involving any official of the [UN] who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary‐General," is a condition precedent to its immunity under Section 2 of the [General Convention], which provides that the UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."
> Because we hold that the UN's fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity— and because we find plaintiffs' other arguments unpersuasive—we **AFFIRM** the District Court's judgment.'[377]

Notwithstanding the foregoing, there is a 'growing recognition of a human rights-based challenge to international organization's immunity'.[378] The Special Rapporteur on extreme poverty and human rights, Philip Alston, stated in the context of the Haiti cholera crisis and the UN's jurisdictional immunity before the US courts:

> 'The irony of the position of the United Nations on cholera in Haiti is that far from strengthening its case for immunity, it has provoked a backlash which has led scholars and commentators to call for immunity to be lifted, for only functional immunities to be recognized, or for national courts to adapt their approach to immunity to respect the human rights principle of access to a remedy. Support for these suggestions will only grow if an appropriate remedy is not provided in the Haiti cholera case. There is much to be said in favour of the argument, supported by many scholars and invoked in the litigation, that the absolute immunity conferred by article II of the 1946 Convention is contingent upon respect for the requirement of article VIII, section 29, that 'appropriate modes of settlement' be provided by the United Nations. The rejection of this argument by courts in the United States provides no assurance that courts elsewhere will follow suit.'[379]

Indeed, as explained by Reinisch,[380] domestic courts of several states have at times denied immunity from jurisdiction to international organisations on the basis that the claimant lacked alternative recourse,[381] 'sometimes even to the extent of making the latter a precondition for the former.'[382]

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alternative remedies, see *Manderlier v. United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, United Nations Juridical Yearbook 1969, 236 at 236.

[377] *Georges v. United Nations*, No. 15-455-cv (2d Cir., 18 August 2016), underlining added, other emphasis in original.

[378] R. Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge', (2014) 25 *European Journal of International Law* 239, at 242, see also ibid., at 254. See also Okada (2018); A. Reinisch, 'Immunity of Property, Funds, and Assets (Article II Section 2 General Convention)', in A. Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (2016), 63, paras. 29-49 ('The Impact of Access to Justice on the Immunity of International Organizations'); A. Tzanakopoulos, 'Theorizing or Negotiating the Law? A Response to Devika Hovell', (2016) 110 *AJIL unbound* 3, at 6; C. Ryngaert, 'The Immunity of International Organizations Before Domestic Courts: Recent Trends', (2010) 7 *International Organizations Law Review* 121, at 147.

[379] UN Doc. A/71/367 (2016), para. 54 (fns. omitted; underlining added).

[380] Reinisch (2016, 'Immunity'), paras. 29-49. Schmalenbach refers to 'rare cases in which courts lifted the immunity of an organization due to a lack of alternative'. Schmalenbach (2016), para. 9, fn. 29 (emphasis added).

[381] Reinisch (2016, 'Immunity'), para. 35. This includes the courts of France, Germany, Italy, Switzerland, Italy and Belgium, including the oft-cited case *Siedler v Western European Union*, as reported in ibid., para. 39, fn. 87.

[382] Reinisch (2016, 'Immunity'), para. 35.

However, Schmalenbach concludes with respect to the UN, 'present international practice, assessed in its entirety, does not yet support the notion of a conditional relationship between Art. II Section 2 and Art. VIII Section 29 General Convention at the expense of the UN's immunity before domestic courts.[383]

3.2.2.2 Denying the UN's immunity in response to 'material breach' or as a 'countermeasure'

While there is no relationship of conditionality between the immunity and the availability of alternative recourse, the forum state might seek to argue, along the lines of Article 60(2) of the VCLT,[384] that the UN's failure to comply with Section 29 amounts to a 'material breach' of the treaty.[385] The state might invoke this as a ground for suspending the General Convention's operation 'in part', that is, insofar as the provision on the UN's immunity from jurisdiction is concerned.

However, this argument is problematic. To start with, the forum state would need to argue that under Article 60(3)(b) of the VCLT, Section 29 is 'essential to the accomplishment of the object or purpose of the treaty'.[386] However, notwithstanding the close link between that provision and Section 2 of the General Convention,[387] the only 'essential' provisions under the Convention, as suggested by its full name ('Convention on the Privileges and Immunities of the United Nations'), arguably are those conferring privileges and immunities on the UN.

Furthermore, the General Convention being a multilateral treaty,[388] the forum state would need to argue that, under Article 60(2)(b) of the VCLT, it qualifies as 'a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State'. In this respect, the state could argue that it is 'specifically

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[383] Schmalenbach (2016), para. 9 (fn. omitted). Similarly, Okada rejects a 'conditional link between fulfilment of the obligation by the UN and entitlement of its immunity because interpreting the [General Convention] in such a way would be contrary to the object and purpose of the *Convention*. Thus, domestic courts are not allowed to exercise unilateral control over the implementation of section 29'. Okada (2018), at 75 (emphasis in original). See likewise, De Brabandere (2010), at 92 ('there is no conditional relation between the two, in the sense that the application of immunity would be conditional upon the existence of alternative mechanisms.').

[384] In the case of a bilateral treaty, such as a headquarters agreement, the relevant provision is Art. 60(1) of the VCLT.

[385] An argument along these lines was put forward by the plaintiffs in *Delama Georges et al. v. United Nations et al*. The Court of Appeal held: 'According to plaintiffs, the UN's material breach of its Section 29 obligation means that it 'is no longer entitled to the performance of duties owed to it under' the CPIUN, including its Section 2 immunity. We need not reach the merits of this argument, however, because plaintiffs lack standing to raise it.' *Georges v. United Nations*, No. 15-455-cv (2d Cir., 18 August 2016), at 19.

[386] The claimants in *Delama Georges et al. v. United Nations et al.* argued that 'Section 29, by its nature, is such a provision because dispute settlement provisions are generally considered essential under international law.' *Delama Georges et al. v. United Nations et al.*, on Appeal from the United States District Court for the Southern District of New York, Brief for Appellants, 27 May 2015, at 36.

[387] As evidenced by the travaux préparatoires (see below).

[388] On the UN being bound by the General Convention, see subsection 3.2.1 of this study.

affected' since by respecting the immunity absent alternative remedies, it would incur international responsibility for denying access to court.

However, the problem lies with the argument's underlying premise, that is, that the UN's failure to comply with Section 29 amounts to a 'material breach' of the treaty. The interpretation and application of that provision—including whether, to begin with, the dispute in point has a 'private law character'—are matters that concern the international organisation as a whole and its entire membership. In this respect, the General Convention is not merely a multilateral treaty: it is part of the UN's constitutional framework, being grounded in Article 105 of the UN Charter and having been adopted by the UNGA. Arguably, therefore, it is not for a member state on its own, but rather for the Organisation as a whole, to consider the UN's compliance with Section 29.

In any event, even if the treaty law provision granting immunity from jurisdiction were to be suspended, under the Dutch Supreme Court's ruling in a case against the Iran-United States Claims Tribunal ('IUSCT'), *Spaans v. IUSCT*, international organisations are entitled to immunity under 'general international law'.[389] The implication would be that if the Dutch courts were to deny immunity, even absent a treaty law basis, the Netherlands would still commit an internationally wrongful act towards the UN.

Another potential argument against upholding the UN's immunity is advanced by Irmscher: the forum state could deny the UN's immunity as a *countermeasure* against the UN for its failure to implement Section 29 of the General Convention.[390] One problem with this argument is that, under Article 52(1)(b) of the ARIO, a member state of an international organisation is not allowed to take countermeasures, 'unless . . . the countermeasures are not inconsistent with the rules of the organisation' (emphasis added). Under Article 2(b) of the ARIO, '"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.

Arguably, the General Convention forms part of the rules of the organisation, as it has been adopted by an UNGA resolution pursuant to Article 105(3) of the UN Charter. It would be inconsistent with Section 2 of the General Convention to deny immunity (immunity not being conditional on compliance with Section 29), such that the contemplated countermeasure is not allowed.

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[389] However, that is not generally accepted. See M. Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 29.
[390] Irmscher (2014), at 476-478.

In any event, more fundamentally, a condition for taking countermeasures is that the UN has committed an internationally wrongful act,[391] that is, that it breached the obligation under Section 29 of the General Convention. This is problematic for the very same reason that the abovementioned material breach argument is problematic: whether the UN implemented that provision correctly is a question for its membership as a whole.

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In conclusion, it is submitted that failure on the part of the UN to implement Section 29 of the General Convention has no bearing on its entitlement to immunity from jurisdiction.

3.3 Overview of practice of the UN under Section 29(a) of the General Convention

The purpose of this section is to provide an overview of the UN's practice under Section 29(a) on the basis of available information. The section is therefore largely descriptive in nature. Upon introducing the various documents that describe the UN's practice and regulations (subsection 3.3.1), it provides a breakdown of the UN's practice per category of claim (subsection 3.3.2). It then introduces the three case studies in more detail: the Srebrenica genocide, the Haiti cholera epidemic, and the Kosovo lead poisoning (subsection 3.3.3).

3.3.1 Key documents setting out the practice and regulations of the UN

The first available document dates from 1967 and is entitled 'The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities; study prepared by the Secretariat'.[392] It contains four studies which the UN Secretariat prepared to assist the ILC in its work on relations between states and 'inter-governmental organisations'. The study that is of relevance for present purposes concerns the practice of the UN ('1967 Study').[393]

The first chapter of the 1967 Study is entitled 'juridical personality of the United Nations'. It contains sections concerning the contractual capacity of the UN, the capacity of the UN to acquire movable and immovable property, and legal proceedings brought by and against the UN. The last-mentioned section, Section 4, is most relevant for present purposes. Its third subsection is entitled 'claims of a private law nature made against the United Nations and the steps taken to avoid or mitigate such claims'.[394] That subsection includes a brief overview of dispute settlement mechanisms regarding: commercial contracts

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[391] Art. 51(1) of the ARIO provides: 'An injured State . . . may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.' (emphasis added).
[392] UN Doc. A/CN.4/L.118 and Add. 1 and 2 (1967), Volume II, at 154 ff.
[393] Ibid., at 207 ff.
[394] Ibid., at 217, sub I (emphasis provided).

(negotiation and arbitration); disputes concerning employment contracts (internal appellate procedures); 'other claims of a private law nature' (insurance or negotiation); and disputes in connection with operational UN programmes, such as UNICEF or UNDP.

Section 5 of the 1967 Study concerns 'international claims'. The subsection entitled 'Claims made against the United Nations by states or by other international organizations' is of particular relevance for present purposes. In it, the UN Secretariat stated that 'the only claims of any significance brought by States (whether on their own behalf or on behalf of their nationals') arose out of the United Nations activities in the Democratic Republic of Congo.'[395] The 1967 Study then goes on to discuss the ONUC settlements in detail.

Moving on from the 1967 Study, the next document concerning the UN's practice in regard to the settlement of claims by third non-state parties dates from 1985. This is an update of the 1967 Study, produced by the UN Secretariat at the request of the ILC ('1985 Supplement to the 1967 Study').[396] The update in particular concerns the practice of the UN in relation to contracts.

The principal UN document setting out the UN's practice and regulation in regard to claims by private non-state parties is the 1995 Report, which the UNSG prepared at the request of the UNGA. It is entitled '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'. On 17 September 1996, on the recommendation of the Fifth Committee, the General Assembly 'took note of' the 1995 Report.[397] To date, the 1995 Report remains the most comprehensive overview of the UN's practice in relation to Section 29 of the General Convention. The 1995 Report mainly deals with procedural mechanisms for the settlement of disputes, but it also addresses certain substantive matters pertaining to Section 29 of the General Convention.

The 1995 Report distinguishes between various categories of claims (discussed separately hereafter). One of these categories concerns claims in connection with UN peacekeeping operations. Around the same time, though with little reference to Section 29 of the General Convention or the 1995 Report,[398] the UNSG and the UNGA further addressed that category in a separate process. That process involved

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[395] Ibid., para. 54.
[396] UN Doc. A/CN.4/L.383 and Add.1-3 (1985), Yearbook of the International Law Commission 1985, Volume II, Part One, at 145 ff.
[397] Decision 50/503 of 17 September 1996 ('Review of the efficiency of the administrative and financial functioning of the United Nations'). See also UN Doc. A/INF/50/4/Add.2 (1996), at 32. The UNGA decided to 'defer consideration of [the 1995 Report] until its fifty-first session'. However, the present author was unable to identify any records pertaining to such consideration during the 51th session.
[398] See 1997 Report, paras. 10 and 43; 1996 Report, para. 7; the ACABQ referred to Section 29 of the General Convention in connection with the 1996 Report, see UN Doc. A/51/491 (1996), para. 6. UN Doc. A/RES/52/247 (1998) does not contain any reference to the 1995 Report.

the production of two reports by the UNSG, followed by the adoption of UNGA resolution 52/247 (1998), in which the UNGA promulgated what will hereafter be referred to as the 'UN Liability Rules'.

More precisely, said process regarding claims in connection with UN peacekeeping operations started in 1996. The Advisory Committee on Administrative and Budgetary Questions ('ACABQ') expressed 'its concern about the magnitude and number (about 800) of outstanding third-party claims submitted to [UN peace forces headquarters]',[399] and

> 'recommends that the current procedures on settling third-party claims associated with United Nations peacekeeping efforts be the subject of a thorough study by the Legal Counsel, the results of which should be reported by the Secretary-General to the General Assembly through the Advisory Committee not later than November 1996. Furthermore, the Advisory Committee recommends that on the basis of the study the Secretary-General develop and propose during the fifty-first session of the General Assembly appropriate measures and procedures which would provide for a simple, efficient and prompt settlement of third-party claims, secure United Nations interests, limit its liabilities and allow for a coordinated approach to this issue on the part of the United Nations organizations, agencies and programmes.'[400]

The UNGA thereupon requested

> 'the Secretary-General to develop revised cost estimates for third-party claims and adjustments, following completion of the thorough study to be completed by the Legal Counsel and taking into account the issues raised in the report of the Advisory Committee on Administrative and Budgetary Questions, and to submit them, through the Advisory Committee, to the General Assembly'[401]

This led to a report of the Secretary-General dated 20 September 1996 ('1996 Report').[402] The report concerns: the scope of UN liability for activities of UN peacekeeping forces (including regarding an exemption from liability for operational necessity and military necessity); procedures for handling third-party claims; and limitation of liability.

The ACABQ commended the 1996 Report and, subject to certain observations,[403] recommended the UNGA to endorse the proposals and recommendations regarding *limitations on the liability* of the UN set out therein.[404] The UNGA endorsed the observations and recommendations of the ACABQ and requested 'the Secretary-General to develop specific measures, including criteria and guidelines for

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[399] UN Doc. A/50/903/Add.1 (1996), para. 19.
[400] Ibid., para. 20.
[401] UN Doc. A/RES/50/235 (1996), par. 16.
[402] UN Doc. A/51/389 (1996).
[403] For example, the ACABQ requested the UNSG to review the provisions of Art. 51 of the of the model SOFA concerning standing claims commissions, which 'have proved to be unrealistic or ineffective'. See UN Doc. A/51/491 (1996), para. 9, discussed further below.
[404] Ibid., paras. 3 and 15 (emphasis added).

implementing the principles outlined in his report and to report thereon to the General Assembly through the Advisory Committee.'[405]

The Secretary-General recommended such measures in the 1997 Report, which is supplemental to the 1996 Report. In addition to setting forth limitations of liability, that report also briefly addresses procedural mechanisms for the settlement of third-party claims in connection with peacekeeping operations. Lastly, at the proposal of the UNSG, the UNGA adopted resolution 52/247 on 17 July 1998, without a vote,[406] promulgating the UN Liability Rules.

The final UN document setting forth, in general terms, the UN's position on the settlement of claims by third non-state parties is a memorandum by the Office of Legal Affairs (OLA) addressed to the UN Controller in 2001.[407] The memorandum concerns 'the regulatory basis for the payment of claims settlements that have been recommended by [the Office of Legal Affairs] and the payment of such settlements'. [408] It recalled the observation by the Controller 'that the United Nations Financial Regulations and Rules do not expressly provide for payments of such settlements', and the Controller's reference 'to financial rule 110.1, which requires that "the expenditures of the Organization remain within the appropriations as voted and are incurred only for the purposes approved by the General Assembly".'[409]

Notwithstanding the lack of clarity regarding the Controller's query and its context, the OLA memorandum clearly concerns the relationship between the UN and private non-state parties in the context of Section 29 of the General Convention.[410] The memorandum makes certain assertions regarding the UN's liability and the consequences thereof.

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[405] UN Doc. A/RES/51/13 (1996), para. 2 (emphasis added).
[406] UN Doc. A/52/PV.88 (1998), at 16.
[407] Office of Legal Affairs, Memorandum to the Controller, United Nations Juridical Yearbook 2001, at 381 ff ('2001 OLA Memorandum to the Controller').
[408] Ibid., para. 2.
[409] Ibid., para. 2.
[410] Amongst others, this results from its reference to the 1996 Report and other documents concerning third party claims. And, according to the background section of the memorandum: 'The authority of the United Nations to resolve claims arising under such contracts and other types of liability claims, such as those arising from damage or injury caused by the Organization to property or persons, is reflected in article 29 of the Convention on Privileges and Immunities and the long-standing practice of the Organization in addressing such claims.' See 2001 OLA Memorandum to the Controller, para. 4. The memo's background section also refers to the limitations of liability decided upon by the UNGA. Regarding the procedures for the settlement of private law claims, it moreover refers to the following documents: UN Doc. A/RES/52/247 (1998); the 1995 Report, 1996 Report and 1997 Report; and the 1967 Study.

3.3.2 The UN's practice per category of dispute

On the basis of the foregoing UN documents, following the categorisation in the 1995 Report, the picture that emerges of the UN's practice concerning the settlement of third-party disputes is as follows.

At the outset, it is noted that most contractual and tort disputes are settled amicably. As the UN Legal Counsel stated in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* proceedings before the ICJ:

> 'If the United Nations has a private law dispute arising out of a non-contractual situation and such dispute has not been settled by negotiation, it does make provision for suitable means to settle the dispute, usually by arbitration in accordance with the UNCITRAL Arbitration Rules. The United Nations has also agreed to formal conciliation through the UNCITRAL Conciliation Rules. I should emphasize, however, that the overwhelming majority of claims are settled through negotiation.'[411]

Rashkow, a Former Director of the General Legal Division of the Office of Legal Affairs (writing in his personal capacity), explained that

> 'the Organization consistently and, for the most part, successfully seeks to amicably resolve all third party claims—both contractual and tort. In this respect, the Organization has developed a number of measures or processes for dealing with third party claims, depending on the nature of the claims or the situations in which they arise.'[412]

In this respect, Article 17.1 of the UN's General conditions of contract (contracts for the provision of goods and services) (rev. April 2012) provides:

> 'AMICABLE SETTLEMENT: The Parties shall use their best efforts to amicably settle any dispute, controversy, or claim arising out of the Contract or the breach, termination, or invalidity thereof. Where the Parties wish to seek such an amicable settlement through conciliation, the conciliation shall take place in accordance with the Conciliation Rules then obtaining of the United Nations Commission on International Trade Law ("UNCITRAL"), or according to such other procedure as may be agreed between the Parties in writing.'[413]

Furthermore, as reported by the UNSG in 2008: 'Non-staff personnel, including consultants, individual contractors and individuals under service contracts, may . . . seek the services of the Office of the

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[411] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1998/17, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 9.

[412] Rashkow (2015), at 79. See also, e.g., 1995 Report, para 7: '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.'

[413] <un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods_services.pdf> accessed 21 December 2021.

Ombudsman, which, in a number of instances, has assisted the parties in reaching mutually acceptable solutions.'[414]

3.3.2.1 Disputes 'arising out of commercial agreements (contracts and lease agreements)'

With reference to the first limb of Section 29(a) of the General Convention ('disputes arising out of contracts'), the practice of the UN and its subsidiary bodies has been to include arbitration clauses in commercial agreements, that is, contracts and lease agreements.[415] Where an arbitration clause has not been included 'because of error or oversight',[416] and where negotiation fails,[417] the UN agrees to negotiate an arbitral *compromis*. This applies to all types of contractual disputes, as Rashkow explained:

> 'Individual consultants, contractors both large and small, and others who interact with the United Nations but are not staff members, e.g. volunteers, generally must seek to resolve their claims in some manner consistent with Section 29 of the General Convention, calling for a modality for resolving disputes of a private law character.'[418]

According to the 1995 Report, this specifically also includes disputes concerning contracts concluded in the context of peacekeeping operations,[419] insofar as they cannot be resolved through negotiation.[420]

The UN's standard arbitration clause, which may be amended if the circumstances so warrant, provides for arbitration proceedings under the UNCITRAL Arbitration Rules.[421] At the time of the 1995 Report, there had been only a limited number of arbitration cases since few disputes had arisen and most could be settled through negotiation.[422]

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[414] UN Doc. A/62/748 (2008), para. 18.
[415] 1995 Report, paras. 3-8. According to Schmalenbach: 'The UN concludes various contracts of a private law character for various reasons, ranging from, for example, contracts for maintenance work, the purchase of goods, leasing of premises and supply of short-term services such as research, editing, and translation through services such as consultants or experts on mission as well as arrangements for hosting UN conferences. Short-term employment contracts also fall under this category provided that they do not accord the status of staff members to the contracting partner.' Schmalenbach (2016), para. 37 (fns. omitted). See also Report by the Secretary-General, Procurement-related arbitration, A/54/458, 14 October 1999.
[416] 1995 Report, para. 8.
[417] Rashkow (2015), at 79.
[418] Ibid., at 79.
[419] As well as commercial agreements entered into by UNDP and UNICEF. See 1995 Report, para. 22.
[420] 1995 Report, para. 21.
[421] Art. 17.2 of the UN's General conditions of contract (contracts for the provision of goods and services (Rev. April 2012). <un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods_services.pdf> accessed 21 December 2021. Under the standard arbitration clause at the time of the 1995 Report, arbitration was conducted under the auspices of either the American Arbitration Association ('AAA') (for contracts to be performed in the USA) or the International Chamber of Commerce ('ICC') (for contracts to be performed outside the USA).
[422] 1995 Report, para. 7. Cf. 1985 Supplement to the 1967 Study, at 152, para. 3. In 1999, the UNSG reported to the UNGA on the roles and mandates within the Secretariat concerning the settlement negotiations. According to OLA, the same procedure applies to the settlement of other types of private law claims. See 2001 OLA

The 1985 Supplement to the 1967 Study explained the practice of including arbitration agreements in contracts, whilst waiver of jurisdictional immunity normally only occurred in situations involving third party liability insurance.[423] In fact, according to the 1995 Report, a standard clause normally incorporated in commercial agreements concluded by the UN typically stipulated that 'nothing in or relating to the contract shall be deemed a waiver' of its privileges and immunities.[424] The 1995 Report emphasized in this connection that the immunity 'does not adversely affect the commitment to arbitration since the Organization has agreed to be bound by the arbitration award as the final adjudication of the dispute, controversy or claim'.[425]

As to the *applicable law* in commercial contracts, according to the 1967 Study, 'express reference has rarely been made to a given system of municipal law. The standard practice was for the contract to contain no choice of law clause as such.'[426] According to the 1985 Supplement to the 1967 Study, 'the Organization relies on general principles of law in the interpretation of contracts concluded by it with private parties'.[427] More specifically,

> 'it has been the practice of the United Nations to interpret the contracts concluded by it on the basis of general principles of law, including international law, and upon the standards and practice established by its internal law, including its Financial Regulations, principles of delegation of authority under the United Nations Charter and the internal rules and procedures promulgated thereunder'.[428]

Otherwise put, at the time of the 1985 supplement to the 1967 Study:

> 'The most recent trend in United Nations contractual practice is to avoid wherever possible reference to any specific law of application, especially any system of national law, and to consider the governing law of the contract to be found in general principles of law, including international law, as well as in the terms of the contract itself.'[429]

In 2008, the UNSG stated in the context of grievances by consultants and individual contractors:

> 'With respect to the law applicable to arbitral claims, the Organization reviews such claims in the light of the applicable contractual terms as well as general principles of international law. As an intergovernmental Organization with 192 Member States, the United Nations takes the view that its contracts and agreements should not be subject to the laws of any one jurisdiction, but should respect general principles of international law. Therefore, the General Conditions do not include a choice of

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Memorandum to the Controller, para. 9. The procedure for the settlement of contractual claims is set out in UN Doc. A/54/458 (1999).

[423] 1985 Supplement to the 1967 Study, at 156 and 159.

[424] 1995 Report, para. 6.

[425] 1995 Report. Para. 6.

[426] 1967 Study, para. 6. As to employment contracts, they form part 'of a growing system of international administrative law, independent of given systems of municipal law', at 208, para. 5.

[427] 1985 Supplement to the 1967 Study, at 153.

[428] Ibid., at 154-155 (emphasis added, fn. omitted).

[429] Ibid., at 155. As far as the 'terms of the contract' are concerned, these include any General Terms and Conditions of Contract annexed thereto, which form an integral part of the contract. See <un.org/Depts/ptd/about-us/conditions-contract> accessed 21 December 2021.

> law provision but stipulate that the "decisions of the arbitral tribunal shall be based on general principles of international commercial law".'[430]

3.3.2.2 Other disputes of a private law character

3.3.2.2.1 Third-party claims arising outside peacekeeping[431]

Tort claims arising from acts within the UN Headquarters district in New York[432]

At the time of the 1967 Study, claims in respect of personal injuries incurred on premises of the UN (as well as those caused by UN-operated vehicles) were largely dealt with through insurance, and otherwise through negotiation between the UN and the injured party.[433]

The 1995 Report recalls that, in conjunction with the UN's decision to become self-insured, on 11 December 1986, the UNGA adopted resolution 41/210, entitled 'Limitation of damages in respect of acts occurring within the Headquarters district',[434] known as 'Headquarters regulation No. 4'. It was adopted pursuant to Section 8 of the Headquarters Agreement between the US and the UN,[435] according to which said regulation 'displaces any inconsistent federal, state or local law or regulation of the United States, to the extent of such inconsistency, which would otherwise have been applicable within the Headquarters district.'

Headquarters regulation No. 4 concerns

> 'any tort action or in respect of any tort claim by any person against the United Nations or against any person, including a corporation, acting on behalf of the United Nations, to the extent that the United Nations may be required to indemnify such person, whether such person is a member of its staff, an expert or a contractor, arising out of any act or omission, whether accidental or otherwise in the Headquarters District'.[436]

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[430] Administration of justice: further information requested by the General Assembly, Note by the Secretary-General, A/62/748, 14 March 2008, para. 22. See Art. 17.2 of the UN's General conditions of contract (contracts for the provision of goods and services (Rev. April 2012). <un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods_services.pdf> accessed 21 December 2021. According to the 1985 Supplement to the 1967 Study, at the time: 'More generally, the determination of the applicable law has been left to the arbitrators'. See 1985 Supplement to the 1967 Study, at 152.

[431] The heading in the 1995 Report is: 'Third-party claims for personal injury (arising outside the peace-keeping context)'. In fact, however, what follows is not limited to personal injury, but also concerns property-related claims.

[432] 1995 Report, paras. 10-13.

[433] 1967 Study, para. 44.

[434] UN Doc. A/41/210 (1986). See generally P. Szasz, 'The United Nations Legislates to Limit its Liability' (1987) 81 *American Journal of International Law* 739, at 739.

[435] Agreement between the United Nations and the United States of America regarding the headquarters of the United Nations, 26 June 1947, approved by the General Assembly of the United Nations, on 31 October 1947, with an exchange of Notes, dated 21 November 1947, 11 UNTS 11, ('US-UN headquarters agreement').

[436] UN Doc. A/41/210 (1986), para. 1 (chapeau). As to the term 'Headquarters district', the resolution incorporates by reference the definition in Section 1 of the Agreement between the Unites Nations and the United States of America Regarding the Headquarters of the United Nations, 26 June 1947. Ibid., para. 2(b).

Headquarters regulation No. 4 limits damages as follows. As to 'economic loss', compensation or damages relating to *death, injury or illness* is capped according to the

> 'limits prescribed for death, injury or illness in the Rules Governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations applied *mutatis mutandis*'.[437]

The term 'economic loss' is defined as

> 'the reasonable cost of repairing or replacing property, and, in respect of death, injury or illness, any reasonable past, present and estimated future: (i) Health care expenses; (ii) Rehabilitation expenses; (iii) Loss of earnings; (iv) Loss of financial support; (v) Cost of homemaker services; (vi) Transportation expenses; (vii) Burial expenses; (viii) Legal expenses.'[438]

As to damaged, lost or destroyed *property*, the resolution provides that compensation is limited to 'reasonable amounts'. As to 'non-economic loss', compensation or damages is capped at $100,000.[439] Punitive and moral damages are excluded.[440]

As to the mechanisms for settling such disputes arising at UN headquarters, the UNSG's Bulletin 'resolution of tort claims' (ST/SGB/230 of 8 March 1998) sets forth dispute settlement arrangements.[441] Accordingly, in the case of claims that upon a preliminary review by the Office of Legal Affairs (OLA) can be settled by payment of a sum up to $5,000, OLA negotiates a settlement subject to approval from the Controller. Claims that are not so settled must be referred to a Tort Claims Board, composed of five members, four of which are from various UN offices and one of which is appointed by the SG. If the Board considers that the UN is liable, it recommends a maximum settlement amount to the Controller. If the Controller agrees, the Office of Legal Affairs then conducts negotiations with the claimant under the guidance of the Board.[442]

If such negotiations do not lead to settlement of the claim, the UN agrees to resort to arbitration in accordance with the UNCITRAL rules and conducted under the auspices of the American Arbitration Association, with New York as the place of arbitration.[443] In terms of applicable law, the arbitral tribunal is to take 'into account, as appropriate, Headquarters Regulation no. 4'.[444]

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[437] Ibid., para. 1(a)(i). The rules referred to are included in UN Doc. ST/SGB/103/Rev.1 (1980).
[438] UN Doc. A/41/210 (1986), para. 2(a).
[439] Ibid., para. 1(b).
[440] Ibid., para. 1I. The term 'non-economic losses' is not defined and neither is the term 'moral damages'.
[441] However, UN Doc. ST/SGB/230 (1989) was abolished pursuant to Section 1(a) of UN Doc. ST/SGB/2017/3 (2017). It is not known to the present author whether the regime contained in UN Doc. ST/SGB/230 (1989) was incorporated into another administrative instrument.
[442] UN Doc ST/SGB/230 (1989), para. 5.
[443] Ibid., para. 6.
[444] Ibid., para. 6.

As to tort claims arising from acts at other duty stations than New York, these are settled through negotiation and, where this fails, arbitration.[445]

Claims 'arising from accidents involving vehicles operated by United Nations personnel for official purposes'

The UN has taken out commercial liability insurance with worldwide coverage against third party claims arising in connection with accidents involving UN vehicles.[446] According to Rashkow: 'This system has worked effectively to insulate the Organization from such claims throughout the years.'[447] The insurance coverage for car accidents includes claims arising from such accidents during UN peacekeeping operations.[448]

Cases involving third party liability insurance represent the only instance 'in which the Organization might normally waive its immunity'.[449] This is because insurers would otherwise not be able to defend claims against the UN.[450] In practice, however, it may well be that insurers settle claims rather than

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[445] 1995 Report, para. 13.
[446] Ibid., para. 14.
[447] Rashkow (2015), at 80.
[448] 1995 Report, para. 17. The 1996 Report clarifies that if the insurance company does not have a representative on the ground, the claim is first reviewed by the local claims review board before it is forwarded to the insurance company. 1996 Report, para. 3, fn. 1. Rashkow explained that insurance coverage has also been put in place in connection with aircraft charter arrangements. Rashkow (2015), at 80.
[449] 1985 Supplement to the 1967 Study, at 159.
[450] According to the 1967 Study, para. 84: 'In 1949 a suit was commenced by a private individual against the United Nations for damages arising out of a motor car accident in New York in which a United Nations vehicle was involved. Under the terms of the insurance policy held by the United Nations, the insurers were ready to defend the action in court. Before they could do so, however, it was necessary for the United Nations to waive its immunity. In an internal memorandum the Office of Legal Affairs recommended that this should be done "for the purpose of allowing this particular suit to go to trial and that as a matter of policy it also be prepared to waive its immunity in any other case of a similar nature, subject to each such case being first reviewed by the Office of Legal Affairs to make sure that it has no complication such as might merit special treatment." The memorandum continued: "The question arises as to how this immunity may be waived. Resolution 23 (I), paragraph E, instructs the Secretary-Gener"l "to insure that the drivers of all official motor cars of the United Nations and all members of the staff who own or drive motor cars shall be properly insured against third party r"sk". Under this resolution the Secretary-General has clear authority to take whatever steps he may deem necessary to implement its terms. As it is really not feasible to take out insurance without permitting the insurance carrier the right to defend any suits which might be brought against the United Nations, the Secretary-General clearly has the power to waive the immunity of the United Nations for the purpose of permitting such suits to be brought. This memorandum is only intended to deal with the waiver of the Organizat'on's immunity in insurance cases. The question as to under what circumstances the United Nations might be prepared to waive its immunity in other cases is complex, but as this question has no bearing on the insurance cases which are in a class by themselves, the necessity for discussing the waiver of immunity as a whole does not arise at this time. In accordance with the conclusions reached in this memorandum, it is proposed that the Office of Legal Affairs should authorize the insurance carrier to defend this particular suit on behalf of the United Nations, thereby, of course, resulting in the United Nations waiving its immunity for this particular case and that the Office of Legal Affairs take similar action in all other insurance cases where it considers it would be within the spirit of the relevant General Assembly Resolution so to do. The same policy has been followed in subsequent cases.' Ibid. (emphasis added). The 1985 Supplement to the 1967 Study also refers to the 1949 OLA memorandum and state': 'The only situation in which the Organization might normally waive its immunity would be one involving third party liability insuran'e.' See 1985 Supplement to the 1967 Study, at 159.

going to Court so that there is no need for the UN to waive its immunity. In terms of applicable law, according to the 1995 Report, 'the claims are dealt with by the insurers . . . in accordance with the local law of the particular State concerned.'[451]

Claims related to 'operational activities for development'

As to the operational activities for development carried out by UNDP and UNICEF, commercial agreements with contractors (or lessors) include an arbitration clause as described above. Furthermore, according to the 1995 Report,

> 'in consideration of the fact that UNDP and UNICEF assistance to national programmes and projects (including entering into agreements with contractors for the provision of goods and services) are provided at the request of and for the benefit of the respective recipient State, it has been the practice of both UNDP and UNICEF to include in their agreements with recipient Governments a provision to shift liability to the latter in respect of third-party claims. In effect, the provision ensures that the Government concerned will be responsible for dealing with, and satisfying, third-party claims and will hold harmless the United Nations in respect of any such claims that may arise, except in cases of gross negligence or wilful misconduct on the part of the United Nations organ or its representatives.'[452]

3.3.2.2.2 Third party-claims arising in connection with UN peacekeeping operations

Claim settlement mechanisms

As to the settlement of claims of private parties that arise in the context of peacekeeping operations, other than the aforementioned claims in relation to contracts and car accidents, the 1996 Report set forth two procedures:[453] claim settlement by a standing claims commission, and by a local claims review board. In reality, however, the former does not exist, though its establishment is envisaged in status-of-forces agreements. Article 51 of the then model status-of-forces agreement provides as follows:[454]

> 'Except as provided in paragraph 53, 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. 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 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 or the Government, appoint the chairman. Any vacancy on the commission shall be filled by the same method prescribed for the original appointment, provided that the thirty-day period there described shall start as soon as there is a vacancy in the chairmanship. The commission

[451] 1995 Report, para. 14 (emphasis added). Likewise, 1996 Report, para. 3, fn. 1.
[452] 1995 Report, para. 22. The 1995 Report discusses this category under the heading 'claims related to United Nations peacekeeping operations', but such claims do not necessarily relate to peacekeeping. Indeed, it appears that the topic was erroneously placed under said heading, given also that the introductory paragraph (para. 9) of 'other disputes of a private law character' refers to claims related to development activities as a separate category.
[453] 1996 Report, paras. 20-37. See 1995 Report, paras. 16-20.
[454] UN Doc. A/45/594 (1990).

> shall determine its own procedures, provided that any two members shall constitute a quorum for all purposes (except for a period of thirty days after the creation of a vacancy) and all decisions shall require approval of any two members. 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 established in accordance with paragraph 53.'[455]

As to standing claims commissions not being established, the 1997 Report speculated that this may be 'due to the 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.'[456] Yet, as the 1997 Report put it,

> 'the standing claims commission envisaged in article 51 of the model agreement should be maintained, mainly because it provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par. The mechanism also reflects the practice of the Organization in resolving disputes of a private law character under article 29 of the Convention on the Privileges and Immunities of the United Nations. The local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case. Based on the principle that justice should not only be done but also be seen to be done, a procedure that involves a neutral third party should be retained in the text of the status-of-forces agreement as an option for potential claimants.'[457]

This notwithstanding, the reality is that to date local claims review boards are the only dispute settlement mechanisms,[458] in addition to negotiations, for third-party claims in the case of peacekeeping operations, other than contractual disputes.[459]

With respect to claims review boards,[460] the UN Secretary-General explained in the 1996 Report that

> '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 that are attributable to acts performed in connection with official duties by civilian or military members of the mission . . . When a claims review board approves a settlement amount within its delegated financial authority, the relevant administrative office of the peacekeeping mission - normally the claims unit - proceeds to offer such a settlement amount to the claimant. In

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[455] Art. 53 provides for an appeal against the commission's award to a tribunal to be established jointly by the Government and the Secretary-General in accordance with the same procedure for establishing the claims commission.

[456] 1997 Report, para. 8.

[457] Ibid., para. 10. The UNSG did, however, propose to remove the option of a further appeal to a tribunal as foreseen in Art. 53 of the model SOFA to avoid what may in fact be seen as a 'duplication of the proceedings in the standing claims commission.' Ibid., fn. 2. This was done in modern SOFAs, which are discussed below.

[458] According to the Schmalenbach: 'The settlement of disputes by the local claims review board has developed into a form of adjudication', which is 'by no means unusual'. See Schmalenbach (2006), at 42, referring to practice in connection with NATO operations.

[459] The UNSG's financial report for 2016-2017 refers to the settlement of third-party claims through arbitration, though without specifying the type of disputes in point: 'During the reporting period, the Office of Legal Affairs defended the Organization from claims totalling $91.3 million arising out of peacekeeping operations. As a result of the efforts of the Office, such claims were resolved, whether by arbitral award or by approved settlement, in the amount of $4.9 million, representing some 5.4 per cent of the amount originally claimed, and a reduction of 94.6 per cent in the actual liability borne by the Organization from that originally claimed.' UN Doc A/72/701 (2018), para. 27 (emphasis added).

[460] On the liability of the UN towards members of peacekeeping contingents, see Schmalenbach (2016), para. 58.

> the vast majority of cases, the offer is accepted by the claimant and payment is made against the execution of a release form.'[461]

The 1995 Report explained that the 'release form' entails the claimant's agreement 'to indemnify and hold harmless the United Nations, its officials and agents, from any and all claims and causes of action by third parties arising from or relating to the injuries or loss at issue.'[462]

Importantly, where the claimant does not accept the settlement proposed following proceedings before the local claims review board, in the absence of a standing claims commission, there is no further recourse.[463]

While the 'existing mechanisms and procedures for dealing with third-party claims are not inadequate per se', [464] according to the UNSG in the 1996 Report, problems were being encountered in the practice of claims review boards.[465] According to the 1996 Report: 'the increasing number and complexity of claims that have arisen from recent major United Nations operation have taxed the ability of the Organization to deal with claims efficiently and promptly'.[466] Indeed, there were 'exceptionally large numbers of claims from several major current or recent United Nations operations'.[467] The 1995 Report was more specific in stating that it

> 'is important to note that there has been a marked increase in the number of third-party claims that have been submitted to the United Nations Operation in Somalia (UNOSOM II) - the first Chapter VII peacekeeping operation in recent years established under United Nations command - and, in addition, that the nature of those claims has varied, to a certain extent, from those that have arisen within the context of traditional Chapter VI operations. The question of how to assess and handle the category of claims for personal injury or death and/or property loss or damage arising from "enforcement actions" of UNOSOM II (involving the use of force) is currently under study by the relevant Secretariat offices as this matter raises complex issues of public international law that must eventually be reviewed by the General Assembly.'[468]

As the 1997 Report summarized, with reference to the 1996 Report,

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[461] 1996 Report, paras. 22-23. The 1996 Report continues: 'When, however, the settlement amount recommended by a claims review board exceeds its authorized financial limit, the third-party claim is referred by the mission to Headquarters for review and approval. In those cases, the recommendations of the local claims review board are submitted to the Field Administration and Logistics Division of the Department of Peacekeeping Operations, which, in turn, forwards them to the Director of the Peacekeeping Financing Division of the Office of Programme Planning, Budget and Accounts for review and approval.' Ibid., para. 24.
[462] 1995 Report, para. 19.
[463] According to Schmalenbach, this is in contrast to NATO operations in Bosnia-Herzegovina and Kosovo. See Schmalenbach (2006), at 42.
[464] 1996 Report, para. 30.
[465] Ibid., paras. 31-33. See likewise 1997 Report, para. 9.
[466] 1996 Report, para. 26.
[467] Ibid., para. 27.
[468] 1995 Report, para. 20. The present author is not aware that such a study has been produced.

> 'in order to cope with the large numbers and amounts of claims a series of measures, such as provision of additional personnel, increasing the financial authority of local claims review boards or increasing their numbers in the field, were suggested.'[469]

In this respect, as the *first set* of 'modified procedures for the settlement of third-party claims' (the second such set is discussed below), the 1996 Report suggested changing the financial authority of the local claims review boards on the basis of the work by the 'Interdepartmental Working Group on Third-party Claims', which was ongoing at the time.[470]

In terms of the law applied by claims reviews boards, there has been a lack of clarity as the proceedings before those boards are not public.[471] Arguably, according to the 1996 Report, they apply international law.[472] However, the UN Legal Counsel wrote in 1966 concerning the UNEF claims review board:

> 'I believe that it would be correct to say that the local law was taken as a guideline in reaching an equitable settlement and it has not been necessary to reach definitive conclusions whether the lex loci or general principles of law are to be applied.'[473]

According to the 1997 Report, specifically with respect to personal injury:

> 'In the practice of peacekeeping operations, compensation payable to third-party claimants for personal injury is based on the types of injury and loss compensable under local law and the prevailing practice in the mission area, in particular, as well as on the past practice of the Organization.'[474]

According to Zwanenburg:

> 'One could argue that the applicable primary norms that apply to a peace operation in the host state are the national law of the host state, in particular its law of torts. Status of Forces Agreements concluded by the UN provide that UN peace operations shall respect all local laws and regulations.'[475]

However, Zwanenburg continued to state that

> 'it could also be argued that the obligation in SOFAs to respect the law of the host state must be understood as entailing a lesser obligation than "to apply" or "to comply with" and essentially obliges the staff to take duly into account local law.'[476]

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[469] 1997 Report, para. 9.
[470] 1996 Report, para. 31. The present author was unable to determine the outcome of the work by said working group.
[471] According to Zwanenburg: 'The legal framework in which local claims review boards operate is relatively unclear.' M. Zwanenburg, 'UN Peace Operations Between Independence and Accountability', (2008) 5 *International Organizations Law Review* 23, at 29.
[472] Ibid., at 29.
[473] Cited in ibid., at 29 (emphasis added).
[474] 1997 Report, para. 24 (emphasis added).
[475] Zwanenburg (2008), at 29. See, e.g., Para. 5 of the MINUSTAH SOFA.
[476] Zwanenburg (2008), at 30.

Ultimately, according to Schmalenbach:

> 'the claims review boards of the early missions leaned towards general principles of laws of tort in order to identify substantive rules governing the UN's liability. Beyond that, it is impossible to fathom the exact set of rules applied by the boards, and it remains unclear whether such a set of established rules exists at all. In this regard, however, it should be noted that the claims review boards' recommendations and their correspondence with the UN headquarters rarely, if at all, discussed the applicable rules and principles, nor even mentioned a survey into different domestic tort laws.'[477]

That said, as explained by Schmalenbach:

> 'With regard to the amount of damages to be paid by the UN, the claims review boards apply local laws and standards as it is common practice of member States in the course of their own military missions as well. That does not alter the fact that this practice is open to human rights concerns given that some local laws of operational areas of UN missions measure the amount of damage on the basis of sex, age, profession, and social status of the injured or killed person.'[478]

Against this backdrop, it was perhaps no surprise that the 1996 Report stated as one of the problems encountered in relation to claims review boards:

> 'The procedural problems encountered by local claims review boards have been exacerbated by the lack of clarity as to the scope of United Nations liability for property loss or damage, in general, and its liability for damage resulting from "operational necessity", in particular.'[479]

This lack of clarity was addressed through the UN Liability Rules. As discussed hereafter, following the 1996 Report and the 1997 Report, these were promulgated by the UNGA in resolution 52/247 (1998).

As a *second set* of 'modified procedures for the settlement of third-party claims', the 1996 Report referred to 'lump-sum agreements', whereby the UN negotiates a settlement with the government of nationality of the claimants.[480] There is only one known example in UN practice of such an arrangement: the ONUC settlements in the 1960s.[481] Such an arrangement has been understood to qualify as a mode

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[477] Schmalenbach (2016), para. 75 (emphasis added).
[478] Ibid., para. 76 (fns. omitted, emphasis added).
[479] 1996 Report, para. 29. When it comes to the UN's liability for combat-related activities, the 1996 Report stated: 'The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces. The scope of third-party liability of the Organization, however, will have to be determined in each case according to whether the act in question was in violation of any particular rule of international humanitarian law or the laws of wars. Thus, for example, the fact that damage was caused in itself may not necessarily engage the liability of the United Nations. Such liability would be entailed if the damage was caused in violation of international humanitarian law rules and could not be justified on grounds of "military necessity".' Ibid., para. 16. See Observance by United Nations forces of international humanitarian law, United Nations, Secretary-General's Bulletin, UN Doc. ST/SGB/1999/13 (1999), reprinted in: International Review of the Red Cross, vol. 81, No. 836, 1999, 812; ILM, vol. 38, 1999, 1656. See generally D. Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', (2000) 94 *American Journal of International Law* 406.
[480] 1996 Report, para. 34.
[481] Schmalenbach (2016), para. 26 and fn. 77.

of settlement under Section 29 of the General Convention. That results from the background of those arrangements. That is, in response to USSR opposition to one such arrangement (alleging aggression on the part of Belgium),[482] the UNSG stated that

> '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 Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.'[483]

The reference to the General Convention in the UNSG's statement may be taken to point to Section 29 thereof, taking into account that the lump sum agreement was to 'compensate individuals who have suffered damages for which the Organization was legally liable'. Thus, at the time, the lump sum agreement was arguably understood to qualify as a 'mode of settlement' under that provision.

Similarly, the 1996 Report proposed lump sum agreements as part of the 'modified procedures for the settlement of third-party claims' under Section 29.[484] The 1996 Report listed a number of advantages of such agreements: no lengthy and costly proceedings to handle individual claims; lump-sum agreements would be in full and final settlement of all claims by both the government and its nationals; any determination of the ownership of property can be left to the government; any claims from the UN against the Government can be deducted.[485] On the downside, according to the 1996 Report, lump sum agreements depends on the availability of a government and, where a government is available, its willingness to espouse the claim.[486] The 1996 Report did not contain any proposals on how to revive lump sum agreements. Neither the 1997 Report nor the UNGA in resolution 247 (1998) referred to such agreements.

The UN Liability Rules

As seen, the UNGA in resolution 52/247 (1998) promulgated the UN Liability Rules. More precisely, in that resolution, the UNGA:

- decided that the financial and temporal limitations set out in the 1997 Report shall apply;[487]

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[482] UN Doc. S/6597 (1965), reproduced in the 1967 Study, para. 55.
[483] Ibid., para. 56 (emphasis added).
[484] 1996 Report, para. 34.
[485] Ibid., para. 35.
[486] Ibid., para. 37.
[487] UN Doc. A/RES/52/247 (1998), para. 5.

- endorsed the view of the UNSG in the 1997 Report that no limitations on liability apply in the case of gross negligence or wilful misconduct;[488] and
- endorsed the view of the UNSG in the 1996 Report that the liability of the UN is not engaged in the case of operational necessity.[489]

Two general observations are called for at this point. First, the 1996 Report, the 1997 Report and A/RES/247 (1998) concern the non-contractual[490] liability of the UN towards 'third parties'. That term is not defined in these documents, but it clearly denotes private non-state parties. This results from the focus in the reports and resolution on the types of loss or injury most commonly encountered in the practice of UN operations, namely: non-consensual use and occupancy of premises; personal injury and property loss or damage arising from the ordinary operation of the force; and such injury and damage resulting from combat operations.[491] In this respect, an annex to the 1997 Report contains a 'consolidated claim form for third-party personal injury or death and/or property damage or loss', which clearly envisages the claimant to be a natural person.

Second, the 1996 Report, the 1997 Report and UNGA resolution 247 (1998) relate to 'peacekeeping operations'. That term is used broadly so as to cover different types of UN operations. According to the 1996 Report:

> 'In view of the fact that such damage has occurred both in traditional peacekeeping operations (the so-called "Chapter VI" operations) and in enforcement actions conducted under Chapter VII of the Charter, the approach of the present study to the question of United Nations third-party liability cuts across the peacekeeping/peace-enforcement divide. It distinguishes instead between the tortious liability of the Organization for damage caused in the ordinary operation of the force regardless of the type of operation and its liability for combat-related damage whether in the course of a Chapter VII operation or in a peacekeeping operation where force has been used in self-defence'.[492]

The following describes the UN Liability Rules and specifically the UN's liability for the ordinary operation of the force and for combat-related activities, and limitation of liability.

- The scope of liability for the ordinary operation of the force

Insofar as peacekeeping operations are carried out with the consent of the host state, it is for the host state to provide premises to the UN force, if necessary, by taking possession of privately-owned land

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[488] Ibid., para. 7.
[489] UN Doc. A/RES/52/247 (1998), para. 6.
[490] Schmalenbach (2016), para. 80 ('the liability resolution is geared towards tort claims so that contractual claims against the UN are excluded from its scope'.).
[491] 1996 Report, para. 3; 1997 Report, para. 2. See also ILC commentary to Art. 33 ARIO, para. (5) ('breaches committed by peacekeeping forces and affecting individuals'), fn. 242, which refers to UN Doc. A/RES/247 (1998).
[492] Ibid., para. 4.

and premises. This was reflected in Article 16 of the 1989 model status-of-forces agreement. In practice, however, host states rarely do so. This may be because there is no government, or none that exercises effective control over the area of operation. This leaves the UN to arrange for its own premises. According to the 1996 Report:

> 'It is only when the Government fails to provide the necessary premises and they could not be otherwise secured that the United Nations force may take temporary possession of land and premises - whether State or privately owned - as may be operationally necessary for the deployment of the force and the pursuance of its mandate.'[493]

The Secretary-General considers such occupancy to be lawful—i.e., one that is not tortious—though it does not 'exempt the Organization from liability to pay adequate compensation or fair rental for privately owned property'.[494] UNGA resolution 52/247 (1998) does not address the practice concerning the occupancy of privately-owned land and premises.

By contrast, in that resolution the UNGA did endorse the view of the UNSG in the 1996 Report that 'liability is not engaged in relation to third-party claims resulting from or attributable to the activities of members of peacekeeping operations arising from "operational necessity" as described in paragraph 14 of the [1996 Report]'.[495] Paragraph 13 of the 1996 Report sets out the basic notion regarding operational necessity (fn. omitted):

> 'The liability of the Organization for property loss and damage caused by United Nations forces in the ordinary operation of the force is subject to the exception of "operational necessity", that is, where damage results from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates.'

Paragraph 14 of the 1996 Report explained this further:

> 'It is, of course, difficult, if not impossible to determine in advance what would constitute "operational necessity" in any given situation. That decision must remain within the discretionary power of the force commander, who must attempt to strike a balance between the operational necessity of the force and the respect for private property. In deciding upon the operational necessity of any given measure the following must be taken into account:
>
> (a) There must be a good-faith conviction on the part of the force commander that an "operational necessity" exists;
>
> (b) The operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option;
>
> (c) The act must be executed in pursuance of an operational plan and not the result of a rash individual action;

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[493] Ibid., para. 11.
[494] Ibid., para. 12. The UN retains the right to seek reimbursement from the Government of the host state.
[495] UN Doc. A/RES/52/247 (1998), para. 6.

> (d) The damage caused should be proportional to what is strictly necessary in order to achieve the operational goal.'

The ACABQ recalled with reference to the 1996 Report that 'the concept of "operational necessity" . . . has been formally presented in a document for the first time, although it has already been applied in the practice of Claim Review Boards as an exception from liability.'[496]

According to Schmalenbach, 'operational necessity' is historically rooted in the obligation of host states of UN operations to provide the UN for free with the necessary premises, if necessary by taking possession thereof.[497] Indeed, as seen above, the 1996 Report also uses the term 'operational' in connection with the non-consensual use of premises. However, as seen, in that case the UN is liable to pay compensation, while this is not the case under the rules of operational necessity endorsed by the UNGA.

- The scope of liability for combat-related activities

The 1996 Report is rather brief on the scope of the liability of the UN for combat-related activities. First, it states that the principles and rules of international humanitarian law determine its liability. Concretely, this means that 'liability would be entailed if the damage was caused in violation of international humanitarian law rules and could not be justified on grounds of "military necessity".'[498]

Second, the 1996 Report asserts the following:

> 'The principle that in coordinated operations liability for combat-related damage in violation of international humanitarian law is vested in the entity in effective command and control of the operation or the specific action reflects a well-established principle of international responsibility.'[499]

Therefore, the liability of the UN for combat-related damage is engaged insofar as it exercises effective command and control, and where such damage is caused in breach of international humanitarian law and could not be justified on the basis of 'military necessity'. Notwithstanding this practice, however, UNGA resolution 52/247 (1998) addresses neither the UN's liability for violation of international humanitarian law, nor the exemption from liability regarding 'military necessity'.

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[496] UN Doc. A/51/491 (1996), para. 8. Cf. Schmalenbach (2016), para. 79 ('A pattern was begun with the UNEF mission where the claims review board refused to settle claims related to damages that were caused by actions considered necessary from an operational point of view.'). According to Schmalenbach, the OAS and NATO have similarly dismissed claims on grounds of 'operational necessity'. See Schmalenbach (2006), at 44.
[497] Schmalenbach (2006), at 44-45.
[498] 1996 Report, para. 16.
[499] Ibid., para. 19.

- Limitation of liability

As to third-party claims for personal injury, illness or death, and for property loss or damage (including non-consensual use of premises*)* in connection with peacekeeping operations, the UNGA decided in UNGA resolution 52/247 (1998), paragraph 5, that the temporal and financial limitations set out in the 1997 Report, as reproduced in paragraphs 8-11 of the resolution, 'shall apply'. These limitations, which are to be included in SOFAs with host states of peacekeeping operations and in the terms of reference of local claims review boards,[500] are as follows:

- As to *temporal limitations* 'in relation to third-party claims . . . resulting from peacekeeping operations', they are laid down in paragraph 8 of UNGA resolution 247 (1998). Though that paragraph only refers to 'damage, injury, or loss', read in conjunction with paragraph 5 of the resolution and paragraph 13 of the 1997 Report, it seems that the temporal limitations apply to the full scope of third-party claims for personal injury, illness or death, and for property loss or damage (including the non-consensual use of premises). Claims must be submitted within six months of sustaining the damage, loss or injury, or six months after the claimant discovered it, and in any event within a year of the termination of the mandate of the operation. The UNSG has a discretionary power to accept, in exceptional circumstances, the consideration of claims submitted at a later date.[501]
- As to *financial limitations* in regard to 'third-party claims against the Organization for personal injury, illness or death resulting from peacekeeping operations', according to paragraph 9 of UNGA resolution 52/247 (1998):

> '(a) Compensable types of injury or loss shall be limited to economic loss, such as medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, legal and burial expenses;
>
> (b) No compensation shall be payable by the United Nations for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages;
>
> (c) No compensation shall be payable by the United Nations for homemaker services and other such damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the injury or loss itself;
>
> (d) The amount of compensation payable for injury, illness or death of any individual, including for the types of loss and expenses described in subparagraph (a) above, 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;

[500] UN Doc. A/RES/52/247 (1998), paras. 12 and 13.
[501] 1997 Report, para. 20; UN Doc. A/RES/52/247 (2008), para. 8. Such exceptional circumstances would arise where damage occurs during the wind-up period of an operation. 1997 Report, para. 20.

(e) In exceptional circumstances, the Secretary-General may recommend to the General Assembly, for its approval, that the limitation of 50,000 dollars provided for in subparagraph (d) above be exceeded in a particular case if the Secretary-General, after carrying out the required investigation, finds that there are compelling reasons for exceeding the limitation.'

As discussed further below, it follows from the 1997 Report that the maximum ceiling amount is drawn from the maximum amounts that apply for military or police observers and members of UN commissions.[502] As to the term 'economic loss', it is taken from Headquarters regulation No. 4, criteria developed by the UN Compensation Commission, and practice of peacekeeping operations.[503]

- As to *financial limitations in regard to* 'third-party claims against the Organization for property loss or damage resulting from peacekeeping operations', according to paragraph 10 of A/RES/247 (1998):

'(a) Compensation for non-consensual use of premises shall either: (i) be calculated on the basis of the fair rental value, determined on the basis of the local rental market prices that prevailed prior to the deployment of the peacekeeping operation as established by the United Nations pre-mission technical survey team; or (ii) not exceed a maximum ceiling amount payable per square metre or per hectare as established by the United Nations pre-mission technical survey team on the basis of available relevant information; the Secretary-General will decide on the appropriate method for calculating compensation payable for non-consensual use of premises at the conclusion of the pre-mission technical survey;

(b) Compensation for loss or damage to premises shall either: (i) be calculated on the basis of the equivalent of a number of months of the rental value, or a fixed percentage of the rental amount payable for the period of United Nations occupancy; or (ii) be set at a fixed percentage of the cost of repair; the Secretary-General will decide on the appropriate method for calculating compensation payable for loss or damage to premises at the conclusion of the pre-mission technical survey;

(c) No compensation shall be payable by the United Nations for loss or damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the loss of or damage to the premises'.

- As to *loss or damage to personal property of third parties,* according to paragraph 11 of UNGA resolution 52/247 (1998):

'(a) Compensation for loss or damage to personal property of third parties arising from the activities of the operation or in connection with the performance of official duties by its members shall cover the reasonable costs of repair or replacement;

(b) No compensation shall be payable by the United Nations for loss or damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the loss of or damage to the personal property.'

[502] 1997 Report, paras. 27-29.
[503] Ibid., para. 25.

- Lastly, according to paragraph 7 of UNGA resolution 52/247 (1998), as to 'third-party claims resulting from gross negligence or wilful misconduct of the personnel provided by troop-contributing States for peacekeeping operations', the UNGA endorsed the view of the UNSG in the 1997 Report that no limitations on liability apply.

By contrast, the UNGA did not endorse a further proposal in the 1996 Report to limit the liability of the UN through 'counter-claims' and 'off-sets'.[504] These are claims by the UN against the claimant that relate to the same or a different situation, respectively. Such claims by the UN against an individual are rare, whereas they frequently arise against the host state of a UN operation regarding payments made by the UN that were not legally required. Thus, counter-claims and off-sets will come into play in the case of diplomatic protection, of which the ONUC settlements are the only known example in the case of the UN. Indeed, in that case, the UN off-sets amounts in settlement of several financial matters outstanding between the UN and Belgium.[505]

3.3.2.3 'Other claims'

In addition to the categories of 'Disputes arising out of commercial agreements' and 'Other disputes of a private law character', the 1995 Report contains a chapter entitled 'Other claims'. Such claims do *not* qualify for dispute settlement under Section 29 of the General Convention. According to the 1995 Report:

> 'The Organization 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 Organization 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 utilize public funds to submit to any form of litigation with the claimants to address such issues.'[506]

Furthermore, according to the 1995 Report:

> 'The other major category of claims of a private law nature that have been received to date by the Organization have been from disappointed job applicants, i.e. individuals who are aggrieved that they were not selected for a United Nations position. Such claims typically allege the occurrence of prejudice or some other impropriety in the selection process. The Organization's policy is not to enter into any litigation or arbitration with such individuals but to reply in a reasoned manner to such individuals with a copy provided to their Permanent Mission if it has become involved in the matter. Furthermore, appointments, other than short-term appointments, are examined by joint staff management appointment machinery (the Appointment and Promotion Board and its subsidiary bodies) and the Secretary-General considers that this procedure ensures fairness in selection. Again, the Secretary-General considers that it would be inappropriate to use public funds to submit to any

[504] 1996 Report, para. 41.
[505] 1967 Study, para. 56.
[506] 1995 Report, para. 23 (emphasis added).

> form of litigation with the many disappointed job applicants world wide who wish to contest their non-selection.'[507]

There are therefore two types of claims under the heading of 'other claims', neither of which qualifies for dispute settlement under Section 29: claims based on 'political or policy-related grievances', and claims from disappointed job applicants. As will be seen in the next section, the exclusion of these types of claims from dispute settlement raises questions in light of the key criterion under Section 29, that is, the 'private law character' of disputes. Do disputes concerning claims based on 'political or policy-related grievances' necessarily lack such a character? And, if claims by disappointed job applicants are of a private law *nature*, as per the above-quoted passage from the 1995 Report, would the disputes to which they give rise lack a private law *character* under Section 29?

The chapter's title 'Other claims' may be taken to suggest that the chapter covers *all* claims other than the ones specifically mentioned in the 1995 Report, and that none of these other claims qualify for dispute settlement under Section 29 of the General Convention. That is, *any* other claim (i) is either from a disappointed job applicant, or one that is based on 'political or policy-related grievances', and (ii) is excluded from the scope of Section 29. However, that does not necessarily seem to be the intention behind the 1995 Report. That results from the report's discussion of the implementation of Section 29(b), concerning disputes involving UN officials.[508] According to the 1995 Report:

> '30. At the outset, it ought be noted that if a claim is against an official for acts performed in the course of his or her official functions, the Organization will inform the claimant that the action is against the Organization itself and then the normal procedures for dispute resolution set out in paragraphs 3 to 8 above should apply. It is only if an act relates to private activities of the official that the issue of waiver is examined.
>
> 31. Should there be a dispute not dealt with in accordance with the preceding paragraph involving any official of the Organization who by reason of his official position enjoys immunity, if immunity has not been waived, the United Nations, in accordance with Article VIII, section 29(b) of the General Convention, is expected to make provisions for appropriate modes of settlement of such a dispute. The General Convention itself, however, does not provide for a specific mechanism for the settlement of disputes of this character'.[509]

The reference in paragraph 30 of the 1995 Report to 'the normal procedures for dispute resolution set out in paragraphs 3 to 8 above' is ambiguous. Paragraphs 3 to 8 of the 1995 Report concern the

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[507] Ibid., para. 24 (emphasis added). Of note, the 'Appointment and Promotion Board' has now been replaced by 'central review bodies' (UN Doc. ST/SGB/2011/7 (2011)). These bodies encompass (field) Central Review Boards, (field) Central Review Committees and (field) Central Review Panels (UN Doc ST/SGB/2011/7, (2011), Section 1). The involvement of each respective body depends on the level of the staff to be selected. These bodies, which are composed of UN staff members (UN Doc. ST/SGB/2011/7 (2011), Section 3) are tasked to 'advise the Secretary-General on all proposed appointments of one year or longer' (UN Doc. ST/SGB/2011/7 (2011), Subsection 4.3).

[508] The UN 'shall make provisions for appropriate modes of settlement of: . . . (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.'

[509] 1995 Report, paras. 30-31 (emphasis added).

settlement of contractual disputes through negotiation and, as necessary, arbitration. Is the reference in paragraph 30 of the 1995 Report to be understood to refer to contractual disputes only? The types of disputes under Section 29(b) may well concern non-contractual, that is, tortious, liability. It may be, therefore, that said reference is rather to be understood as negotiation and arbitration being the 'normal procedures' for dispute resolution under Section 29(b) irrespective of the type of dispute at issue. That is, except disputes concerning claims based on 'political or policy-related grievances', or claims from disappointed job applicants, which the 1995 Report explicitly excludes.

That reading of the 1995 Report would be supported by the UN's position in the advisory proceedings before the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The matter will be introduced here to complete the overview of UN practice in connection with Section 29 of the General Convention.

The advisory proceedings arose out of defamation claims against a Special Rapporteur of the UN Commission on Human Rights on the independence of judges and lawyers, Mr Cumaraswamy, before the Malaysian courts. In the November 1995 issue of International Commercial Litigation entitled 'Malaysian Justice on Trial', Mr Cumaraswamy was quoted as saying in regard to a specific case

> 'that it looked like "a very obvious, perhaps even glaring example of judge-choosing", although he stressed that he had not finished his investigation.
>
> Mr. Cumaraswamy is also quoted as having said:
>
> > "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice."
>
> He added: "But I do not want any of the people involved to think 1 have made up my mind." He also said:
>
> > "It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."'[510]

This led two commercial firms to sue Mr Cumaraswamy for slander and libel (collectively referred to as 'defamation').[511] The Malaysian courts entertained the claims notwithstanding Mr Cumaraswamy's immunity as a UN special rapporteur under the General Convention. The UN Economic and Social Council then submitted a request for an advisory opinion to the ICJ as to whether Mr Cumaraswamy

[510] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), at 71, para. 13.
[511] Ibid., para. 14.

was entitled to immunity from jurisdiction before the Malaysian courts under Section 22 of the General Convention.[512] The ICJ held this to be the case, opining

> 'that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (b), of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.'[513]

As to the defamation claims against the UN—which were not as such at issue in the case before the ICJ—in his written submissions on behalf of the UNSG, the UN Legal Counsel submitted to the Court:

> 'Article VIII, Section 29(a) deals with disputes of a private law character to which the United Nations is a party. It is clear that a claim of libel and/or slander constitutes a dispute of a private law character. Moreover, once the United Nations maintained that the words giving rise to the lawsuits were spoken by the [*sic*] Dato' Param Cumaraswamy in his official capacity and within the course of the performance of the mission entrusted to him by the United Nations Commission on Human Rights, the United Nations had an obligation to protect the Special Rapporteur and to ensure respect for his immunity from legal process. As this immunity was at the heart of the litigation and as the United Nations had formally ratified the words of its expert on mission, the plaintiffs could have pursued the matter with the United Nations as the party to the dispute. Article VIII, Section 29(a) of the Convention is therefore applicable to the dispute.'[514]

At the hearing before the Court, the UN Legal Counsel similarly stated: 'The United Nations settles most claims through negotiation, referring those claims that cannot be settled to arbitration under the UNCITRAL Arbitration Rules or, sometimes, through conciliation under the UNCITRAL Conciliation Rules.'[515]

More specifically, according to the UN Legal Counsel:

> 'By determining that the words spoken by Mr. Cumaraswamy were performed during the performance of the mission for the United Nations, the words complained of are now the responsibility of the United Nations. It follows that any private plaintiff who considers himself harmed by the publication of those words may submit a claim to the United Nations which, if the suits in national courts are withdrawn, will attempt to negotiate a settlement with the plaintiffs; if this

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[512] To be precise, the request concerned 'the legal question of the applicability of Art. VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of D'to' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, contained in document E/1998/94, and on the legal obligations of Malaysia in this case.' *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), at 64.

[513] Ibid., at 86, para. 56 (emphasis in original).

[514] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Written Statement Submitted on behalf of the Secretary-General of the United Nations, 30 October 1998 <icj-cij.org/en/case/100/written-proceedings> accessed 21 December 2021, para. 14 (emphasis added).

[515] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 12.

> is not possible, the United Nations will make provision for an appropriate means of settlement, for example, by submission of the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules'[516]

This resonates to some extent in the ICJ's advisory opinion, according to which

> '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. However, as 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 settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.'[517]

Therefore, the UN accepted that these defamation claims would come within the purview of Section 29 of the General Convention.[518] This supports the reading of the 1995 Report that it does not categorically exclude *all* 'other claims', that is, claims other than those specifically mentioned in the 1995 Report.

The 1995 Report, coupled with the UN Legal Counsel's statement in the proceedings in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, suggest that for the UN, UNCITRAL conciliation and arbitration are the 'normal procedures' (or default procedures), for dispute resolution under Section 29 of the General Convention.

3.3.3 From Srebrenica to Haiti: introduction to case studies

The key criterion to determine the application of Section 29 of the General Convention is whether disputes have a 'private law character'. That criterion, as interpreted and applied by the UN, was key in connection with its alleged third-party liability in cases arising out of three distinct events: the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic. The case studies concerning these events and the resulting legal cases, having been briefly set out in chapter 1, will now be introduced more extensively to complete the overview of the UN's practice under Section 29(a) of the General Convention.

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[516] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 14 (emphasis added).

[517] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), para. 66.

[518] Irrespective of whether the claims underlying *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* were actually the subject of dispute settlement under Section 29 of the General Convention.

3.3.3.1 The Srebrenica genocide

Following the initiation of the case *Mothers of Srebrenica et al. v. State of the Netherlands and the United Nations* before the Dutch courts in 2007, several years of litigation followed concerning the UN's entitlement to immunity from jurisdiction. The Dutch courts upheld the immunity in all instances. The claimants then sued the Netherlands before the ECtHR alleging that the UN's immunity violated the forum state's obligations under, *inter alia*, Article 6 of the ECHR. The ECtHR declared the application inadmissible on 11 June 2013.[519]

The claimants alleged that, as UNPROFOR's 'Dutchbat' had proved unable to protect the 'safe area' of Srebrenica, the respondents are partly liable for the fall of Srebrenica and the subsequent genocide. More specifically, the Dutch Supreme Court summarized the claim as follows:

> '[The claimants] held the State (and Dutchbat, the Dutch unit under UN command) and the UN partly responsible for the fall in 1995 of the Srebrenica enclave in Eastern Bosnia, where Dutchbat was based and which had been designated a 'Safe Area' under the protection of the UN peacekeeping force UNPROFOR by Security Council resolutions, and for the consequences of its fall, in particular the genocide committed subsequently which cost the lives of at least 8,000 people, including relatives of appellants 2-11 in the cassation proceedings. They sought, in brief, a declaratory judgment to the effect that the State and the UN acted wrongfully in failing to fulfil undertakings they had given before the fall of the enclave and other obligations, including treaty obligations, to which they were subject, in addition to (advances on) payments in compensation, to be determined by the court in follow-up proceedings.'[520]

The ECtHR understood the claim before the Dutch courts to be

> 'that the State of the Netherlands (responsible for Dutchbat) and the United Nations (which bore overall responsibility for UNPROFOR), despite earlier promises and despite their awareness of the imminence of an attack by the VRS, had failed to act appropriately and effectively to defend the Srebrenica "safe area" and, after the enclave had fallen to the VRS, to protect the non-combatants present. They therefore bore responsibility for the maltreatment of members of the civilian population, the rape and (in some cases) murder of women, the mass murder of men, and genocide. The applicants based their position both on Netherlands civil law and on international law . . .
>
> The argument under civil law was, firstly, that the United Nations and the State of the Netherlands had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations and the State of the Netherlands had failed to honour; and secondly, that the Netherlands State, with the connivance of the United Nations, had committed a tort (*onrechtmatige daad*) against them by sending insufficiently armed, poorly

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[519] The present author has discussed the judgments of the Dutch courts and the decision of the ECtHR in the following publications: T. Henquet, 'The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg', in N.M. Blokker and N. Schrijver (eds.), *Immunity of International Organizations* (2015), 279; T. Henquet, 'The Supreme Court of the Netherlands: Mothers of Srebrenica Association et al. v. the Netherlands', (2012) 51 ILM 1322; T. Henquet, 'International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts', (2010) 57 *Netherlands International Law Review* 267.

[520] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.2.1.

> trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.'[521]

The case against the UN was terminated as a result of its jurisdictional immunity, which was upheld by the Dutch courts in three instances. As discussed below, the case against the State of the Netherlands did proceed and resulted in the Supreme Court finding the State liable to a limited extent.

As to the implementation of Section 29 of the General Convention, the Supreme Court concluded that the UN 'has not made provision for any 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'.[522] According to the court, this was '[c]ontrary to the provisions of article VIII, § 29, opening words and (a) of the Convention.'[523] This implies that, according to the Supreme Court, the dispute had a private law character. As to the ECtHR, in declaring the case against the Netherlands inadmissible (on grounds discussed below), it left unresolved whether Section 29 of the General Convention required the UN to arrange for dispute settlement.[524]

3.3.3.2 The Kosovo lead poisoning

The claims by former residents of UNMIK-administered camps for internally displaced persons in Kosovo, set up since 1999, concerned alleged damages due to, amongst others, lead contamination at the camps.[525] On 10 February 2006,[526] the claims were submitted under, what Administrative Direction No. 2009/1 of the Special Representative of the UN Secretary-General referred to as, the 'UN Third Party Claims Process'.[527] According to Section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo of 18 August 2000:

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[521] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), paras. 54-55.
[522] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3. Under Para. 55 of the UNPROFOR SOFA, that agreement remained in force 'until the departure of the final element of UNPROFOR from Bosnia and Herzegovina' with the exception of the third-party dispute settlement clause (Art. 48), which 'shall remain in force until all claims have been settled that arose prior to the termination of the present Agreement and were submitted prior to or within three months of such termination.' It is not known to the present author whether, at the time, the claims were submitted under the third-party dispute settlement clause.
[523] Ibid., para. 3.3.3.
[524] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 165 ('Regardless of whether Article VIII, paragraph 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case').
[525] *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, para. 2; *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016), para. 37.
[526] *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08, para. 5.
[527] Section 2.2 of Administrative Direction No. 2009/1 of the Special Representative of the Secretary-General, dated 17 October 2009, cited in *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08, para. 20.

> '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 presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for.'[528]

On 4 July 2008, whilst the claims were pending under the Third Party Claims Process, the complainants submitted parallel claims to the Human Rights Advisory Panel ('HRAP').[529] They claimed

> 'to have suffered lead poisoning and other health problems on account of the soil contamination in the camp sites due to the proximity of the camps to the Trepca smelter and mining complex and/or on account of the generally poor hygiene and living conditions in the camps. The Trepca smelter extracted metals, including lead, from the products of nearby mines from the 1930s until 1999. It currently operates on a limited basis.'[530]

Asserting a broad scope of human rights violations,[531] the complainants contended that UNMIK

> 'has a particular duty of care to [the claimants] as a vulnerable displaced minority population subjected to historical discrimination and marginalization. This duty of care requires [UNMIK] to take positive measures to protect the complainants and to desist from any actions that would violate the complainants' human rights.'[532]

On 5 June 2009, the HRAP declared the complaint partially admissible.[533] However, pending the HRAP's consideration of the case on the merits, on 17 October 2009, the SRSG issued Administrative Direction No. 2009/1. According to Section 2.2 thereof:

> 'Any complaint that is or may become in the future the subject of the UN Third Party Claims process or proceedings under section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their personnel in Kosovo of 18 August 2000, as amended, shall be deemed inadmissible for reasons that the UN Third Party Claims Process and the procedure

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[528] Cited in *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08, para. 24. According to the HRAP: 'The UN Third Party Claims Process referred to in Section 2.2 forms the object of General Assembly resolution 52/247 of 17 July 1998 on "Third-party liability: temporal and financial limitations" (A/RES/52/247).' Ibid., para. 23.

[529] *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, para. 18.

[530] Ibid., para. 2.

[531] According to *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, para. 16: 'The complainants contend that their human rights have been violated under certain provisions of the European Convention on Human Rights (ECHR), namely: Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment), Article 6 § 1 (right to a fair hearing), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 14 (prohibition against discrimination). Breaches of the following human rights instruments are also alleged by the complainants: the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).'

[532] *N.M. and Others v. UNMIK*, Decision of 5 June 2009, HRAP, Case No. 26/08, para. 14.

[533] Ibid., Decision of 5 June 2009, HRAP, Case No. 26/08. Insofar as the complaint was declared inadmissible, this was, amongst others, on grounds of lack of personal jurisdiction (see Decision, chapter IV(A)(1)). Of further note, On 20 February 2006, the European Roma Rights Centre filed an application with the European Court of Human Rights on behalf of 184 Romani residents of camps for Internally Displaced Persons (IDPs) in northern Kosovo. The Court declared the application inadmissible for lack of jurisdiction. See also paragraph 2.4.2.1.1.

> under section 7 of Regulation No. 2000/47 are available avenues pursuant to Section 3.1 of (Regulation No. 2006/12).'[534]

As third-party proceedings were pending, the HRAP held:

> 'The procedure set forth in General Assembly resolution 52/247 and in Section 7 of UNMIK Regulation No. 2000/47 allows the United Nations, at its discretion, to provide compensation for claims for personal injury, illness or death as well as for property loss or damage arising from acts of UNMIK which were not taken out of operational necessity. Therefore, complaints about violations of human rights attributable to UNMIK will be deemed inadmissible under Section 2.2 of UNMIK Administrative Direction No. 2009/1 to the extent that they have resulted either in personal injury, illness or death, or in property loss or damage. Complaints about violations of human rights that have not resulted in damage of such nature will normally not run counter to the requirement of exhaustion of the UN Third Party Claims Process.'[535]

In this respect, the Panel considered:

> 'The substantive complaints declared admissible by the Panel in its 5 June 2009 decision on admissibility are all directly linked to the initial operational choice to place the IDPs in the camps in question and/or the failure to relocate them, and the subsequent effects which resulted in personal injury, illness or death. The Panel considers that these parts of the complaint fall *prima facie* within the ambit of the UN Third Party Claims Process and therefore are deemed inadmissible.'[536]

This notwithstanding, over a year later, the UN Third Party Claims Process ended with the claims being rejected. According to HRAP:

> 'On 25 July 2011, the UN Under-Secretary-General for Legal Affairs informed the complainants of her decision to declare the claims non-receivable. She stated that under Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations . . . the UN Third Party Claims Process provided for compensation only with respect to "claims of a private law character", whereas the complainants' claims concerned "alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo".'[537]

HRAP proceedings then resumed. In a decision dated 26 February 2016,[538] the panel granted the complaints. If found a significant number of human rights violations and made (non-binding) recommendations for remedial action.[539] However, according to the HRAPs final report,[540] the HRAP's recommendations remained to be implemented.

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[534] Cited in *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08, para. 20.
[535] Ibid., para. 38.
[536] Ibid., para. 40. As to complaints regarding procedural human rights violations, though they were not part of the third-party process, they were deemed to be interlinked with the substantive complaints (which were part of that process) such that the complaint was ruled inadmissible in its entirety. Ibid, paras. 42-43.
[537] *N.M. and Others v. UNMIK*, Decision of 10 June 2012, HRAP, Case No. 26/08, para. 19. The HRAP decision refers to similar claims by a large group of claimants, which received the same response from the UN. Ibid., para. 20-21.
[538] *N.M. and Others v. UNMIK*, Opinion of 26 February 2016, HRAP, Case No. 26/08, 55 ILM 925 (2016).
[539] See subsection 2.4.1 and paragraph 2.4.2.1.1 of this study.
[540] Nowicki, Chinkin and Tulkens (2017), para. 64.

3.3.3.3 The Haiti cholera epidemic

In 2011, over 5,000 victims of the cholera epidemic, which left thousands dead and several hundred thousand persons sick, held the UN liable on the basis that UN peacekeepers from Nepal brought the disease to Haiti.

After initial approaches to the UN had failed, in what has been referred to as a 'watershed moment' regarding the accountability of the UN,[541] in 2013, the petitioners in *Georges et al.* filed a class action lawsuit against the UN (as well as UN officials) in the US District Court for the Southern District of New York. The case, like related ones, was dismissed for lack of jurisdiction on account of the UN's jurisdictional immunity.[542]

The introductory paragraphs of the Legal Complaint in *Georges et al.* speak for themselves:

> '1. This class action arises out of an epidemic of cholera that broke out in Haiti in October 2010. At the time of this filing, the epidemic has killed at least 8,300 people and sickened at least 679,000 others in Haiti, and has resulted in additional cholera cases in at least the United States, the Dominican Republic, and Cuba.
>
> 2. The outbreak resulted from the negligent, reckless, and tortious conduct of the Defendants: the United Nations ("UN"); its subsidiary, the United Nations Stabilization Mission in Haiti ("MINUSTAH"); and at least two of their officers.
>
> 3. Prior to Defendants' introduction of the cholera bacterium to Haiti in October 2010, Haiti had no reported cases of cholera.
>
> 4. Defendants have long known that Haiti's weak water and sanitation infrastructure created a heightened vulnerability to waterborne disease but failed to exercise due care to prevent the devastating outbreak of such disease.
>
> 5. In or around October 2010, Defendants knowingly disregarded the high risk of transmitting cholera to Haiti when, in the ordinary course of business, they deployed personnel from Nepal to Haiti, knowing that Nepal was a country in which cholera is endemic and where a surge in infections had just been reported. Defendants failed to exercise reasonable care to test or screen the personnel prior to deployment, allowing them to carry into Haiti a strain of cholera that a UN-appointed panel of experts and other independent scientific experts have since determined is the source of Haiti's present cholera epidemic.

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[541] Boon and Mégret (2019), at 1.

[542] *Delama Georges, et al. v. United Nations*, *et al.*, No. 13-cv-7146 (JPO) (S.D.N.Y., 9 January 2015). Documents pertaining to this litigation are available at <ijdh.org/our_works/case-1/> accessed 21 December 2021. Similar suits were filed before New York courts: *Laventure et al.* v. *UN* and *Petit Homme Jean-Robert et. al.* v. *UN* <opiniojuris.org/2014/03/13/developments-haiti-cholera-claims-un-us-support-uns-absolute-immunity-two-new-suits-filed> accessed 21 December 2021. The UN's immunity from jurisdiction was upheld in each case. For case law references, see International Human Rights Clinic, Harvard Law School *et al.,* 'Violations of the Right to Effective Remedy: The UN's Responsibility for Cholera in Haiti. Joint Submission to the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (undated) <hrp.law.harvard.edu/wp-content/uploads/2020/02/HLS-IHRC-IJDH-BAI-Submission-to-Special-Procedures_Cholera.pdf> accessed 21 December 2021, at 15, fn. 83.

> 6. Defendants stationed their personnel on a base on the banks of the Meille Tributary, which flows into the Artibonite River, Haiti's longest river and primary watersource for tens of thousands. There, Defendants discharged raw sewage from poor pipe connections, haphazard piping, and releases of water contaminated with human waste. They also regularly disposed of untreated human waste in unprotected, open-air pits outside the base where it flowed into the Meille Tributary. Defendants' sanitation facilities and disposal pits overflowed in heavy rain, emitted noxious odors, and exposed the local community to raw sewage.
>
> 7. Defendants knew or should have known that their release of raw sewage into Haiti's primary water source created a high risk of contamination, but they did not take any steps prior to the outbreak to mitigate the dangers or to prevent highly foreseeable harm to the local population, environment and any visitors to the area.
>
> 8. In or around October 2010, human waste from the base seeped into and contaminated the Meille Tributary with cholera. From the Meille Tributary, the contaminated waters flowed into the Artibonite River, resulting in explosive and massive outbreaks of cholera along the river and eventually throughout the entire country.
>
> 9. Defendants recklessly failed to take remedial steps necessary to contain the outbreak of cholera, willfully delayed investigation into the outbreak, and obscured discovery of the outbreak's source. As a result of Defendants' tortious acts and omissions, cholera continues to present an ongoing grave threat to water quality, public health and safety in Haiti, resulting in additional injuries and deaths.
>
> 10. The Named Plaintiffs and the members of the proposed Class they seek to represent have been proximately harmed through Defendants' acts and omissions. These plaintiffs, who are residents in Haiti and the United States, have been or will be sickened, or have family members who have died or will die, as a direct result of the cholera introduced to Haiti by Defendants.'[543]

In terms of the facts, a 2013 report by Yale University stated:

> 'In the years following the outbreak, the U.N. has denied responsibility for the epidemic. The U.N. has repeatedly relied on a 2011 study by a U.N. Independent Panel of Experts, which concluded that at the time there was no clear scientific consensus regarding the cause of the epidemic. However, these experts have since revised their initial conclusions. In a recent statement, they unequivocally stated that new scientific evidence does point to MINUSTAH troops as the cause of the outbreak.'[544]

The Yale University report concluded: 'Scientific study of the origins of the cholera epidemic in Haiti overwhelmingly demonstrates that U.N. peacekeeping troops from Nepal introduced the disease into the country.'[545]

The claimants in *Georges et al.* had initially approached the UN, sending a 'petition for relief' dated 3 November 2011 to the Claims Unit of MINUSTAH (with a copy to the office of the UNSG). The petition requested the UN, amongst others, to establish a standing claims commission as per the MINUSTAH SOFA and to pay compensation to the petitioners.[546] In a letter dated 21 February 2013, the UN Legal

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[543] *Georges et al. v. United Nations et al.*, United States District Court, Southern District of New York, 9 October 2013, Complaint, paras. 1-10.
[544] Transnational Development Clinic, Yale Law School *et al*., 'Peacekeeping Without Accountability' (2013), at 3.
[545] Ibid., at 25.
[546] Petition for Relief, 3 November 2011, paras. 102-114.

Counsel acknowledged the 'terrible suffering caused by the Cholera outbreak' and provided an overview of the UN's efforts to fight the epidemic.[547] The letter went on, however, to assert that 'consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention]'.[548]

According to a report by the UN Special rapporteur on Extreme Poverty and Human rights:

> 'The claimants challenged the non-receivability finding and requested either mediation or a meeting to discuss the matter. In July 2013, the Under-Secretary-General wasted no words in dismissing such requests: "In relation to your request for the engagement of a mediator, there is no basis for such engagement in connection with claims that are not receivable. As these claims are not receivable, I do not consider it necessary to meet and further discuss this matter."'[549]

According to Higgins et al., with reference to the same July 2013 communication from the Under-Secretary-General: 'As a result of the view that the claims were not receivable, the UN also declined a request for a standing claims commission'.[550]

Eventually, on 1 December 2016:

> 'United Nations Secretary-General Ban Ki-moon today apologized to the people of Haiti, expressing deep regret for the loss of life and suffering caused by the country's cholera epidemic, and outlined the way forward including immediate steps to stem the outbreak and long-term support for those affected – while also highlighting the need for adequate funding of the proposal.'[551]

This involved a proposed $400 million response package.[552] However, the UN did not admit liability or accept dispute settlement under Section 29 of the General Convention.

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The cases arising out of the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic have in common that dispute settlement under Section 29 of the General Convention did not take place. At least in the last two cases, this is because the UN determined that the respective disputes

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[547] Letter of Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, dated 21 February 2013 <opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf> accessed 21 December 2021.
[548] Letter of Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, dated 21 February 2013, at 2.
[549] UN Doc. A/71/367 (2016), para. 29 (fn. omitted).
[550] Higgins et al. (2017), at 709-710, fn. 39.
[551] <news.un.org/en/story/2016/12/546732-uns-ban-apologizes-people-haiti-outlines-new-plan-fight-cholera-epidemic-and> accessed 21 December 2021.
[552] Reportedly, little funding has been received. See UN inaction denies justice for Haiti cholera victims, say UN experts, 30 April 2020, <ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25851&LangID=E> accessed 21 December 2021.

lacked a 'private law character'. That determination is therefore significant, both in terms of substance and process. That will be addressed further as part of the discussion in the next section.

3.4 Discussion: 'a complete remedy system to private parties'?

As seen, the 1995 Report concluded that the procedures and mechanisms set forth in the report

> 'in the view of the Secretary-General, implement the obligation to provide an appropriate means of dispute resolution in respect of disputes arising out of contracts or other disputes of a private law character or involving any official of the United Nations who by reason of his official position enjoys immunity that has not been waived by the Secretary-General.'[553]

In a similar vein, the UN Legal Counsel stated in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* advisory proceedings before the ICJ in 1998:

> 'Section 29 of the Convention requires the United Nations to make provision for appropriate modes of settlement of private law disputes in two situations which are intended to provide a complete remedy system to private parties who allege to have been harmed by actions of the United Nations or by its agents acting within the scope of their mandate.'[554]

In his statement before the ICJ, the UN Legal Counsel proceeded to elaborate on the UN's implementation of this purported system.

This section interprets Section 29 of the General Convention and assesses whether, in light of the international organisation law framework governing third-party remedies and against the broader backdrop of the rule of law, its implementation by the UN amounts to the purported 'complete remedy system to private parties'. It begins by making general observations regarding Section 29 of the General Convention (subsection 3.4.1). It then considers, respectively, the elements 'private law character' (subsection 3.4.2) and 'appropriate modes of settlement' (subsection 3.4.3). Each subsection is followed by interim conclusions.

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[553] 1995 Report, para. 33.

[554] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 6 (emphasis added) under the heading 'The remedy regime [*sic*] envisaged by the Convention and implemented by the United Nations'. In this respect, Rashkow notes that 'the Organization has consistently maintained over the years that its immunity is not a shield from responsibility to respond to credible claims of a private law character and that the Organization is obligated to make a dispute resolution modality available for such claims under Section 29 of the General Convention. See, e.g., United Nations Juridical Yearbook (1980) at 227–242.' Rashkow (2015), at 84, fn. 22.

The present section is particularly lengthy and detailed. This is due to the central importance of Section 29(a) of the General Convention to the present study, and the need to set the scene properly for the chapters that follow.

3.4.1 General observations regarding Section 29 of the General Convention

The general observations regarding Section 29 of the General Convention in this subsection concern: the reference in the chapeau to 'disputes . . . to which the UN is a party' (subsubsection 3.4.1.1); the UN's liability and international responsibility in connection with the provision (subsubsection 3.4.1.2); and who decides whether a dispute has a 'private law character' and whether modes of settlement qualify as 'appropriate' (subsubsection 3.4.1.3).

3.4.1.1 'Disputes . . . to which the UN is a party'

Section 29 concerns 'disputes . . . to which the United Nations is a party'.[555] As to the meaning of 'dispute', Black's Law Dictionary defines the term as 'a conflict or controversy, esp. one that has given rise to a particular lawsuit'.[556] In terms of international law, the PCIJ in *Mavrommatis Palestine Concessions* stated: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.'[557] In an early advisory opinion, the ICJ held:

> 'There has . . . arisen a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.'[558]

As to the term 'United Nations' in Section 29,[559] it has the same meaning as under Article 105 of the UN Charter, on which the General Convention is based. Accordingly, 'United Nations' refers to both

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[555] According to Schmalenbach, 'the existence of a reasonably purposeful dispute between the UN and a claimant who has the exclusive right to dispose of the claim' corresponds to two of the four requirements which according to Harpignies must be met in order for Section 29 of the General Convention to apply. These two requirements are that the claimant acts in in good faith, and that settlement of the claim definitively extinguishes the claim. The other two requirements formulated by Harpignies are: '[t]he claimant has a *prima facie* case' and '[t]the damage complained about has actually occurred.' Schmalenbach (2016), para. 19, referring to R. Harpignies, 'Settlement of Disputes of a Private Law Character to Which the United Nations Is a Party—A Case in Point: The Arbitral Award of 24 September 1969 in Re Starways Ltd. v. the United Nations', (1971) 7 *Revue Belge de Droit International* 451. Schmalenbach adds: 'On closer scrutiny, the four requirements are specifications of the key elements of Art. VIII Section 29 General Convention.' Ibid.

[556] B.A. Garner (ed.) *Black's Law Dictionary* (2014), at 572. See generally C. Schreuer, 'What is a Legal Dispute?', in I. Buffard and others (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2009), 959.

[557] *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Jurisdiction, Judgment of 30 August 1924, Rep. PCIJ Series A No. 2, at 11.

[558] *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, [1950] ICJ Rep. 65, at 74.

[559] On the issue of 'attribution', see Schmalenbach (2016), paras. 31-36.

the Organization and its (subsidiary) organs.[560] UN funds and programs legally resort under the UN. This is because, contrary to specialized and related organisations, they do not have their own legal personality.[561] Therefore, even where funds and programs, such as UNDP or UNICEF, are named as a contractual party, it is the UN, as the entity with legal personality, whose obligation under Section 29 of the General Convention is engaged (as is its immunity under Article Section 2 of the General Convention).[562] The same applies in the case of tort claims against UN funds and programs.[563]

3.4.1.2 Liability and responsibility

3.4.1.2.1 Liability

Section 29 of the General Convention does not refer to the 'liability' of the UN in relation to disputes of a private law character. Nonetheless, the UN has consistently recognised that it incurs liability where third-party claims are sustained. Early on, in the context of the ONUC settlements, the UNSG stated that the UN's policy to compensate individuals for damage for which it is liable is

> 'in keeping with generally recognized legal principles and with the [General Convention]. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.'[564]

The 2001 OLA Memorandum to the Controller referred, amongst others to 'the inherent authority of the Organization to incur liabilities of a private law nature and the obligation to compensate for such liabilities,'[565] More specifically, according to the memorandum,

> 'as an attribute of the international legal and juridical personality of the United Nations, it is established that the Organization is capable of incurring obligations and liabilities of a private law nature. Such obligations and liabilities may arise, for example, from contracts entered into by the Organization. The capacity of the Organization to contract is specifically provided in the [General Convention], article I, section 1. The authority of the United Nations to resolve claims arising under such contracts and other types of liability claims, such as those arising from damage or injury caused

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[560] Reinisch (2016, 'Immunity'), para. 50, referring to A. Ziegler, 'Article 105', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2012), 2158, para. 17.
[561] Reinisch (2016, 'Immunity'), para. 50.
[562] Schmalenbach (2016), para. 29, writing with respect to subsidiary organs like UNICEF or UNWRA: 'As UN organs, they nevertheless fall within the scope of Arts. 104 and 105 UN Charter to the effect that, for the purpose of dispute settlement, the UN is the actual party to any contractual disputes even though in individual cases, the latter is represented by UNICEF or UNRWA' (fn. omitted).
[563] Furthermore, where the UN has taken out insurance, as in the case of traffic accidents, it is the UN that remains the defendant in litigation before national courts (in which case, if the claim cannot be settled, the UN waives its immunity from jurisdiction). Cf. Schmalenbach (2016), para. 30 ('it must be not entirely unreasonable that, on the basis of the claimant's assertion, the UN is the proper party to the dispute').
[564] See correspondence between UNSG and Permanent Representative of the USSR regarding the ONUC settlement (discussed hereafter), S/6597, reproduced in 1967 Study, para. 56.
[565] 2001 OLA Memorandum to the Controller, para. 3.

> by the Organization to property or persons, is reflected in article 29 of the [General Convention] and the long-standing practice of the Organization in addressing such claims.'[566]

The memorandum continues to state that the obligation to honour obligations incurred by the UN follows from 'general principles of law'.[567] It concludes:

> 'As a matter of international law, it is clear that the Organization can incur liabilities of a private law nature and is obligated to pay in regard to such liabilities. It is equally clear that the Administration has the obligation and the authority to resolve claims of a private law nature, and that there is a long practice of the Administration in exercising that authority. It is also true that the practice has been presented to the General Assembly and that it is aware of that practice.'[568]

As to the nature of the UN's liability towards third parties under Section 29 of the General Convention, like the disputes referred therein, it is of a 'private law character'. As seen, the precise law applicable to disputes varies.[569] Thus, for example, as seen:

- contractual liability: general principles of law, including international law, as well as the terms of the contract itself;[570]
- liability in tort within UN headquarters district: Headquarters regulation No. 4, supplemented by relevant US law, to the extent it is not inconsistent with the former; and
- liability in connection with traffic accidents: domestic law.

The applicable law is relevant not least as it determines the remedies available.

3.4.1.2.2 Responsibility

The 1967 Study juxtaposed 'claims of a private law nature'[571] with 'international claims',[572] which are 'claims . . . in respect of a breach of international law'.[573] Under the latter heading, the study referred, amongst others, to the ONUC settlements. Those settlements arose from claims by private parties against the UN for injury and damage in connection with the UN operation in the Congo in the early 1960s. The claims were espoused by the claimants' states of nationality, which in exercising diplomatic protection reached settlements with the UN. In connection with those settlements, the UN incurred international

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[566] Ibid., para. 4 (fns. omitted).
[567] Ibid., para. 10.
[568] Ibid., para. 17.
[569] On claims of military and civilian personnel of peacekeeping missions, see Schmalenbach (2016), paras. 52-53.
[570] However, according to Reinisch: 'In more recent practice, however, it seems that most sales, rental, and service contracts between international organizations and private parties are governed by national law.' Reinisch (2011), para. 9. Nonetheless, the arbitration clause in Art. 17.2 of the UN's General conditions of contract (contracts for the provision of goods and services) (Rev. April 2012) provides: 'The decisions of the arbitral tribunal shall be based on general principles of international commercial law.'
[571] 1967 Study, paras. 44-48.
[572] Ibid., paras. 54-55.
[573] Ibid., para. 54.

responsibility – that is, responsibility under international law – towards those states (and not towards the third non-state parties themselves).[574]

The nature of the UN's responsibility, that is, *international* responsibility, in connection with the ONUC settlements is confirmed by the ARIO Commentaries. As seen, an international organisation incurs international responsibility where it commits an internationally wrongful act by breaching an international obligation.[575] Regarding the content of international responsibility, in connection with Article 36 of the ARIO ('Compensation'), the ARIO Commentaries prominently referred to the ONUC Settlements:

> 'Compensation is the form of reparation most frequently made by international organizations. The most well-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo . . . The fact that such compensation was given as reparation for breaches of obligations under international law may be gathered not only from some of the claims but also from a letter, dated 6 August 1965, addressed by the Secretary-General to the Permanent Representative of the Soviet Union'.[576]

The original third-party claims triggered the UN's third-party liability towards the claimants under Section 29 of the General Convention. Upon the respective states of nationality espousing the claims, and settlements being reached, the UN incurred international responsibility towards those states.

The UN's international responsibility in connection with the ONUC settlements seems to be reflected in the following passage of the 1996 Report:

> 'The international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility – widely accepted to be applicable to international organizations – that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization) and its liability in compensation.'[577]

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[574] This is discussed further below in connection with 'lump sum agreements' and the 1996 Report.

[575] Thus, 'the primary applicable law is international law'. A. Pronto, 'Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 147 at 155. The ARIO are explicitly not concerned with private law liabilities. G. Gaja, First Report on Responsibility of International Organizations, UN Doc. A/CN.4/532 (2003), para. 29 ('The provision on the scope of the draft articles should first of all make it clear that the present study is only concerned with responsibility under international law. Thus, issues of civil liability, which have been at the centre of recent litigation before municipal courts, will be left aside. This is not intended to deny the interest of some judicial decisions on civil liability, because these decisions either incidentally address questions of international law or develop some arguments with regard to a municipal law that may be used by analogy'. [fn. omitted]). See also ARIO Commentaries, Art. 1, at 69, para. 3 ('The reference in paragraph 1 of article 1 and throughout the draft articles to international responsibility makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law.').

[576] ARIO Commentaries, Art. 36, at 126-127, para. 1-2 (emphasis added).

[577] See 1996 Report, para. 6-7 (fn. omitted, emphasis added), partially cited in ARIO Commentaries, Art. 3, at 78, para. 1.

The 1996 Report likely included that statement in connection with its, unsuccessful, proposal to revive lump-sum agreements (see paragraph 3.4.3.1.3 of this study).

3.4.1.3 Who decides?

As Schmalenbach explained:

> 'Under current conditions, the UN exercises a substantial degree of discretion when implementing Art. VIII Section 29 General Convention, not only with regard to the choice of appropriate modes of settlement, but also with regard to the types of claims and claimants falling under the provision's scope.'[578]

That discretion is particularly at play when it comes to determining whether a particular dispute has a 'private law character' and whether modes of settlement are 'appropriate'. In practice, it is the UN that makes that determination unilaterally. Regarding the character of the dispute, this is clear, for example, from the correspondence of the UN Legal Counsel to the claimants in the *Haiti cholera* dispute: 'With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention].'[579]

As discussed further below, the 'review of political and policy matters' appears to mean that, in the view of the UN, the dispute lacks a private law character. It is the UN Legal Counsel who determined that the 'review of political and policy matters' was at issue.

It is true that there is the potential for advisory proceedings before the ICJ under Section 30 of the General Convention on the interpretation and application of Section 29 of the General Convention. Section 30 provides in relevant part (emphasis added):

> '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 mode of 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 in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

Article 96 of the UN Charter provides:

> 'a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
> b. Other organs of the United Nations and specialized agencies, which may at any time be so

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[578] Schmalenbach (2016), para. 87.
[579] Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Brian Concannon, 20 February 2013, at 2.

> authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.'

Article 65 of the Statute of the Court provides:

> '1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. 2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.'

For any UN organ, duly authorised, to agree to request the Court for an advisory opinion involves a political process. There have been two advisory opinions regarding the General Convention; both were requested by ECOSOC and concerned legal questions concerning Section 22 of the General Convention.[580]

As to disputes concerning the implementation of Section 29 of the General Convention, as explained by Schmalenbach, 'Section 30 is not the proper procedural provision to handle the multitude of disputes on the legal nature of each individual third party claim against the UN.'[581] As a result, 'the obvious reluctance of UN member States to diplomatically or via the ICJ intervene in dispute settlement practices of the UN leaves it entirely to the organization to interpret Art. VIII Section 29 General Convention.'[582]

Schmalenbach contended that the decision on the legal character of a dispute instead ought to fall within the jurisdiction of the settlement mechanisms established pursuant to Section 29 of the General Convention. In its advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, concerning the jurisdictional immunity of a Special Rapporteur of the UN Commission on Human Rights, the ICJ opined that the UNSG's finding concerning the immunity of a UN agent 'creates a presumption which can only be set aside for the most

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[580] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, [1989] ICJ Rep. 177; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*). However, as the ICJ noted in the latter case (ibid., para. 24), that case was the 'first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention'.

[581] Schmalenbach (2016), para. 50. But see Daugirdas (2019), exploring 'raising the reputational stakes by seeking an advisory opinion from the International Court of Justice about the scope the United Nations' obligations under section 29 of the General Convention in connection with the cholera outbreak in Haiti.' Ibid., at 36-37.

[582] Schmalenbach (2016), para. 87. Cf. Rashkow (2015), at 87-88 ('If the United Nations were to continue to resist the responsibility to review the claims of the Haitian cholera victims, the claimants could urge the Haitian Government to seek an advisory opinion from the ICJ under Section 30 of the General Convention regarding the responsibility to review the claims in light of the mandate imposed on the Organization under Section 29 of the Convention. It does not appear that any member state has ever exercised or sought to exercise this right to go to the ICJ under Section 30. The process for making such a request could be very complicated, both legally and politically.' [emphasis added]).

compelling reasons and is thus to be given the greatest weight by national courts.'[583] According to Schmalenbach:

> 'This assessment is equally valid for alternative dispute settlement mechanisms that replace domestic courts in the light of the UN's immunity. Applied to a decision on the legal nature of a claim against the UN, from the foregoing it follows that any dispute settlement mechanism established under Art. VIII Section 29 General Convention would need jurisdiction to decide a dispute on the legal nature of the claim. If no compelling reasons are provided against the 'public international law' assessment of the UN Secretary-General, a negative decision on jurisdiction is required.'[584]

The problem is that the UN controls the *very existence* of dispute settlement mechanisms on the basis of its own assessment of that character. Thus, as seen in the correspondence regarding the *Haiti cholera* dispute, and as further discussed below (paragraph 3.4.2.2.2), the UN held the claims to be 'irreceivable', presumably on the basis that the dispute lacks a private law character. As a result, and as discussed below, the UN denied that there existed a legal basis to establish a standing claims commission under Section 29 of the General Convention. The commission therefore was unable to determine the nature of the dispute.

In this respect, according to Schmalenbach: 'The 2010 Haiti cholera claims exemplify the weaknesses of the system set up under Art. VIII Section 29 and 30 that tolerate the UN being both the judge and respondent.'[585] Similarly, as discussed below, the UN refused to activate the 'Third Party Claim Process' with respect to the dispute over claims concerning lead poisoning in Kosovo. This practice exposes the UN to criticism that it violates the maxim that no one may be judge in their own case (*nemo iudex in causa sua*). In effect, the UN exercises a significant measure of control over its own accountability.

This practice is at odds with the rule of law as understood by the UN Secretariat, as seen in chapter 1.[586] To recall, first articulated in a 2004 report by UNSG Annan,[587] the UNSG's understanding of the rule of law was reiterated in a 2012 report by UNSG Ban Ki-moon:

> 'The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'[588]

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[583] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), para. 61.
[584] Schmalenbach (2016), para. 50 (emphasis added).
[585] Ibid., para. 87 (fn. omitted).
[586] See section 1.2.2 of this study.
[587] UN Doc. S/2004/616 (2004), para. 6.
[588] UN Doc. A/66/749 (2012), para. 2.

Moreover, according to the UNSG's 2012 report:

> 'It is important for the Security Council, in addition to the other principal organs of the United Nations, to fully adhere to applicable international law and basic rule of law principles to ensure the legitimacy of their actions. In this connection … The Secretary-General fully accepts that relevant international law, notably international human rights, humanitarian and refugee law, is binding on the activities of the United Nations Secretariat, and is committed to complying with the corresponding obligations.'[589]

In its 2012 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International levels', the UNGA took note of the UNSG's 2012 report.[590] Whilst it ultimately did not include a definition of the rule of law, the declaration did provide:

> 'We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built. . . .
>
> 1. We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.
>
> 2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.'[591]

Read in conjunction with the 2012 declaration, the UNSG's consistent understanding of the rule of law—particularly the elements of independent adjudication, separation of powers, avoidance of arbitrariness, and procedural and legal transparency—is difficult to reconcile with its unilateral determination of the legal character of third-party disputes.

Moreover, the UNSG's control over the application of Section 29 of the General Convention may violate Article 14(1) of the ICCPR which, as discussed below, governs the interpretation of Section 29.[592] An alternative approach, whereby such control is exercised by a body external to the UN, will be proposed in chapter 5.

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[589] Ibid., para. 11 (emphasis added).
[590] Un Doc. A/RES/67/1 (2012), para. 39.
[591] Ibid., preamble and paras. 1-2 (emphasis added).
[592] That is, the process to determine whether a dispute has a private law character must arguably meet the requirements of Art. 14 of the ICCPR. Art. 6 of the ECHR, which is similar to this provision, has been held to apply by the ECtHR where there is an 'arguable (civil) right for the purposes of Article 6'. See, e.g., *Markovic and Others v. Italy* [GC], Judgment of 14 December 2006, [2006] ECHR (XIV), para. 101.

3.4.1.4 Interim conclusions

Section 29(a) of the General Convention concerns legal controversies concerning third party claims, having a 'private law character', to which the UN, as a legal person, is a party. Under Section 29, the UN is required to make 'provisions for appropriate modes of settlement' of such disputes. Where the UN fails to do so, in breach of Section 29(a) of the General Convention, it incurs international responsibility towards those states parties (not to third parties themselves).

There is a long-standing tradition of the UN recognising its liability where third party claims are substantiated. The nature of that liability varies depending on the law applied in settling the dispute. Where a state espouses claims of its nationals by way of diplomatic protection, and the claims are founded, the UN incurs *international responsibility*, that is, responsibility under international law, towards that state.

In reality, it is the UN that unilaterally determines whether a dispute has a 'private law character' and whether modes of settlement qualify as 'appropriate' (both heads of Section 29 are discussed separately below). Consequently, the UN effectively controls its own accountability. Whilst such determinations may be scrutinised by the ICJ in advisory proceedings under Section 30, that is not a realistic avenue given the multitude of claims and the political nature of the process regarding the making of a request for an advisory opinion. The current practice is at odds with core notions of justice and the rule of law (and arguably Article 14 of the ICCPR), which are central to the UN's very purposes and operations, and which it has embraced.

3.4.2 'Private law character'

This subsection begins by interpreting the term 'private law character' under Section 29(a) of the General Convention (3.4.2.1). In so doing, it will consider the ordinary meaning of the term (paragraph 3.4.2.1.1) and the travaux préparatoires (paragraph 3.4.2.1.2). It will then make a number of observations in light of the dichotomy of private v. public (paragraph 3.4.2.1.3). This is followed by a discussion of UN practice (subsubsection 3.4.2.2), including regarding the aforementioned disputes arising in connection with the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic.

3.4.2.1 'Private law character': interpretation

3.4.2.1.1 Ordinary meaning

Section 29(a) of the General Convention does not define the term 'private law character' in Section 29(a) of the General Convention phrase and neither does the 1995 Report. The ordinary meaning of

'private law' may be formulated as follows:[593] 'the area of law that deals with disagreements between people or companies, rather than disagreements that involve government'.[594]

Section 29(a) refers to claims of a 'private law character' (emphasis added), not claims under 'private law', or 'private law claims'. As private laws differ from state to state, if the nature of the dispute were to be determined in accordance with the law of any particular state, Section 29(a) would likely have been worded differently.[595] The reference to 'character' rather suggests a common denominator amongst private laws, that is, it may be referring to disputes that are typically governed by private law.[596]

In sum, as to the term 'disputes of a private law character' under Section 29(a) of the General Convention, the most that can be concluded in terms of its ordinary meaning is that such a character refers to:

- domestic law, not international law;
- the opposite of 'public law'; and
- a common denominator among domestic private laws, not a specific domestic law.

Otherwise, however, the meaning of the term 'private law character' remains ambiguous and obscure. It is therefore necessary to turn to the preparatory work of Section 29(a) of the General Convention.[597]

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[593] Cf. Art. 31 of the VCLT, which is identical to Art. 31 of the 1986 VCLT (not yet in force). The 'context' of the term 'disputes of a private law character', and the object and purpose of the General Convention point to the same: the privileges and immunities of the UN. The present author is unaware of either an agreement or instrument in connection with the conclusion of the General Convention in the sense of Art. 31(2) of the VCLT, nor of a subsequent agreement or practice in the sense of Art. 31(3) of the VCLT. With respect to the latter provision, it is noted that the UN Liability Rules (see paragraph 3.3.2.2.2 and subsubsection 3.4.3.2 of this study) were promulgated by the UNGA and, whilst UN member states include the states parties to the General Convention, these rules form part of the implementation *by the UN* of Section 29(a) of the General Convention.

[594] <dictionary.cambridge.org/dictionary/english/private-law> accessed 21 December 2021. See also Garner (2014), at 1390 ('private law . . . The body of law dealing with private persons and their property and relationships.').

[595] The French version refers to 'différends de droit privé'. Though the General Convention itself is silent as to its language versions, the text on the UN website is in both languages and it is certified as a 'a true copy of the English and French text of the Convention', <treaties.un.org/doc/Treaties/1946/12/19461214%2010-17%20PM/Ch_III_1p.pdf> accessed 21 December 2021. Insofar as this means that the General Convention has been 'authenticated' in both English and French, each text version is equally authoritative (cf. Art. 33(1) of the VCLT).

[596] Cf. F. Mégret, 'La Responsabilité des Nations Unies aux Temps du Choléra' (2013) <ssrn.com/abstract=2242902> accessed 21 December 2021, heading I-A ('Il atteste simplement de ce qu'il y a une logique institutionnelle à réfléchir en termes de catégories du droit privé plutôt que de s'engager dans un délicat exercice de conflits de lois.').

[597] Art. 32 of the VCLT, which is identical to Art. 32 of the 1986 VCLT. As will be seen, according to the early *travaux*, the provision in Section 29 of the General Convention was conceived as the 'counterpart' to the UN's jurisdictional immunity.

3.4.2.1.2 Travaux préparatoires

The United Nations Audiovisual Library of International Law contains an extensive note on the drafting history of the General Convention,[598] which has been further explained by Miller in a series of articles.[599] Together with the relevant documents in the UN archives, these sources shed light on the drafting history of Section 29 of the General Convention. As will be seen, however, to the extent there is any insight into the drafters' intention behind the term 'private law character', this is provided by the travaux préparatoires of the Specialized Agencies Convention.

During the UN Conference on International Organization, which resulted in the signing of the UN Charter in June 1945, the possibility of a general convention on the UN's privileges and immunities was conceived, which led to Article 105(3) of the UN Charter.[600] Input for this provision had been provided, amongst others, by C.W. Jenks, the then legal adviser of the ILO. His advice to the drafters included:

> 'Immunities and Facilities to be Accorded to General International Organisation . . . it would seem essential that the text of the Charter should embody general principles which guarantee effectively the independence of the Organisation and its agents by the grant of appropriate immunities'.[601]

Around the same time, the agenda of the 26th session of the International Labour Conference in April 1944 in Philadelphia included

> 'as the first item the question of the future programme, policy and status of the Organisation. In taking that decision the Governing Body had in mind the desirability of the Organisation taking steps to map out the place it thought it should hold in the new world organization which would be designed after the war had been won, and also of reviewing its existing constitution and practice in the light of its twenty-five years' experience, with a view to there being incorporated in its Constitution and practice such amendments as might be necessary to enable it to deal effectively with its future responsibilities.'[602]

The International Labour Office presented the Conference with proposals concerning, amongst others, the ILO's status. However, the Conference did not have sufficient time to examine these proposals and referred them to the Committee on Constitutional Questions of the ILO's Governing Body.[603] The agenda for the Constitutional Committee's first session, in January 1945, included: 'the Status, immunities and other facilities to be accorded to the International Labour Organisation by governments'.

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[598] <legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html#1> accessed 21 December 2021.
[599] A. Miller, 'The Privileges and Immunities of the United Nations', (2009) 6 *International Organizations Law Review* 7, at 16 ff; A. Miller, 'Privileges and Immunities of United Nations Officials', (2007) 4 *International Organizations Law Review* 169, at 180 ff; A. Miller, 'United Nations Experts on Mission and Their Privileges and Immunities', (2007) 4 *International Organizations Law Review* 11, at 17 ff.
[600] Report of the Rapporteur of Committee IV/2 at the San Francisco Conference, Document 933, re-issued by secretariat of the UN Preparatory Commission as PC/LEG/22 (1945), at 3 ('the possibility is not excluded of a general convention to be submitted to all the members').
[601] Jenks (1961), at 13.
[602] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 111.
[603] Ibid., at 112, para. 4.

The International Labour Office submitted to the Constitutional Committee a revised text, containing a draft resolution and an explanatory commentary. These documents were included in a 'General Note', which Jenks subsequently referred to as the 'ILO Memorandum'.[604] The International Labour Office prepared these documents, having 'had the advantage of being able to take into consideration a number of recent discussions and decisions in regard to the status, immunities and facilities to be accorded to other public international organisations.'[605] These organizations were the UNRRA, the FAO, the Pan-American Union, the IMF and the IBRD.[606]

Article 18(2) of the 'suggested text of proposed resolution', which would evolve into Section 29 of the General Convention, read as follows:

> '(2) The International Labour Organisation shall make provision for the determination by an appropriate international tribunal of:
>
> (a) disputes arising out of contracts to which the Organisation is a party which provide for the reference to such a tribunal of any disagreement relating thereto;
>
> (b) disputes involving any official of the Office who by reason of his official position enjoys immunity from the jurisdiction of the tribunal which would otherwise have cognizance of the matter in the case of which such immunity has not been waived by the Director;
>
> (c) disputes concerning the terms of appointment of members of the staff and their rights under the applicable staff and pension regulations.'[607]

The ILO's explanatory memorandum stated with respect to draft Article 18(2):

> 'The arrangements suggested in this paragraph are designed as a counterpart for the immunities of the Organisation and its agents. The nature and effect of these immunities are frequently misunderstood. The circumstances in which international immunity operates to except the person enjoying it from compliance with the law are altogether exceptional. Such immunity is not a franchise to break the law, but a guarantee of complete independence from interference by national authorities with the discharge of official international duties.'[608]

According to Jenks, the ILO's legal adviser, the ILO Memorandum was of significant relevance for the drafting of the General Convention. That is,

> 'broadly speaking the General Assembly based itself squarely on League experience as interpreted by the ILO. The historical link, though never formally recorded, is sufficiently direct and

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[604] The 'General Note' was published in International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 197-223. See Jenks (1961), at 14, fn. 17. Jenks referred to the 'General Note' as the 'ILO Memorandum'. Jenks (1961), at 15. The quote from the 'ILO Memorandum' in Jenks (1961), at 42, confirms that the ILO Memorandum and the General Note are the same document.
[605] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 198.
[606] Ibid.
[607] Ibid., at 223.
[608] Ibid., at 219 (emphasis added). The document stated elsewhere: 'It must never be forgotten that the special status and immunities accorded to the Organisation and those acting on its behalf carry with them corresponding responsibilities.' Ibid., at 197.

> unquestionable for the memorandum explaining the original proposals submitted by the International Labour Office to the Governing Body to remain an important historical document to which, it is submitted, it is still permissible to refer as an exposition of the purpose of and justification for the various immunities, even though it does not formally constitute a part of the *travaux préparatoires* of the General Convention.'[609]

As to the drafting process of the General Convention, at the time of the signing of the UN Charter, the UN Preparatory Commission was established. A committee of the Preparatory Commission's Executive Committee prepared a study on privileges and immunities.[610] The study considered the following topics:[611] precedents afforded by the constitutions of specialized agencies; co-ordination of the privileges and immunities of the UN with those of the specialized agencies; creation of an international passport; taxation of officials in their state of nationality; and privileges and immunities of the Judges of the ICJ and those appearing before the Court. A separate paragraph concerning privileges and immunities concerned the position of UN officials. The only statement in the study that concerns the UN itself is relevant for present purposes. It provides that

> 'it is desirable that where the United Nations or a specialized agency concludes contracts with private individuals or corporations, it should include in the contract an undertaking to submit to arbitration disputes arising out of the contract, if it is not prepared to go before the Courts. Most of the existing specialised agencies have already agreed to do this.'[612]

In its final report, the Executive Committee recommended the Preparatory Commission to refer this study to the future UN General Assembly.[613]

The Preparatory Commission first referred the matter to its committee for legal matters, Committee 5. The delegation of Canada submitted to the Committee a 'Draft resolution concerning the question of immunities, facilities and privileges to the Organization, to representatives of the members and to the officials',[614] which included a draft convention. Article 9(2)(a)-(b) of the draft convention was materially identical to Article 18(2)(a)-(b) of the ILO's 'suggested text of proposed resolution'.

Committee 5 referred the matter to a sub-committee on privileges and immunities.[615] The sub-committee produced a draft convention on privileges and immunities.[616] Article 8(3)(a) of the draft convention

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[609] Jenks (1961), at 15. See also Miller (2007, 'Officials'), at 181. According to Jenks, the proposals were known to the Preparatory Commission while the discussions in the UNGA Sixth Committee were 'based largely' thereon. However, the available records of these bodies do not reflect this.
[610] The study is appended to the report of the Executive Committee to the Preparatory Commission of the United Nations, PC/EX/113/Rev.1 (1945), Part III, Chapter V, Section 5, at 69 ff.
[611] Ibid., at 69-71.
[612] Ibid., at 70.
[613] Ibid., at 69.
[614] PC/LEG/17 (1945).
[615] PC/LEG/10 (1945). The following states were represented on the sub-committee: Egypt, UK, Belgium, Cuba, Canada, USA, Yugoslavia, Belarus. See PC/LEG/16 (1945).
[616] PC/LEG/34 (1945), at 3 ff. See also 'Proposed additions to draft convention on immunities and privileges by

provided: 'The Organization shall make provision for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the Organization is a party.'[617]

Thus, this draft no longer referred exclusively to contractual disputes of the Organization, but also to 'other disputes of a private law character'. The record does not reflect whether the broadening of the scope was discussed in the sub-committee; the debate largely concerned the relationship between the proposed convention and the UN's headquarters agreement.[618]

The debate in Committee 5 concerned the following questions: whether to submit a draft convention to the UNGA at all; the status of the draft convention as a working document; and the relationship between the work of the Committee and that of the committee on the privileges and immunities of the UN at its headquarters.[619] According to the available records, the debate did not concern the provisions on the settlement of disputes of a private law character. Article 8(3) was retained unchanged in the draft convention which Committee 5 recommended the Preparatory Commission to transmit to the General Assembly for its consideration, along with the Executive Committee's study on privileges and Immunities.[620]

In Chapter VII ('Privileges, immunities and facilities of the United Nations') of its report to the General Assembly, the Preparatory Commission transmitted said draft convention to the assembly for consideration at its first session, recommending: 'that the General Assembly, at its First Session should make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of Article 105 of the UN Charter, or propose conventions to the Members of the United Nations for this purpose.'[621]

At its first session in January 1946, the UNGA referred Chapter VII of the Preparatory Commission's report to its Sixth Committee, dealing with legal matters. The committee established a sub-committee on privileges and immunities. According to the sub-committee's first report, rather than to formulate recommendations on privileges and immunities, it

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Mr. Beckett, chairman of the Sub-Committee', PC/LEG/39 (1945), amongst others, adding a new Art. 10 to the draft convention establishing jurisdiction of the ICJ over disputes concerning the interpretation and application of the convention.

[617] PC/LEG/34 (1945), at 9 (emphasis added). According to Art. 8(3)(b): 'disputes involving any official of the Organization, who by reason of his official position enjoys immunity, if such immunity has not been waived by the Secretary-General.'

[618] PC/LEG/33 (1945); PC/LEG/33/Rev.1 (1945).

[619] PC/LEG/35 (1945), PC/LEG/37 (1945), PC/LEG/40 (1945) and PC/LEG/41 (1945).

[620] PC/LEG/42 (1945), at 1, para. 3.

[621] PC/20 (1945), Chapter VII, para. 2.

> 'agreed without reservation to request Committee 6 to recommend that the General Assembly should propose to the Members of the United Nations a general convention which would determine the details of application of paragraphs 1 and 2 of Article 105 of the Charter.'[622]

The first report contained reasons in favour of the adoption of a general convention but did not concern the substance of such a convention.[623] At its seventh meeting, on 28 January 1946, the Sixth Committee unanimously adopted this recommendation and agreed that the sub-committee should draft the convention.[624]

On 5 February 1946, following several meetings, the Sub-Committee submitted to the Sixth Committee a 'resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, to which the text of the convention is annexed'.[625] The resolution and its annex were included in a 'draft recommendation from the sixth committee to the General Assembly'.[626] The Sub-Committee's rapporteur clarified that 'the General Convention on privileges and immunities of the United Nations was based closely on the text in the report of the Preparatory Commission.'[627]

In terms of substance, the second report of the Sub-Committee concerns the interpretation of a provision concerning 'rates and taxes on mail' (Article 9). It also recalled that certain members made reservations regarding the provisions concerning the immunity of officials from national service obligations (Article 18) and dispute settlement by the ICJ (Article 30).[628] Similar reservations were made during the subsequent discussion in the Sixth Committee, together with a reservation concerning the exemption from taxation of officials.[629] The settlement of disputes of a private law character does not appear to have been the subject of debate either in the sub-committee or the Sixth Committee. On 7 February 1946, at its 11th meeting, the Sixth Committee unanimously adopted, with minor modifications, the sub-committee's 'draft recommendation concerning the General Convention on immunities and privileges',[630] that is, that the UNGA approve the draft convention.

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[622] UN Doc. A/C.6/17 (1946), para. 2. The following states were represented on the Sub-Committee: Australia, Belgium, Bolivia, China, Cuba, Czechoslovakia, Denmark, El Salvador, Egypt, France, Poland, United Kingdom, United States, USSR and Yugoslavia. Ibid.
[623] However, the report states: 'The adoption of a convention would not exclude the possibility of the adoption in addition of recommendations upon particular points which were not fully dealt with in the convention.' UN Doc. A/C.6/17 (1946), para. 4.
[624] UN Doc. A/C.6/19 (1946), at 16.
[625] UN Doc. A/C.6/31 (1946), at 1.
[626] UN Doc. A/C.6/28 (1946), to which a convention on the privileges and immunities of the United Nations was annexed.
[627] UN Doc. A/C.6/37 (1946), at 26.
[628] UN Doc. A/C.6/31 (1946).
[629] UN Doc. A/C.6/37 (1946), at 26-27.
[630] Ibid., at 28. The draft convention was contained in document UN Doc. A/C.6/28 (1946).

During the subsequent debate in the UNGA, according to the available record, only the delegations of the UK and the US spoke, both addressing reservations made. The UK moreover stated:

> 'Within the scope and the ambit of the Charter this Convention will give the United Nations Organization, in every Member State, a sufficient degree of sovereignty in regard to its own affairs to enable it to carry out its own functions independently, impartially and efficiently.'[631]

According to the record, there was no discussion of the issue of the settlement of disputes of a private law character.

On 14 February 1946, the General Assembly adopted the General Convention,[632] which entered into force on 17 September 1946.[633] Of the reservations made, none relate to Section 29.[634] The text of the chapeau and sub (a) of Article VIII, Section 29, is identical to the corresponding provision in the draft produced by the Sixth Committee, except that the Sixth Committee's draft contained the word 'provision' in the singular.[635] There are no records concerning that change known to the present author, much less whether it was intentional.

In conclusion, by the time the drafting of the General Convention commenced, it appeared to have been accepted that contractual disputes ought to be subject to dispute settlement. At some point in the drafting process, in the Sub-Committee of Committee 5 of the Preparatory Commission, the scope of disputes was widened to include also 'other disputes of a private law character'. However, the records regarding the drafting of the General Convention do not clarify the intention of that term.

By contrast, on 21 November 1947, the UNGA approved the Convention on the Privileges and Immunities of the Specialized Agencies ('Specialized Agencies Convention'). This convention contains a provision that is identical in substance to Section 29 of the General Convention. As discussed next, the convention's travaux préparatoires do shed some light on the intended meaning of the phrase 'dispute of a private law character'.

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[631] Records of the First Part of the First Sess. of the General Assembly, Plenary Meetings of the General Assembly, 10 January – 14 February 1946, verbatim record of 13 February 1946, at 452.
[632] UN Doc. A/RES/22(I)(A) (1946).
[633] <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en> accessed 21 December 2021.
[634] Ibid.
[635] The text of Section 29 of the General Convention as authenticated by the UN and included in the UN treaty database <treaties.un.org/doc/Treaties/1946/12/19461214%2010-17%20PM/Ch_III_1p.pdf> accessed on 21 December 2021, does not contain a comma before the phrase 'to which the Organization is a party', whereas the version of the text contained in UN Doc. A/RES/22 (I)A (1946) does.

The Specialized Agencies Convention

Article IX (Settlement of disputes), Section 31, of the Specialized Agencies Convention reads in relevant part: 'Each specialized agency shall make provision for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of private character to which the specialized agency is a party'.

The differences with the corresponding text in Section 29 of the General Convention appear to be merely a matter of drafting.[636] These differences are that in the Specialized Agencies Convention, in addition to 'United Nations' being replaced by 'specialized agency', the word 'provision' is in the singular (which, as seen, was only pluralized in the General Convention after the text left the Sixth Committee). Also, the Specialized Agencies Convention refers to 'disputes of private character', without the article 'a' preceding 'private', and without the word 'law'. However, as will be seen, the records of the Sixth Committee refer to 'disputes of a private law character'(emphasis in original), underscoring that this is a mere drafting issue. It is these records that provide insight into the meaning of the phrase.

The Sub-Committee of the Sixth Committee that drafted the Specialized Agencies Convention commented as follows on the draft Convention:

> 'With reference to Section 31 (a), which provides that an Agency shall make provision for appropriate modes of settlement of disputes of a private law character to which a Specialized Agency is a party, *it was observed* that this provision applied to contracts and other *matters incidental to the performance by the Agency of its main functions under its constitutional instrument and not to the actual performance of its constitutional functions*. It applied, for example, to matters such as hiring premises for offices or the purchase of supplies. The provision relates to disputes of such a character, that they *might have come before municipal courts, if the Agency had felt able to waive its immunity*, but where the Agency had felt unable to do so.'[637]

Continuing from the above quote, the report provides further insight into the intended meaning of the term 'private law character' in connection with disputes concerning officials under paragraph (b):[638]

> 'This explanation with regard to (a) also illustrates the type of case to which (b) also refers. Officials (other than one or two high officials) have only immunity in respect of their official acts, and even in those cases immunity will be waived in respect of matters of a private law character if this is possible without prejudicing the interests of the Organization. If, however, in the case of such disputes, immunity is not waived, then the obligation to make provisions on an appropriate mode of settlement arises.'[639]

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[636] Cf. Miller (2009), at 96 ('Section 31 of the Specialized Agencies Convention is identical in substance to Section 29 of the General Convention.'), fn. 366 ('a mere drafting change').
[637] UN Doc. A/C.6/191 (1947), at 12-13, para. 32 (underlining in original; italics added).
[638] That provision, together with the chapeau, reads as follows: 'Each specialized agency shall make provision for appropriate modes of settlement of: . . . (b) disputes involving any official of a specialized agency who by reason of his official position enjoys immunity, if immunity has not been waived in accordance with the provisions of Section 22.' UN Doc. A.C.6/191 (1947), Appendix A.
[639] Ibid., at 13, para. 32 (emphasis added).

Among the available records, this is the most clearly articulated intended meaning of the term 'disputes of a private law character'. Thus, the following can be said to result from the travaux préparatoire:

- such disputes concern matters that are 'incidental' to the performance by the Agency of its 'main functions';
- those 'main functions' are defined under its constitutional instrument';
- such disputes do not relate to the 'actual performance of the constitutional functions';
- such disputes would have come before municipal courts but for the immunity of the agency; and
- the performance of 'official acts' may give rise to 'disputes of a private law character', but this is not the case with 'constitutional functions'. Thus, the term 'official acts' is not synonymous with 'constitutional functions'.

The report of the sub-committee is not specific as to who made the aforementioned observation regarding Section 31(a). The report merely states 'it was observed'. Elsewhere, the report also uses that formulation,[640] as well as similarly general formulations, such as: 'it was considered that';[641] 'it was noted that';[642] 'it must be noted';[643] and 'it was thought that'.[644] Conversely, in other places the report is more precise in attributing statements. For example: the 'delegation of the USSR proposed';[645] the 'Sub-Committee considered that';[646] the 'Sub-committee recommended that';[647] 'the majority of the Sub-Committee considered that';[648]'the delegations of Canada, Egypt and USSR placed it on record that';[649] 'the committee agreed that';[650] and the 'Sub-Committee did not consider that'.[651]

Notwithstanding the generality of the observation concerning Section 31, in light of the Sub-Committee report's overall degree of precision, as the foregoing examples illustrate, if members on the Sub-Committee had opposed the observation in point, this would likely have been reported. There is no indication in the available records that the settlement of disputes of a private law character to which the organisation is a party was at any point controversial. In those circumstances, it is submitted that the

[640] Ibid., e.g., paras. 20 and 31.
[641] Ibid., e.g., paras. 20 and 21.
[642] Ibid., para. 15.
[643] Ibid., para. 21.
[644] Ibid., para. 30.
[645] Ibid., para. 16.
[646] Ibid., para. 18
[647] Ibid., para. 18.
[648] Ibid., para. 23.
[649] Ibid.
[650] Ibid., para. 25.
[651] Ibid., para. 30.

absence of debate in the Sub-Committee and the Sixth Committee may be taken to mean that these bodies tacitly endorsed the observation.[652]

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The endorsement by the Sixth Committee of the intended meaning of the term 'disputes of a private law character' arguably applies not only to the Specialized Agencies Convention but also to the General Convention. This is because the drafting history of the Specialized Agencies Convention is closely linked to that of the General Convention.

That linkage goes back to the UN Preparatory Commission, which in Chapter VII ('Privileges, immunities and facilities of the United Nations') of its report to the UNGA dated 23 December 1945 recommended 'that the privileges and immunities of specialized agencies contained in their respective constitutions should be reconsidered. If necessary, negotiations should be opened for their co-ordination in the light of any convention ultimately adopted by the United Nations'.[653]

In 1946, the UNGA approved the General Convention as part of a set of six resolutions under the heading 'privileges and immunities of the United Nations'. Resolution A concerned the General Convention. Resolution D was entitled 'Resolution on the coordination of the privileges and immunities of the United Nations and the Specialized Agencies'. On the recommendation of the Sixth Committee's sub-committee on privileges and immunities,[654] as adopted (with one amendment) by the Sixth Committee,[655] Resolution D stated the following:

> 'The General Assembly considers that there are many advantages in the unification as far as possible of the privileges and immunities enjoyed by the United Nations and the various specialized agencies.
>
> While recognizing that not all specialized agencies require all the privileges and immunities which may be needed by others, and that certain of these may, by reason of their particular functions, require privileges of a special nature which are not required by the United Nations itself, the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of their respective functions may require, and that no privileges and immunities which are not really necessary should be asked for.
>
> *Therefore the General Assembly instructs the Secretary-General* to open negotiations with a view to the re-consideration, in the light both of the General Convention adopted by the United Nations and of the consideration above, of the provisions under which the specialized agencies at present enjoy privileges and immunities.'[656]

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[652] The Sixth Committee's report to the UNGA reproduced the comments and observations of the Sub-Committee. UN Doc. A/503 (1947), at 13, para. 32.
[653] PC/20 (1945), at 60.
[654] UN Doc. A/C.6/31 (1946), at 2, para. 4.
[655] UN Doc. A/C.6/34 (1946); UN Doc. A/C.6/38 (1946), at 34.
[656] UN Doc. A/RES/22(I)D (1946) (emphasis in original).

In March and July 1947, the Secretary-General undertook consultations with the specialized agencies. After it had been 'unanimously agreed that the adoption of a single instrument presents the best method for co-ordination and unification',[657] these consultations concentrated on a draft convention prepared by the UN Secretariat. The draft Convention on the Privileges and Immunities of the Specialized Agencies, as amended during said consultations, was annexed to the UNSG's report to the UNGA.[658]

At the second session of the UNGA, on 23 September 1947, the issue of the coordination of the privileges and immunities of the UN and of the Specialized Agencies was referred to the Sixth committee,[659] which in turn referred it to a sub-committee on privileges and immunities.[660] The Sixth Committee approved the Sub-Committee's conclusion that a single convention would be preferable[661] and the Sub-Committee then prepared a draft thereof. According to the final report of the Sub-Committee, the draft

> 'falls into two distinct parts, namely, the first part consisting of standard clauses (Articles II to IX) drawn up on the basis of the Convention on the Immunities and Privileges of the United Nations, and of a second part consisting of nine draft annexes relating to each of the Specialized Agencies at present in relationship with the United Nations. The privileges and immunities provided for in the standard clauses are modelled on those of the United Nations under its convention, and, indeed, in a certain number of cases are narrower in scope.'[662]

The provision on the settlement of private law disputes was contained in Article IX of the draft convention and, thus, falls into the first part of the draft, 'drawn up on the basis' and 'modelled on those' of the General Convention. The final report of the Sub-Committee contains the aforementioned explanation as to the phrase 'disputes of a private law character'. This explanation was reproduced in the Sixth Committee's report to the UNGA,[663] in which the Sixth Committee indicated its approval of the final report of its Sub-committee.[664]

The UNGA approved the Specialized Agencies Convention on 21 November 1947,[665] proposing 'it for acceptance by the Specialized Agencies and for accession by all Members of the United Nations and by

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[657] UN Doc. A/339 (1947), at 2.
[658] Ibid., at 3.
[659] UN Doc. A/C.6/134 (1947), point 3.
[660] The sub-committee's interim report is contained in UN Doc. A/C.6/148 (1947) and its final report is contained in UN Doc. A/C.6/191 (1947). The latter report identifies the following member states as having been represented on the sub-committee: Argentina, Canada, Cuba, Czechoslovakia, Egypt, India, Norway, USSR, UK, USA and Yugoslavia.
[661] UN Doc. A/C.6/148 (1947); UN Doc. A/503 (1947), at 2.
[662] UN Doc. A/C.6/191 (1947), para. 5.
[663] UN Doc. A/503 (1947), para. 32.
[664] Ibid., at 4.
[665] UN Doc. A/RES/179(II) (1947).

any other State member of a Specialized Agency'. The convention entered into force on 2 December 1948.[666] None of the reservations made relates to Section 31.[667]

In sum, once the Sixth Committee had produced the General Convention, it continued to draft the Specialized Agencies Convention in furtherance of the goal stated by the Preparatory Commission and the UNGA to coordinate and unify the respective legal regimes. Specifically, the provision concerning the settlement of disputes of a 'private character' in the Specialized Agencies Convention was taken directly from the General Convention. Thus, the same body, the Sixth Committee, approved both draft conventions. Moreover, of the 15 states[668] represented on the Sixth Committee's sub-committee that drafted the General Convention and the 11 states[669] identified as having been represented on the sub-committee that drafted the Specialized Agencies Convention, seven states were represented on both,[670] including three permanent members of the UN Security Council. Both sub-committees had the same rapporteur.[671]

In conclusion, the drafting processes regarding the two conventions were closely intertwined. Therefore, whilst the available records of the preparatory work of the General Convention shed little light on the meaning of the term 'disputes of a private law character', the insights on this term provided by the preparatory work of the Specialized Agencies Convention are relevant also for the General Convention.

3.4.2.1.3 'Private' v. 'public'

It results from the foregoing interpretation of Section 29 of the General Convention that disputes concerning the 'actual performance of the constitutional functions' of the UN under the Charter are not 'disputes of a private law character'. In keeping with the ordinary meaning of the term 'private', such constitutional disputes may be said to be disputes of a 'public law character'. According to Schmalenbach:

> 'Even though it was unthinkable for the drafters of the UN Charter that the UN could be capable of exercising sovereign State-like authority giving rise to claims of a "public law character", it is evident from the historical material that the performance of "constitutional" functions was considered of a genuine public international law character because they are based on international powers derived from the UN Charter'.[672]

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[666] <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2&chapter=3&clang=_en> accessed 21 December 2021.
[667] Ibid.
[668] UN Doc. A/C.6/17 (1946), at 1, fn.
[669] UN Doc. A/C.6/191 (1947).
[670] Cuba, Czechoslovakia, Egypt, UK, USA, USSR and Yugoslavia.
[671] Mr. W.E. Beckett of the UK. See UN Doc. A/C.6/17 (1946) and UN Doc. A.C.6/191 (1947).
[672] Schmalenbach (2016), para. 46 (fn. omitted).

That said, the dichotomy between private and public does not make the interpretation and application of the term 'private law character' all that easier.[673] The key challenge is how to distinguish 'private law character' from 'public law character' in the case of the UN.[674] Mégret comments as follows:

> 'On remarquera néanmoins à titre liminaire que la distinction entre droit public et droit privé est historiquement et géographiquement construite et donc contingente, qu'elle revêt souvent un sens spécifique mais incertain au niveau international au point de s'avérer inapte à décrire certains des mécanismes les plus iconoclastes produits par la pratique, et qu'elle fait partie de ces dichotomies instables à la déconstruction desquelles la mondialisation s'est depuis longtemps attelée, et qui seraient peut être même entrées dans une phase de décadence terminale. Comme le notait déjà Hans Kelsen dans son ouvrage sur le droit des Nations Unies en 1947 « the differentiation between public and private law is highly problematical and justified only in so far as based on positive provisions of a legal order »'[675]

The following paragraphs make observations that may inform the interpretation and application of the term 'private law character' in the case of the UN.

Typical 'private law' elements

In applying the term 'private law character' in the case of the UN, it may be instructive to consider the four senses in which Barnett makes a distinction between private and public law in general:

> '(1) the kinds of substantive standards used to assess the types of conduct that may properly be subject to legal regulation; (2) the different status of persons or entities that may properly complain about violations of legal regulation; (3) the different status of persons or entities that are subject to legal regulation; (4) the different kinds of institutions that may be charged with adjudicating and enforcing legal regulations.'[676]

As to the third distinction, Barnett explained:

> 'We might call laws that are meant to regulate the internal conduct of governmental authorities and that define their relationship or duties to private individuals "public law." In contrast, laws that define the rights and duties that private individuals and groups owe *to each other* may be termed "private law."'[677]

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[673] Cf. Schmalenbach (2016), para. 47 ('What appears to be a relatively straightforward dichotomy—claims of private law in contrast to those of a public international law character—blurs in practice.').
[674] See likewise Mégret (2013), under heading IA ('La distinction publique/privée mérite d'être comprise dans un sens assez spécifique propre aux Nations Unies.').
[675] Ibid., under heading I (fns. omitted). The reference is to H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), at 318. See likewise S. Somers, 'De Drittwirkung van Grondrechten' (2012) 41 *Netherlands Journal of Legal Philosophy* 44, at 44 ('Tegen de achtergrond van de internationalisering van het recht lijken de grenzen tussen privaat- en publiekrecht stilaan te vervagen.'); D. Kennedy, 'The Stages of the Decline of the Public/Private Distinction', (1982) 130 *University of Pennsylvania Law Review* 1349. See generally M.J. Horwitz, 'The History of the Public/Private Distinction', (1982) 130 *University of Pennsylvania Law Review* 1423.
[676] R. Barnett, 'Foreword: Four Senses of the Public Law-Private Law Distinction', (1986) 9 *Harvard Journal of Law and Public Policy* 267, at 267-268.
[677] Ibid., at 270 (italics in original, underlining added).

In the case of the UN, the basic idea is that, as Mégret explained:

> 'l'ONU ne devrait pas en règle générale avoir à répondre, même de manière interne, à des réclamations venant de l'extérieur mettant en cause l'exercice même de son mandat, cette contestation relevant au mieux de la logique politique et juridique propre à l'organisation. En revanche, les litiges de droit privé font l'objet d'un traitement préférentiel, un peu par analogie avec la manière dont les immunités des Etats cèdent en matière d'actes de jure gestionis, car ils remettent moins directement en question l'action des Nations Unies.'[678]

This corresponds to the travaux préparatoires insofar as they juxtapose the 'actual performance of constitutional functions' with matters that are merely 'incidental' to those functions.

The 1995 Report points to certain elements of 'private law character' in UN practice. Disputes of a private law character relating to peacekeeping operations, for example, concern 'claims for compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by member of a United Nations peace-keeping operation within the "mission area" concerned'.[679]

In this connection, according to Schmalenbach, Section 29 of the General Convention

> 'is tailored towards disputes over rights and duties within the private law domain which traditionally embraces under domestic law subjects such as property, contracts, unjust enrichment, and tort (*i.e.* personal injury, illness, or death). In this area, it can be argued, the UN acts like a private person within the territory of its host State, subjected to the latter's private law and thus entering on an equal footing into legal relationships with other private persons. In line with the traditional perception of private law claims, all post 1998-SOFAs/SOMAs specify . . . "dispute or claim of a private law character" in their Art. VII para 54 as "third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to (the mission)".'[680]

Thus, three ingredients in the UN's practice may suggest—though without necessarily being determinative of—a 'private law character': the nature of the claimants (third non-state parties); the damage sustained (personal injury, illness or death, and property loss or damage); and the remedy requested (compensation). Mégret contended in this respect: 'On le voit, la caractéristique première d'une réclamation en responsabilité extra-contractuelle est le fait qu'elle émane de personnes privées ayant souffert un dommage à cause d'une faute de l'organisation internationale.'[681]

'Private law character' and the 'normal' jurisdiction of national courts

As seen, the travaux préparatoires clarify that Section 29 of the General Convention was designed as the 'counterpart' to the UN's immunities and that disputes of a private law character would have come

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[678] Mégret (2013), under heading I.
[679] 1995 Report, para. 15 (emphasis added).
[680] Schmalenbach (2016), para. 45 (fn. omitted).
[681] Mégret (2013), under heading I-A. Cf. Transnational Development Clinic, Yale Law School *et al*., 'Peacekeeping Without Accountability' (2013), at 31, referring to Barnett (1986).

before municipal courts but for the UN's immunity.[682] In this respect, according to Schmalenbach: 'It is the aim of Art. VIII Section 29 General Convention to ensure that the jurisdictional immunity of the UN before domestic courts does not result in a legal vacuum devoid of responsibility and redress.'[683]

As Mégret observes, disputes of a 'private law character' are disputes which would *normally* have come before domestic courts.[684] The implication is that disputes that would *not normally* be adjudicated by domestic courts do not have such a character. In this respect, according to Mégret: 'Les juridictions nationales n'aient pas a priori compétence pour juger d'actes purement internes à une organisation internationale, c'est-à-dire en définitive de se substituer aux mécanismes onusiens internes de production du droit.'[685]

In other words, the jurisdiction of domestic courts in private law disputes would normally exclude those disputes that are within the public realm of international organizations. In this respect, Reinisch has demonstrated the disinclination of national courts, using different techniques, to consider internal matters of international organizations. One such technique is an analogy to act-of-state doctrine,[686] which may be described as 'the principle (which is not a rule of public international law) that municipal courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories.'[687] Applied to international organisations, domestic courts may be reluctant to scrutinize internal acts of these organisations, on the basis that they have been established by states conferring sovereign powers.[688] The less likely that domestic courts would 'normally' exercise jurisdiction over a dispute, the stronger the argument that the dispute is not of a private law character.

The developing governance functions of the UN and the advent of human rights

At the time of the conclusion of the General Convention in 1946, the functions of the UN and the position of individuals were different from today. As to the former, the UN was primarily state-oriented. As Fassbender put it in the context of targeted sanctions, 'the founders of the United Nations did not expect

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[682] This is reflected in UN practice, see, e.g., Para. 55 of the MINUSTAH SOFA ('any dispute or claim of a private-law character, . . . to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement'. [emphasis added]).
[683] Schmalenbach (2016), para. 87.
[684] Mégret (2013), under heading I-A ('il s'agit de litiges au sujet desquels ces tribunaux *auraient* normalement compétence si ce n'était du fait de l'opération des immunités de l'organisation internationale.' [emphasis in original]).
[685] Mégret (2013), under heading I-A.
[686] Reinisch (2000), at 375.
[687] I. Brownlie, *Principles of Public International Law* (2003), at 483-484.
[688] See generally D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005).

the Organization to exercise power or authority in a way that rights and freedoms of individual persons would be directly affected.'[689]

In recent years, there has there been 'a global trend of shifting governance tasks from states (including their sub-entities) to non-state actors', [690] including notably international organizations. Or, as Fassbender put it, 'increasingly, the UN is entrusted with tasks of global governance that go beyond its traditional purposes and functions.'[691] Indeed, according to Reinisch, there are 'increasing attempts of international organizations to adopt measures directly regulating individual behaviour, of which the imposition of targeted economic sanctions is only one example.'[692] UN operations with the most far-reaching effect on individuals may be the administration of territories,[693] such as in Cambodia, East Timor,[694] and, as seen, Kosovo.

As to the latter, the position of individuals has changed with the advent of international human rights. As explained by Fassbender: 'Following the adoption of the Charter, human rights, which at the international level in 1945 were still moral postulates and political principles only, have become legal obligations of states under international treaty and customary law.'[695]

That development was borne out of the need to protect individuals against *state* power.[696] As Tomuschat put it, the

> 'international' protection of human rights denotes an ensemble of procedures and mechanisms which . . . are primarily designed to protect human beings against their own state. Protection is generally needed at home. Human rights have been brought into being as a supplementary line of defence in case national systems should prove to be of no avail. Although the state is on the one hand reckoned

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[689] Fassbender (2006), para. 6.2.
[690] A. Reinisch, 'Governance without Accountability?', (2001) 44 *German Yearbook of International Law* 306, at 270.
[691] Fassbender (2006), para. 6.3.
[692] Reinisch (2010), at 258.
[693] See generally 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 Yearbook of United Nations Law* 291.
[694] According to Wilde: 'It is common to describe the administration projects in Kosovo and East Timor as unique because of the plenary administrative powers asserted, the involvement of the United Nations in this activity, and the problems caused by the supposed lack of pre-existing institutions.' R. Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches', (2004) 15 *European Journal of International Law* 71, at 73. However, the exercise of administrative powers by international organizations is in fact not new, it goes back as far as 1920, when the League of Nations exercised territorial administration in the Free City of Danzig. The UN has on occasion exercised such powers since the 1960s. Ibid., at 76.
[695] Fassbender (2006), para. 8.4. Cf. Schmalenbach (2016), para. 8 ('in late 1945, some months before delegates to the UN discussed and drafted a universal declaration on the subject of human rights, the human rights dimension of Section 29 was at best only implicitly assumed to be present but was never officially brought up for discussion. This has changed with the growing human rights awareness of member States and their judiciaries.')
[696] That explains why major human rights treaties are only open to states, namely 'traditionally States (i.e., their governmental administrative, legislative and judicial organs) have been regarded as the main potential violators of human rights'. Fassbender (2006), para. 3.3.

> with as the indispensable guarantor of human rights, historical experience has also made clear that the state . . . may use the sovereign powers at its disposal to commit violations of human rights".'[697]

The notion that human rights may also bind international organisations is more recent. The more the UN exercises public power over individuals, the more its accountability in terms of international human rights compliance is at issue.[698]

Fassbender summarises the foregoing developments as a

> 'dual process – the coming into existence of a firmly recognized body of human rights in international law, promoted by the United Nations, and the expansion of functions of the UN into new areas resulting in acts with a direct impact on the rights of individuals'.[699]

That process postdates the adoption of the General Convention. The drafters of the UN Charter and the General Convention are unlikely to have envisaged the development whereby the UN came to exercise constitutional or governmental powers in relation to individuals. The quest for remedies concerning the current exercise of such powers by the UN may put pressure on the interpretation and application of Section 29 of the General Convention. But, the travaux préparatoires do not support this. That is moreover for good reasons, as the experience under Dutch law shows.

- The 'wrongful government act' under Dutch law

The question of the scope of Section 29 of the General Convention is reminiscent of a long-running debate under domestic law in the Netherlands as regards the 'wrongful government act' (onrechtmatige overheidsdaad*)*. The following observations regarding the legal situation in the Netherlands are provided by way of illustration; the focus on the Netherlands is in keeping with the focus on that jurisdiction in chapter 4 of this study.

As explained by Di Bella:

> 'The notion that the government can be held liable under the Civil Code for violating private-law norms was accepted early on. There was much debate, though, about whether the government was or should be liable, too, if it transgressed public-law norms . . . There was a consensus of opinion that the civil-law wrongful act sections in the DCC did not apply to the government's violation of public-law norms and that a separate scheme was desirable in this regard.'[700]

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[697] Tomuschat (2003), at 84.
[698] See generally Johansen (2020), at 3; Ferstman (2017), at 1.
[699] Fassbender (2006), para. 8.6. See also para. 6.3. ('a number of developments, in particular in the context of peacekeeping operations and the international administration of territories, have made it a possibility that violations of human rights and international humanitarian law occur that are attributable to the UN', referring to Mégret and Hoffmann (2003), at 325).
[700] L. Di Bella, *De Toepassing van de Vereisten van Causaliteit, Relativiteit en Toerekening bij de Onrechtmatige Overheidsdaad* (2014), at 208.

However, in spite of apparent consensus in legal thinking that there should be a separate scheme of liability for such transgressions,[701] such a scheme has developed only to the extent of allowing challenges to be brought against government *decisions*.[702] That is, no such separate scheme developed regarding wrongful acts committed by the government.

In order 'to fill in the gap in legal protection against the government',[703] the Supreme Court ruled as early as 1924 that 'the government's mere violation of a public-law statutory provision was wrongful within the meaning of the [civil code]. Until to date, under what is currently Article 6:162 of the Dutch Civil Code ('DCC'), Dutch 'civil courts . . . adjudicate government liability for violations of public-law norms based on the civil-law requirements'.[704] As Di Bella concluded:

> 'Wrongful government conduct is consequently based on a provision which is not necessarily appropriate here. This situation raises various obstacles. Due to its private-law character, Section 6:162 DCC does not give adequate attention to the government's special position under liability law. Whether the government can successfully be held liable in a specific case for wrongful conduct is not predictable enough under the current case law'.[705]

Thus, in the absence of a separate and comprehensive remedy system to scrutinise governmental action, the Dutch courts were left to stretch the application of private law, though it is not well-suited for that purpose.

The Dutch experience cautions against stretching the application of Section 29 of the General Convention to disputes that in essence concern the exercise of public, or governmental, functions (which would moreover be contrary to the travaux préparatoires). The changing role of the UN, coupled with the advent of human rights, rather militates in favour of designing an appropriate dispute settlement regime for disputes of a 'public law character' in connection with the developing right to a remedy (see subsection 2.4.2 of this study).

'Official' v. 'constitutional' or public functions

At some level, all disputes are likely to have a link to the UN's purposes. This is because acts of an international organization are necessarily related to its purposes and powers (save for *ultra vires* acts).

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[701] Ibid., at 210.
[702] As explained by Di Bella: 'According to the legislature that enacted the General Administrative Act, in determining whether a damages claim on account of wrongful government conduct exists, administrative courts have to utilise the same requirements which the civil courts apply in resolving disputes concerning wrongful government acts.' Ibid., at 209. More generally, Di Bella explained that 'this topic is politically sensitive and difficult, and no one wanted to stick his/her neck out on it. The legislature, it seems, has just kept putting off dealing with the issue. The court therefore has to (and still must) do the dirty work'. Ibid., at 210.
[703] Ibid., at 209.
[704] Ibid., at 210.
[705] Ibid., at 219. Challenges that arise in scrutinising the legality of government action under Art. 6:162 DCC concern, amongst others, causality, relatively and imputation requirements.

This does not mean, however, that all acts necessarily involve the performance of 'constitutional functions'; otherwise, all disputes would necessarily have a 'public' as opposed to a 'private' law character. The *travaux* of Section 29 clarify, as seen, that an 'official' act may conceivably give rise to a dispute of a 'private law character'. Indeed, if a vehicle used in a peacekeeping operation—and thus on 'official' business—is involved in an accident, according to the 1995 Report, the dispute may well have a 'private law character'.

3.4.2.2 UN practice regarding 'private law character'

3.4.2.2.1 The 1995 Report's exclusion of 'other claims'

As seen, the 1995 Report contains a category of 'other claims' which do not qualify for dispute settlement under Section 29(a) of the General Convention. Specifically, these are claims 'based on political or policy-related grievances against the United Nations', and claims by disappointed job applicants. As seen above, in UN practice, this category does not seem to imply an automatic exclusion from the scope of Section 29 of *any* claim that is not specifically mentioned in the 1995 Report. Rather, the criterion for exclusion seems to be whether any such claim is either from a disappointed job applicant or one that is 'based on political or policy-related grievances against the United Nations'.

That would mean that either category of claims lacks a 'private law character', which is after all the key criterion under Section 29 of the General Convention. That indeed seems to be the UN's position. As to 'political or policy-related grievances' (claims by disappointed job applicants are discussed below), in rejecting the claims relating to the Haiti cholera epidemic, the UN Legal Counsel stated that 'these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention].'[706]

Disputes concerning the performance of the constitutional functions of the UN are likely to be more intensely subject to the political process. However, all claims, including those mentioned in the 1995 Report, at one level, have a political or policy dimension.[707] Mégret argued:

> 'Dans ces conditions, il paraît difficile, au terme du raisonnement du Secrétaire général, d'imaginer ce qui ne constituerait pas une question politique et donc comment l'exception « politique » à l'obligation de fournir des recours alternatifs n'aboutirait pas à vider celle-ci de son sens en ouvrant la voie à un pur arbitraire. Le fait qu'une faute causant un dommage implique de repenser les processus ayant mené à cette faute et pose donc des questions d'ordre institutionnel « politiques »

[706] Letter of Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Brian Concannon, 21 February 2013, at 2 (emphasis added). In the context of the 1995 Report's categorical exclusion of 'political or policy-related grievances', Ferstman states that 'the organization's approach to the "private" "public" divide . . . has in practice foreclosed all major claims brought to the attention of the UN by third-party individuals'. C. Ferstman, 'Reparations for Mass Torts Involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations', (2019) 16 *International Organizations Law Review* 42, at 54.
[707] Cf. Mégret (2013), under heading I-A.

> paraît comme une évidence. Ainsi en droit interne dans de nombreux Etats le principe d'une responsabilité civile ou administrative de l'Etat et de ses démembrements est acquis d'assez longue date justement en ce qu'il implique vraisemblablement (et bénéfiquement) que certaines procédures soient repensées. L'idée qu'une question qualifiable de droit privé cesserait de l'être du seul fait qu'elle pose par ailleurs des questions politiques paraît fallacieuse car elle mène inévitablement à ce que pratiquement toute dispute puisse être qualifiée comme relevant du droit public.'[708]

The question is not whether a dispute is based on political or policy-related grievances. Insofar as the travaux préparatoires provide guidance (see paragraph 3.4.2.1.2 of this study), the question rather is whether the dispute concerns the performance of constitutional functions. If it does, it lacks a 'private law character'. Thus, only where a political controversy has constitutional dimensions proper is the dispute excluded from dispute settlement under Section 29 of the General Convention. To return to the 1995 Report, that is the only criterion on the basis of which 'other claims', that is, claims other than those specifically mentioned in the report, could be excluded from dispute settlement under Section 29 of the General Convention.

The UN seems to have recognised this in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* advisory proceedings before the ICJ.[709] As seen, those proceedings arose from defamation claims against a Special Rapporteur of the UN Commission on Human Rights. The allegedly defamatory statements caused political controversy, as evidenced by the ensuing ICJ advisory proceedings. This notwithstanding, the UN Legal Counsel stated that the claims, which fell in the category of other claims in the 1995 Report, would be actionable under Section 29. Thus, while the Special Rapporteur acted 'in the course of the performance of his mission',[710] the dispute was deemed not to concern the 'actual performance' of the UN's 'constitutional functions'.

If the defamation claims underlying *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* gave rise to a dispute of a 'private law character', there may well be other such claims. Blatt stated in connection with the purported categorical exclusion of 'other claims' in the 1995 Report: 'Dass diese pauschale Verweigerung im Hinblick auf die zahlreichen Arten von Ansprüchen, die dem Typ other claims zuzuordnen sind, eine mehr als fragwürdige Praxis darstellt, kann wohl auch ohne nähere Prüfung festgestellt werden.'[711]

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[708] Ibid., fn. omitted.
[709] The dispute arose under Section 29(b) of the General Convention, but the UN's ratification of the conduct of its Special Rapporteur brought it within the scope of Section 29(a).
[710] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62 (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), para. 56.
[711] H. Blatt, 'Rechtsschutz gegen die Vereinten Nationen. Internationale Immunitaten und die Streitbeilegung nach Section 29 des Ubereinkommens uber die Vorrechte und Immunitaten der Vereinten Nationen', (2007) 45 *Archiv des Völkerrechts* 84, at 99-100.

Blatt referred to the work of the Independent Inquiry Committee into the UN Oil-For-Food Programme, which might well have given rise to defamation claims.[712] The Committee was set up to investigate allegations of bribery and corruption in the administration of the Oil-For-Food Programme. The Committee's final report states

> 'that more than 2,200 companies worldwide paid kickbacks to Iraq in the form of inland transportation fees, after-sales-service fees, or both. Tables of all companies for which there is evidence that kickbacks were paid in connection with their contracts have been separately published by the Committee today.'[713]

Such public allegations could cause serious reputational damage to the companies concerned and might spur actions for damages on the basis of defamation. While no doubt politically sensitive, any link with the performance of the UN's constitutional functions may be rather tenuous. Like the defamation claims in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, any claims in connection with the Oil-For-Food Programme would conceivably qualify as private claims of a 'private law character'.

And, one can conceive of other claims that similarly need not concern the actual performance of constitutional functions of the UN, and may not even be politically controversial. For example, procurement processes for general services may give rise to challenges by disappointed bidders alleging procedural irregularities. It is not inconceivable that such claims give rise to disputes of a 'private law character'. The UN's establishment of the 'Award Review Board' in 2009 (discussed below) may evidence a recognition in that direction.[714]

As to the second type of claims mentioned under the heading 'other claims' in the 1995 Report, these are claims from 'disappointed job applicants, i.e. individuals who are aggrieved that they were not selected for a United Nations position. Such claims typically allege the occurrence of prejudice or some other impropriety in the selection process.'[715]

According to the 1995 Report, such claims do not qualify for dispute settlement under Section 29. Nonetheless, the report expressly refers to these claims as 'claims of a private law nature'.[716] The issue is whether the disputes to which these claims give rise have a 'private law character'.

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[712] Ibid., at 84 ff.
[713] Independent Inquiry Committee into the United Nations Oil-for-Food Programme, 'Manipulation Of The Oil-For-Food Programme by The Iraqi Regime' (2005), at 250.
[714] UN Doc. A/67/683/Add.1 (2012), para. 4.
[715] 1995 Report, para. 24.
[716] Ibid.

A related category concerns 'staff disputes', that is, disputes between staff (upon their recruitment) and the organisation in connection with the former's employment. According to Schmalenbach:

> 'Art. VIII Section 29(b) General Convention can be taken as the proper legal basis for the UN to provide appropriate modes of dispute settlement in cases of staff disputes . . . because the respondent to these applications is the UN Secretary-General as the chief administrative officer of the UN (Art. 97 UN Charter) and the appointing authority (Art. 101 UN Charter).'[717]

To recall, Article VIII, Section 29 ('Settlement of disputes') of the General Convention reads as follows:

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

If, as Schmalenbach argued, staff cases are covered under subparagraph (b), then the implication would be that they are of a 'private law' nature. This is because, according to Schmalenbach,

> 'there is a strong case to be made for the primacy of lit a. If UN officials are exposed to lawsuits or criminal charges before domestic courts even if they acted in their official capacities, their jurisdictional immunity points towards Art. VIII Section 29(b) General Convention: the UN to which the act is attributable has to provide for modes of alternative dispute settlement. Due to the attribution of the official act to the UN . . . however, the proper addressee of the claim is the UN with the corresponding consequences for the applicable liability and dispute settlement regime. Consequently, the claim has to fulfil the lit a elements ('dispute of a private law character') in order to be receivable under Art. VIII Section 29 General Convention.'[718]

Where a dispute has a 'private law character', this may be taken to suggest that the rights at issue qualify as 'civil' under Article 6 of the ECHR. However, it is submitted that the argument that staff disputes are covered by subparagraph (b) of Section 29 of the General Convention fails to persuade.

Returning to the origins of the General Convention, the International Labour Office's 'suggested text of proposed draft resolution' provided in Article 18, paragraph 2:

> '(2) The International Labour Organisation shall make provision for the determination by an appropriate international tribunal of:
> (a) disputes arising out of contracts to which the Organisation is a party which provide for the reference to such a tribunal of any disagreement relating thereto;
> (b) disputes involving any official of the Office who by reason of his official position enjoys immunity from the jurisdiction of the tribunal which would otherwise have cognizance of the matter in the case of which such immunity has not been waived by the Director;
> (c) disputes concerning the terms of appointment of members of the staff and their rights under the applicable staff and pension regulations.'[719]

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[717] Schmalenbach (2016), para. 3.
[718] Ibid., para. 61 (fn. omitted).
[719] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 223.

Thus, staff disputes were specifically catered for in subparagraph (c), meaning that the International Labour Office envisaged those disputes to be distinct from disputes mentioned under (b), which developed into Section 29(b) of the General Convention. The provision in subparagraph (c) was excluded from Section 29 of the General Convention. There is no evidence in the drafting history of Section 29 of the General Convention that this was because staff disputes were understood to be covered by sub-paragraph (b). In commenting on the exclusion of subparagraph (c) concerning staff disputes, Jenks – the driving force behind the ILO proposals – merely noted that 'it is perhaps in this matter that most progress has since been made.'[720]

Furthermore, if Section 29(b) of the General Convention were the legal basis for the settlement of staff cases, one would have expected the UNGA to have referred to this in establishing the UN's Administrative Tribunal at the time.[721] But, the UNGA resolution contains no reference to Section 29 of the General Convention. Nor does the ICJ's advisory opinion in *Effects of Awards* Made by the United Nations Administrative Tribunal refer to that provision. That advisory opinion concerned the legal effect of awards rendered by the administrative tribunal at the time. The ICJ was called to consider whether the UN General Assembly was empowered to establish the tribunal.[722] It concluded that to this end the UN has an implied power, exercised by the General Assembly:[723]

> 'When the Secretariat was organized, a situation arose in which the relations between the staff members and the Organization were governed by a complex code of law. This code consisted of the Staff Regulations established by the General Assembly, defining the fundamental rights and obligations of the staff, and the Staff Rules, made by the Secretary-General in order to implement the Staff Regulations. It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties. The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.
>
> In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.'[724]

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[720] Jenks (1961), at 45. Indeed, according to Schmalenbach, 'Lit c was not very innovative given that employment cases always fell under the jurisdiction of the Administrative Tribunal of the League of Nations, whose transferral to the ILO was foreseeable in 1945'. Schmalenbach (2016), para. 6.
[721] UN Doc. A/RES/351 (IV) (1949).
[722] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, International Court of Justice, (1954) ICJ Reports (*Effect of Awards*), at 56.
[723] Ibid., at 58.
[724] Ibid., at 57.

If Section 29(b) of the General Convention had applied, then the tribunal's establishment would presumably have been based on the chapeau of Section 29, according to which the UN 'shall make provisions for appropriate modes of settlement of' staff disputes. Rather than referring to an obligation under Section 29, however, according to the ICJ, the tribunal's establishment is a corollary of the aforementioned 'express aim' of the UN Charter.

It is submitted that for the ICJ, and earlier the UNGA, to not refer to Section 29 of the General Convention was unlikely to be an 'omission'.[725] Indeed, *Effect of Awards* rather appears to provide the legal underpinning for the establishment of the Administrative Tribunal, in furtherance of the legacy of the League of Nations Administrative Tribunal and the ILOAT.[726]

As a result, the settlement of staff disputes is arguably distinct from that of disputes under Section 29 of the General Convention. An early commentator, Harpignies, suggested this much by juxtaposing the two dispute settlement regimes:

> 'Section 29 of the Convention sets out the obligation of the United Nations to « make provisions for appropriate modes of settlement » concerning disputes of a private law character.
> . . . Similarly, the United Nations, following the example set by the League of Nations, established in 1950 an Administrative Tribunal having jurisdiction over its conflicts with its own officials'.[727]

Indeed, according to Harpignies, staff disputes 'are not strictly of a private law character since they are governed by a distinct body of law, namely, international administrative law'.[728]

3.4.2.2.2 The Srebrenica genocide, Kosovo lead poisoning and Haiti cholera epidemic

The foregoing interpretation of Section 29 of the General Convention allows for an appraisal of the UN's interpretation and application of the phrase 'private law character' in rejecting liability in connection with the Srebrenica genocide, the Kosovo lead poisoning and the Haiti cholera epidemic and rejecting dispute settlement in connection with the second and third dispute.

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[725] Schmalenbach (2016), para. 3. Cf. the IMF's opinion with respect to Section 31 of the Specialized Agencies Convention, which corresponds to Section 29 of the General Convention: 'One matter of contention is the applicability of section 31 of the specialized agencies Convention to staff members. IMF takes the view that the provision is not applicable.' 1985 Supplement to the 1967 Study, para. 229.
[726] As Powers recalls: 'The first administrative tribunal was established in 1927 by the League of Nations. When the League was dissolved in 1946, the League Tribunal was reconstituted, with minor modifications, by the International Labour Organisation and became the ILOAT.' J. Powers, 'The Evolving Jurisprudence of the International Administrative Tribunals: Convergence or Divergence?', in P. Quayle and X. Gao (eds.), *Good Governance and Modern International Financial Institutions: AIIB Yearbook of International Law 2018* (2019) 108, at 110, fn. 4. As to the UNAT, it 'was established in 1950, and its jurisdiction was extended to various UN specialized agencies and other organizations that accepted its jurisdiction.' Ibid., at 110 (fn. omitted).
[727] Harpignies (1971), paras. 3-4.
[728] Ibid., at 453.

As to the claims in connection with the IDP camps in Kosovo, as seen, Human Rights Advisory Panel ('HRAP') held that the complaint before it, in relevant part, fell '*prima facie* within the ambit of the UN Third Party Claims Process' and on that basis declared the complaint inadmissible. That is, according to the HRAP:

> '38. The procedure set forth in General Assembly resolution 52/247 and in Section 7 of UNMIK Regulation No. 2000/47 allows the United Nations, at its discretion, to provide compensation for claims for personal injury, illness or death as well as for property loss or damage arising from acts of UNMIK which were not taken out of operational necessity. Therefore, complaints about violations of human rights attributable to UNMIK will be deemed inadmissible under Section 2.2 of UNMIK Administrative Direction No. 2009/1 to the extent that they have resulted either in personal injury, illness or death, or in property loss or damage. Complaints about violations of human rights that have not resulted in damage of such nature will normally not run counter to the requirement of exhaustion of the UN Third Party Claims Process.
>
> . . .
>
> 40. The substantive complaints declared admissible by the Panel in its 5 June 2009 decision on admissibility are all directly linked to the initial operational choice to place the IDPs in the camps in question and/or the failure to relocate them, and the subsequent effects which resulted in personal injury, illness or death. The Panel considers that these parts of the complaint fall prima facie within the ambit of the UN Third Party Claims Process and therefore are deemed inadmissible.'[729]

Conversely, according to HRAP, as seen:

> 'On 25 July 2011, the UN Under-Secretary-General for Legal Affairs informed the complainants of her decision to declare the claims non-receivable. She stated that under Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations . . . the UN Third Party Claims Process provided for compensation only with respect to "claims of a private law character", whereas the complainants' claims concerned "alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo".'[730]

It took over five years for the UN to reject the claims. The process leading to that decision is not clear from the documents available to the present author. Contrary to Section 7 of UNMIK Regulation No. 2000/47, it seems that the claims were not settled by a Claims Commission (discussed below). Of note, the provisions of UNGA resolution 52/247 (1998), though developed and promulgated in the context of *peacekeeping operations*, were considered applicable—including by the UN Legal Counsel—to the present situation, which concerns a UN territorial (interim) administration.[731]

On the substance of the decision to reject the claims since they fell outside the 'private law character' scope of Section 29 of the General Convention, it is difficult to assess this on the basis of the reasoning relayed in the HRAP decision. However, there may be good arguments in support of that decision. That is, insofar as the claims concerned 'alleged widespread health and environmental risks arising in the

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[729] *N.M. and Others v. UNMIK*, Decision of 31 March 2010, HRAP, Case No. 26/08.
[730] Ibid., Decision of 10 June 2012, HRAP, Case No. 26/08, para. 19.
[731] The UN lists UNMIK amongst its peacekeeping operations, <peacekeeping.un.org/en/mission/unmik> accessed 21 December 2021.

context of the precarious security situation in Kosovo',[732] they may be taken to challenge the discharge by UNMIK of its governmental mandate.[733] Arguably, no private party would be in a position to address effectively the aforementioned risks, for example, by relocating the claimants from the IDP camps or otherwise improving their living conditions in the prevailing security situation. Only UNMIK would arguably have the powers to do so in the performance of its 'constitutional' mandate. The actions allegedly required of it involve public policy choices which, in terms of the travaux préparatoires of Section 29, arguably concern the performance of constitutional functions and are not merely incidental thereto. They represent administrative decisions that may give rise to disputes that have a public, rather than a private, law character. Therefore, in light of the UN Legal Counsel's reasoning, the dispute arguably lacked a 'private law character' within the meaning of Section 29(a) of the General Convention. This would mean that, in terms of substance, the UN had reasons to reject dispute settlement on the basis of that provision.

Conversely, it is submitted that there are good arguments for the proposition that the disputes arising out of the Haiti cholera epidemic were rather of a private law character in the sense of Section 29(a) of the General Convention.[734] As seen, in sum, the claim brought against the UN in 2011 was that it had failed to discharge its duty of care in connection with the spreading of cholera by Nepalese peacekeepers in Haiti.

In what has been referred to as '[o]ne of the most disputed decisions of the UN in this respect',[735] the UN Legal Counsel asserted that 'consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention].'[736]

What are these political and policy matters that would necessarily be reviewed? It is true that the UN would not have incurred liability but for its decision to deploy peacekeepers to Haiti. The decision to deploy may not be reviewable under Section 29 as it represents the performance of the constitutional

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[732] *N.M. and Others v. UNMIK*, Decision of 10 June 2012, HRAP, Case No. 26/08, para. 19.
[733] Cf. Rashkow (2015), at 87, fn. 27 ('there is a much stronger case for characterizing the actions of the 'Interim Administration' as addressing political or policy matters of a governmental nature that do not give rise to claims of a private law character within the meaning of Section 29, than there is in the Haiti situation').
[734] Cf. ibid., at 86 ('It is much more difficult to understand the decision of the United Nations declining to review the claims of the Haitian cholera victims in light of the longstanding practice of the Organization to address claims of a private law character in connection with peacekeeping missions and the terms of the Organization's new peacekeeping liability regime.').
[735] Schmalenbach (2016), para. 47.
[736] Letter of Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Mr Brian Concannon, 21 February 2013, at 2. Related correspondence from the UN has been interpreted as narrowing the definition of private law character, by eliminating torts (other than in connection with motor vehicle accidents), and broadening the category of claims of a public law character. K. Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility', (2016) 16 *Chicago Journal of International Law* 341, at 360-361.

functions of the UN. However, the fact that, in furtherance of its humanitarian mandate, the UN conducted a humanitarian mission in Haiti does not mean that the UN's actions cannot be assessed under private law, notwithstanding the sensitive political realities.

It is the UN's responsibility for the epidemic in carrying out the deployment that gave rise to a dispute. The dispute arguably does not concern the performance of constitutional functions, but instead acts that are 'incidental' thereto. Indeed, contrary to the *UNMIK* case, an entity need not have public, or governmental, powers to discharge the duty of care alleged in that case. That duty applies to any person, be it natural or legal. The deficient black water waste disposal system of the camp seems to represent a classic tort.[737] Insofar as the UN would plead 'operational necessity',[738] that defence would not hold if only because that exemption from liability applies exclusively to property loss and damage, not to claims for personal injury, illness or death.[739]

As Mégret contended:

> 'Le tors immédiat a bien été causé par des actes commis par les soldats népalais en Haïti dont, si l'on exclue leur seule présence, au moins le fait d'avoir épanché les eaux dans le Maribonite est bien une action ayant entraîné le dommage. Le fait que ce tors soit l'objet d'une longue série de décisions dont certaines prises à New York ne devrait pas fondamentalement changer l'inscription du cas haïtien dans cette catégorie.'[740]

Mégret concluded:

> 'Dans le cas de la plainte haïtienne, il n'est aucunement question d'une ambition visant à remettre en cause une politique générale des Nations Unies. La plainte ne vise pas en soi et pour soi les pratiques sanitaires consistant à soumettre ou ne pas soumettre certains contingents de casques bleus à tel ou tel test médical, que dans son abstraction l'on aurait pu en d'autres circonstances qualifier de purement publique. En tant que décision de gouvernance, celle-ci pourrait si existait une « judicial review » être questionnée en elle-même, par exemple en fonction des obligations fondamentales à la charge des Nations Unies, dans une optique quasi-constitutionnelle. Mais ce qui se passe dans le cas haïtien est très différent dès lors qu'un dommage privé a été subi du fait d'une faute onusienne. Ces termes là sont, éminemment, ceux du droit privé.'[741]

In this respect, according to Schmalenbach:

> 'On the basis of the settlement practice of the UN, it is safe to say that all harm-inflicting interactions with private parties arising from or attributable to the UN mission can be the basis of tortious claims of a private law character that create a purely bilateral relationship in which the wrongdoer (*i.e.* the UN) has to make good to the sufferer without putting the mission's international mandate and its implementation under scrutiny. In principle, the international public character of the UN's function

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[737] Cf. comments by Professor J. Alvarez during panel discussion organized by the American Society for International Law, 26 February 2014 <asil.org/remedies-harm-caused-un-peacekeepers> accessed 21 December 2021.
[738] Cf. Mégret (2013), under heading I-B.
[739] 1996 Report, paras. 13-14.
[740] Mégret (2013), under heading I-A.
[741] Ibid., under heading I-B (emphasis provided).

> is irrelevant in this relationship because the claims can be legally assessed on the basis of the general principles of tort law alone, as is the practice of the local claims review boards . . . without putting the mission's international mandate and its implementation under scrutiny.'[742]

As to the final case study, the Srebrenica genocide, it is submitted that the character of the resulting dispute lies somewhere in between those arising out of the Haiti cholera epidemic and the Kosovo lead poisoning, though arguably closer to the latter. As seen, in *Mothers of Srebrenica*, the State of the Netherlands and the UN were sued as co-respondents before the Dutch courts. As discussed at length elsewhere in this study, the case against the UN was dismissed on account of its immunity from jurisdiction.

Whilst the Supreme Court upheld the UN's immunity, as seen, it suggested that Section 29 had been breached.[743] That implies that the Court considered the dispute to have a 'private law character'. As to the ECtHR, in declaring the case against the Netherlands inadmissible (on grounds discussed below), it left unresolved whether Section 29 of the General Convention required the UN to arrange for dispute settlement.[744] But, the ECtHR did accept that

> 'the right asserted by the applicants, being based on the domestic law of contract and tort . . . was a civil one. There is no doubt that a dispute existed; that it was sufficiently serious; and that the outcome of the proceedings here in issue was directly decisive for the right in question. In the light of the treatment afforded the applicants' claims by the domestic courts, and of the judgments given by the Court of Appeal of The Hague on 26 June 2012 in the Mustafić and Nuhanović cases . . . the Court is moreover prepared to assume that the applicants' claim was "arguable" in terms of Netherlands domestic law . . . In short, Article 6 is applicable.'[745]

Regarding the ECtHR's reliance on *Mustafić* and *Nuhanović*, as discussed elsewhere in this study, the Dutch courts had found the Dutch State liable under the law of Bosnia and Herzegovina. If one follows the reasoning of the ECtHR in *Srebrenica*, the more pertinent analogy would be the subsequent decision of the Dutch courts in the same case to hold the State of the Netherlands liable under Dutch private law. It may be tempting to conclude, in line with the reasoning of the ECtHR, that as the dispute against the State was determined under Dutch private law, the dispute against the UN similarly had a 'private law character'.

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[742] Schmalenbach (2016), para. 47 (fn. omitted, emphasis added). Schmalenbach continued: 'By highlighting the difficult sanitary environment in which MINUSTAH had to fulfil its international mandate, the UN left the potentially tortious character of fresh water contamination caused by peacekeepers out of consideration when deciding on the applicability of Art. VIII Section 29 General Convention.' Ibid.
[743] Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.3.3.
[744] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 165 ('Regardless of whether Article VIII, paragraph 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case').
[745] Ibid., para. 120.

However, it is submitted that the analogy is not in fact helpful. This is because the liability of the State under Dutch private law involves a 'wrongful government act' (onrechtmatige overheidsdaad). As di Bella explained (see above), such an act may involve the exercise of governmental or 'public' authority—as di Bella explained, this presents certain challenges in terms of the application of private law. The application of Dutch private law in the dispute by the Dutch courts against the Netherlands does not necessarily dictate that the dispute against the UN has a 'private law character' under Section 29 of the General Convention.

As argued in chapter 4 of this study, whether Article 6 of the ECHR applied is to be determined with reference to the internal law of the UN—that is, Section 29 of the General Convention. *Mothers of Srebrenica*, properly considered in terms of that provision, concerned the exercise of public authority: the operation of a peacekeeping force with a Chapter VII mandate. The Hague Court of Appeal in *Mothers of Srebrenica* seems to have realized this insofar as it stated the following in the context of the UN's immunity from jurisdiction:

> 'Amongst the international organisations the UN has a special position, for under article 42 of the Charter the Security Council may take such actions by air, sea or land forces as may be necessary to maintain or restore international peace and security. No other international organisation has such far-reaching powers. In connection with these extensive powers, which may involve the UN and the troops made available to them in conflict situations more often than not entailing conflicting interests of several parties, there is a real risk that if the UN did not enjoy, or only partially enjoyed immunity from prosecution, the UN would be exposed to claims by parties to the conflict and summoned before national courts of law of the country in which the conflict takes place. In view of the sensitivity of the conflicts in which the UN may be involved this might include situations in which the UN is summoned for the sole reason of obstructing any action undertaken by the Security Council, or even preventing it altogether. It is not inconceivable, either, that the UN is summoned in countries where the judiciary is not up to the requirements set by the ECHR. The immunity from prosecution granted to the UN therefore is closely connected to the public interest pertaining to keeping peace and safety in the world. For this reason it is very important that the UN has the broadest immunity possible allowing for as little discussion as possible. In this light the Court of Appeal believes that only compelling reasons should be allowed to lead to the conclusion that the United Nations' immunity is not in proportion to the objective aimed for.'[746]

The ECtHR stated in a similar vein

> 'that since operations established by United Nations Security Council Resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. 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'.[747]

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[746] Court of Appeal The Hague 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, unofficial English translation provided by the Court (*Mothers of Srebrenica*), para. 5.7.
[747] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), para. 154.

The foregoing passages underscore that *Mothers of Srebrenica* was about the actions of a UN peacekeeping force—by employing military force—in the face of an imminent genocide. This goes to the heart of the powers of the UN and decision-making within the organization. No private party could conceivably face the same dilemmas at issue in this case. In this respect, the present author has submitted elsewhere that *Mothers of Srebrenica* clearly is no ordinary day-to-day dispute, but one that seems to touch on the core decision-making process within the UN,[748] that is, the performance of its constitutional functions.

Mégret similarly states with reference to the UN's inability to stop the genocide in Rwanda, and with reference also to the Srebrenica genocide:

> 'Sans doute peut on supputer que l'organisation a vu dans le défaut de mesures actives pour empêcher le génocide une décision fondamentalement publique (aussi déplorable qu'elle soit par ailleurs). Il ne conviendrait pas, dans cette ligne d'idées, que par le biais de la mise en cause d'omissions de ce type on en vienne à pouvoir exiger des comptes d'une organisation internationale à propos de la conception même d'une mission. Si l'on raisonnait en termes de « centre de gravité » normatif on pourrait ainsi prétendre que celui-ci penche dans le cas du défaut d'empêchement du génocide par la MINUAR plus vers le droit public car il s'agit de se prononcer sur l'échec ou le succès même d'une mission par rapport à ses buts et obligations. Quoiqu'il en soit d'un tel raisonnement en termes de principes (et l'on reviendra en conclusion sur la nécessité de plus en plus évidente de reconnaître des modes de responsabilité y-compris dans des situations plus caractéristiquement publiques), la situation du génocide rwandais ou du massacre de Srebrenica diffèrent manifestement du cas haïtien en ce que dans le scenario qui nous intéresse la question n'est pas le défaut d'exécution de la mission même, mais un aspect relativement annexe de sa mise en œuvre (fournir des soldats libres de maladies infectieuses).'[749]

It is submitted that *Srebrenica* rather resembles the case of UNMIK insofar as it leans, to use the terminology of Mégret, 'plus vers le droit public'.[750]

There is a further issue to be addressed in regard to *Mothers of Srebrenica* and this is the part of the claim concerning 'breach of contract'. The ECtHR articulated that part of the claim as follows:[751]

> '[T]he United Nations . . . despite earlier promises and despite their awareness of the imminence of an attack by the VRS, had failed to act appropriately and effectively to defend the Srebrenica "safe area" and, after the enclave had fallen to the VRS, to protect the non-combatants present. They therefore bore responsibility for the maltreatment of members of the civilian population, the rape and (in some cases) murder of women, the mass murder of men, and genocide. The applicants based their position both on Netherlands civil law and on international law.

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[748] See Henquet (2010), at 293, adding 'the functionality of the UN is intensely at stake'. Ibid.
[749] Mégret (2013), under heading I-B (fn. omitted, emphasis added).
[750] CF. Rashkow (2015), at 85-86 ('In the end, there is a real issue in this case whether the dispute over the actions of the United Nations forces are of a "private law character", or whether the dispute raises an issue of public policy or public international law that would take the matter outside the scope of Section 29.').
[751] This seems to correspond to the Dutch Supreme Court's reference to the claim that 'the UN acted wrongfully in failing to fulfil undertakings they had given before the fall of the enclave'. Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 3.2.1.

> . . . The argument under civil law was, firstly, that the United Nations . . . had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica "safe area" in exchange for the disarmament of the ARBH forces present, which agreement the United Nations . . . had failed to honour'.[752]

The issue is how to characterize the alleged 'agreement': does the dispute concerning such an agreement qualify for dispute settlement under Section 29 of the General Convention? Under that provision, the UN '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.' This phrase has two elements: 'contracts' and 'other disputes of a private law character'. The drafting suggests that both must have such a character. As a result, as with 'other disputes', the test regarding contracts is whether it concerns matters that are 'incidental' to the UN's 'constitutional functions'.

In *Mothers of Srebrenica* , the alleged contract seems to concern rather the opposite, that is, the 'actual performance' of constitutional functions. The purport of said contract was to protect the inhabitants of Srebrenica in exchange for the disarmament of the ARBH forces present. Such an agreement, if it existed, had everything to do with the performance of the UN's core functions. It served a public policy goal of the UN, disarmament of the enclave, and it concerned the exercise of the use of military powers. The dispute concerning the performance of the alleged contract is, therefore, no different in character than the 'other dispute' underlying the case (discussed above). That is, both disputes concern the exercise of governmental functions by the UN and have a public law character, not a private law character within the meaning of Section 29(a) of the General Convention.

That conclusion is supported by an analogy under Dutch law. The alleged agreement resembles an 'exercise-of-powers contract' (bevoegdhedenovereenkomst) under Dutch law, which may be defined as a 'contract between a public entity and private person(s) or another public entity, on the use of one of its specific public powers'.[753] As explained by Huisman, while such an agreement is an 'act of private law',[754] it is governed by rules of both private and administrative law.[755] Indeed, Huisman contended that the legal nature of the contract is 'ambiguous'[756] insofar as it

> 'moves into the twilight zone between the areas of private and public law. It is private, because of its form: a contract, which is traditionally seen as an act of private law in the Dutch legal system. But its content is on the use of a public power, hence public law.'[757]

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[752] *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, [2013] ECHR (III) (*Mothers of Srebrenica*), paras. 54-55 (emphasis added).
[753] P.J. Huisman, *De Bevoegdhedenovereenkomst: De Overeenkomst over Het Gebruik van Een Publiekrechtelijke Bevoegdheid* (2012), at 729.
[754] Ibid., at 730.
[755] Ibid.
[756] Ibid., at 729.
[757] Ibid.

Huisman concludes that the classification of an exercise-of-powers contract as an act of private law 'has been shown to be problematic . . . [and it] is best classified as an act of public law'.[758] As seen, the same may be true of the purported contract at issue under Section 29(a) of the General Convention.

3.4.2.3 Interim conclusions

This section concerned the interpretation and application of the phrase 'private law character' under Section 29(a) of the General Convention. It has been submitted that the ordinary meaning of the term dispute of a 'private law character' refers to the following: domestic law, not international law; the opposite of 'public law'; and a common denominator among domestic private laws, as opposed to one specific domestic law. It has furthermore been submitted that, according to the collective *travaux* of the General Convention and the Specialized Agencies Convention, 'disputes of a private law character' may be said to refer to disputes that: concern matters that are 'incidental' to the 'constitutional functions' of the UN and do not relate to the 'actual performance' of such functions; would have come before municipal courts but for the immunity of the UN, Section 29 of the General Convention being the 'counterpart' of the UN's immunities; and concern the performance of 'official acts', but not 'constitutional functions'.

In interpreting the phrase 'private law character', the key challenge is to distinguish 'public' from 'private'. This section offered a number of considerations to that end. Three ingredients suggest, but are not necessarily determinative of, a 'private law character': the nature of the claimants (third non-state parties); the damage sustained (personal injury, illness or death, and property loss or damage); and, the remedy requested (compensation). Furthermore, the jurisdiction of domestic courts in private law disputes would normally exclude those disputes that are within the public realm of international organizations. Moreover, since the adoption of the General Convention, there has been a development whereby the UN began to exercise governmental powers over individuals. A parallel development involved the advent of international human rights. This 'dual process' calls for the establishment of 'public law remedies'. The Dutch experience cautions against expanding the interpretation of the application of Section 29 to such disputes (which would moreover run contrary to its travaux préparatoires).

When this interpretation of 'private law character' is applied to the UN's practice, the 1995 Report's exclusion of disputes based on 'political or policy-related grievances' appears problematic. In determining whether a dispute has a private law character, what matters is whether the actual performance of constitutional functions is at issue. As seen, in UN practice, defamation claims qualify

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[758] Ibid., at 733.

as disputes of a private law character. And, there are possibly other claims the character of which requires close examination.

As to the three case studies, it is submitted that in the cases arising out of the Kosovo lead poisoning and the Srebrenica genocide there are arguments to reject dispute settlement under Section 29 of the General Convention on account of the prevailing public law character of the respective disputes. That is, the impugned decisions in these cases essentially concern policy choices by the UN in the exercise of its governmental or public authority. Conversely, regarding the Haiti cholera epidemic, it has been submitted that the UN's refusal to engage in dispute settlement under Section 29 is more difficult to justify. It is true that public policy decisions are at play. However, the dispute does not concern such decisions, but rather their operational implementation. The alleged deficiencies in so doing arguably amount to a failure to discharge a duty of care that applies to the UN as much as it does to anyone. In other words, the character of the *Haiti* dispute, properly considered, seems to fit the definition of 'private law' in accordance with the intention of the drafters of the General Convention.

Not only are decisions as to the public or private character of a dispute legally complex, they also have significant implications for the claimants. In addition, controversial decisions, such as with respect to the Haiti cholera epidemic, impact on the UN's reputation and thereby effectiveness, and may also potentially threaten its jurisdictional immunity (notwithstanding that in the cholera dispute the US courts upheld the immunity). This brings into sharp focus that, as seen previously, it is the UN itself that determines the character of disputes brought against it. That process is problematic, which is compounded by procedural problems in the implementation of Section 29(a), as discussed in the next subsection.

3.4.3 'Provisions for appropriate modes of settlement'

This subsection discusses the requirement contained in the chapeau of Section 29 of the General Convention to 'make provisions for appropriate modes of settlement'. The question that arises at the outset concerns the meaning of the obligation to 'make provisions'. The wording suggests that the UN is not required to have modes of settlement up and running continuously; rather, it seems to require the UN to ensure that such modes are available if and when necessary. As Schmalenbach put it, 'the UN has to anticipate future disputes and be prepared to enter into appropriate modes of settlement.'[759] That seems to correspond to UN practice. As submitted by the UN Legal Counsel in the *Difference Relating*

[759] Schmalenbach (2016), para. 11 (fn. omitted). Schmalenbach adds: 'The ways and means of how the UN achieves this task are not stipulated by Art. VIII Section 29, which requires neither specific institutional settings nor the adoption of UN rules or international agreements on dispute settlement for general application.' Ibid.

to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights proceedings before the ICJ:

> 'as other claims of a private law nature could arise in any of the 185 member States, and could arise out of innumerable factual situations, it is neither feasible, practical or economical to establish standing claims bodies to deal with these questions.[760]

This subsection begins by addressing the term 'appropriate modes of settlement' under Section 29(a) of the General Convention (subsubsection 3.4.3.1). In so doing, upon briefly recapping modes of settlement in UN practice (paragraph 3.4.3.1.1), it provides an interpretation of the term in light of present-day criteria (paragraph 3.4.3.1.2). It then appraises the existing modes of settlement (paragraph 3.4.3.1.3). In turning to applicable law, the discussion focuses on the UN Liability Rules, that is, the legal basis for their adoption, and their legal qualification, scope of application and implementation, as well as with aspects of their contents.

3.4.3.1 'Modes of settlement'

3.4.3.1.1 Brief recap of modes in UN practice

As seen, according to the UN's reported practice, it has resorted to several procedural modes of settlement depending on the type of claim in point. These modes are, in brief (based on the 1995 Report, unless otherwise indicated):

- Negotiation: all claims. Settlement by way of negotiation has been institutionalised in the case of tort claims arising within UN headquarters district, both prior to (up to 5,000 USD) and following (from 5,000 USD) proceedings before the Tort Claims Board;[761] and claims relating to peacekeeping operations, following proceedings before claims review boards.
- Arbitration: conducted under the UNCITRAL rules and under the auspices of the AAA (claims arising within US) or ICC (claims arising outside US). Available for all types of contractual claims; claims arising within UN Headquarters District that cannot be settled through negotiation following proceedings before the Tort Claims Board; and tort claims arising on UN premises other than New York that cannot be settled through negotiation.
- Tort Claims Board:[762] tort claims arising within UN headquarters district where settlement by way of negotiation (up to 5,000 USD) has failed;

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[760] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 12 (emphasis added).
[761] The continued existence of the board remains to be confirmed following the abolition of UN Doc. ST/SGB/230 (1989), pursuant to section 1(a) of UN Doc. ST/SGB/2017/3 (2017).
[762] Subject to its continued existence.

- Local claims review boards: all claims in connection with peacekeeping operations. Standing claims commissions are also foreseen for this type of claims, but they have never been established;
- Lump sum agreement: claims in connection with peacekeeping operations. The ONUC Settlement is the only example of this kind;
- Domestic courts: the UN waives its immunity from jurisdiction where necessary in connection with insurance coverage of tort claims in connection with car accidents; and
- Indemnification and holding the UN harmless: clause included in agreement with recipient states with respect to operational activities for development by UNDP and UNICEF.

3.4.3.1.2 'Appropriate modes of settlement': interpretation

Section 29 does not clarify what is meant by 'modes of settlement'. And, while it provides that such modes must be 'appropriate', it does not clarify the meaning thereof either. The ordinary meaning of 'mode' is:[763] 'a way of operating, living, or behaving'.[764] This seems to connote a process – in the present case: a settlement process. The plural 'modes' indicates that Section 29 envisages several such processes. This is to be contrasted with Article 18(2) of the ILO's 'suggested text of proposed resolution', which provided for the 'determination by an appropriate international tribunal'.[765]

The ordinary meaning of 'appropriate' is:[766] 'suitable or right for a particular situation or occasion'.[767] In the present case, the 'situation' or 'occasion' concerns third-party disputes with the UN that need

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[763] Cf. Art. 31(1) of the VCLT.
[764] <dictionary.cambridge.org/dictionary/english/mode> accessed 21 December 2021.
[765] International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 223 (emphasis added). In *Manderlier*, concerning damages allegedly sustained by the claimant in connection with ONUC, the Brussels Court of First Instance ruled on 11 May 1966 ruled : 'Attendu que dans la section 29 de la Convention il est stipulé que l'organisation devra prévoir des modes de règlement appropriés pour les différends de droit privé dans lesquels elle serait partie ; Attendu qu'il s'ensuit normalement que la défenderesse doit élaborer des dispositions réglementaires pour ses rapports de droit privé et instituer des juridictions pour trancher les contestations qu'ils feraient naître ; Attendu que l'O.N.U. a bien institué certaines juridictions à compétence spéciale, tel le Tribunal administratif des Nations Unies ; que toutefois il n'est pas contesté qu'elle n'a pas institué de juridiction avec une compétence générale et entière.' *Manderlier v. United Nations and Belgian State*, Brussels Court of First Instance, Judgment of 11 May 1966, United Nations Juridical Yearbook 1966, 283, cited in Harpignies (1971), at 455. Harpignies concludes that the Court 'seems to have interpreted Article VIII, Section 29 (a) of the Convention as entailing the obligation for the Organization to establish a tribunal with complete and general jurisdiction over conflicts of a private law nature . . . It is indeed accurate that an Administrative Tribunal exists, but it was established under a resolution of the General Assembly. No such resolution was ever adopted or even contemplated with respect to the creation of a Tribunal which would have jurisdiction over conflicts of a private law nature between the Organization and third parties. In the absence of such enabling resolution, the Secretariat has of course no authority to establish such a Tribunal. Moreover such courts or tribunals as have been established by the United Nations do not enjoy a complete and general jurisdiction. Thus, for example, the Administrative Tribunal's judicial powers are severely restricted: it has in principle no jurisdiction over claims for a tort imputed to the Organization and its jurisdiction in disciplinary matters is also restricted to purely legal questions. Even its power to grant compensation for nonobservance of contracts of employment is restricted.' Ibid.
[766] Cf. Art. 31(1) of the VCLT.
[767] <dictionary.cambridge.org/dictionary/english/appropriate> accessed 21 December 2021.

settling. Therefore, the requirement under Section 29 concerns settlement processes that are 'suitable', or 'right', to end legal controversies between the UN and third parties. Given that Section 29 seems to envisage a plurality of processes, what is 'appropriate' may vary depending on the type of claim.[768] In this respect, according to Schmalenbach: 'The UN has certain discretion under the General Convention with regard to the choice of the proper modes of dispute settlement.'[769]

The travaux préparatoires, as supplementary means of interpretation,[770] do not shed light on the meaning of 'appropriate modes of settlement'. The term first appeared in the draft Convention on Privileges and Immunities, prepared by the sub-committee on privileges and immunities of the UN Preparatory Commission's Committee 5.[771] There is no record known to the present author containing a clarification or discussion regarding this term at any stage of the drafting of Section 29 of the General Convention.

That said, as seen, an early explanatory memorandum on the resolution proposed by the International Labour Office on the status, immunities, and other facilities to be accorded to the ILO stated with respect to draft article 18(2), which was to evolve in Section 29 of the General Convention:[772]

> 'The arrangements suggested in this paragraph are designed as a counterpart for the immunities of the Organisation and its agents. The nature and effect of these immunities are frequently misunderstood. The circumstances in which international immunity operates to except the person enjoying it from compliance with the law are altogether exceptional. Such immunity is not a franchise to break the law, but a guarantee of complete independence from interference by national authorities with the discharge of official international duties.'[773]

Furthermore, the Sub-Committee of the Sixth Committee that drafted the Specialized Agencies Convention commented as follows on the draft Convention:

> 'With reference to Section 31 (a), which provides that an Agency shall make provision for appropriate modes of settlement of disputes of a private law character to which a Specialized Agency is a party, it was observed that this provision applied to contracts and other matters incidental to the performance by the Agency of its main functions under its constitutional instrument and not to the actual performance of its constitutional functions. It applied, for example, to matters such as hiring premises for offices or the purchase of supplies. The provision relates to disputes of such a character, that they

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[768] CF. Schmalenbach (2016), para. 11 ('In short, Art. VIII Section 29 General Convention allows for ad hoc solutions for unforeseeable situations. The UN has certain discretion under the General Convention with regard to the choice of the proper modes of dispute settlement. Possible modes of dispute settlement that are adapted to the special nature of cases involving the UN and individual claimants range from UN internal claims review, negotiations (if need be with the aid of a mediator) to conciliation and arbitration.')
[769] Schmalenbach (2016), para. 11.
[770] Cf. Art. 32(a) of the VCLT.
[771] PC/LEG/34 (1945), at 9.
[772] In the 'General Note' accompanying the draft text, the Office stated: 'It must never be forgotten that the special status and immunities accorded to the Organisation and those acting on its behalf carry with them corresponding responsibilities.' International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII, No. 2, at 197.
[773] Ibid., at 219 (emphasis added).

might have come before municipal courts, if the Agency had felt able to waive its immunity, but where the Agency had felt unable to do so.'[774]

The understanding early on, therefore, was that there is a close connection between, on the one hand, domestic court jurisdiction and immunity, and, on the other, alternative recourse. Specifically, the latter was considered to be the 'counterpart' to the former. This leads to a number of observations.

To begin with, the reason why alternative remedies are needed as a counterpart to jurisdictional immunity is that international organisations would otherwise escape accountability. As seen in chapter 2 of this study, and as further detailed in chapter 4 of this study, there are good reasons for that immunity, namely to preclude national courts from exercising jurisdiction over international organisations and thereby interfering in their independent functioning. In determining what alternative recourse is 'appropriate'—that is, 'suitable or right' for the occasion—such recourse must not undermine the UN's immunity, or deprive Section II of the General Convention of its effectiveness.[775] Alternative recourse would not be 'suitable' if it would expose the international organisation to national court jurisdiction (absent a waiver).

Furthermore, if alternative recourse truly is an 'alternative' for domestic litigation—by operating as the counterpart to jurisdictional immunity—then it must arguably meet the standards applicable in litigation before domestic courts. These include the procedural safeguards laid down in Article 6(1) of the ECHR and Article 14(1) of the ICCPR. The latter provides, in relevant part: 'In the determination 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'.

As seen in chapter 2 of this study, there are good arguments that, under the international organisations law framework governing third-party remedies, Article 14(1) of the ICCPR applies to the UN. The ICCPR specifies the human rights obligations of the UN that arguably arise for it under the UN Charter, as its constitution.[776] That provision provides guidance in interpreting and applying Section 29 of the General Convention.[777] The relevance of Article 14(1) of the ICCPR for that purpose results all the more

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[774] UN Doc. A/C.6/191 (1947), at 12-13, para. 32 (underlining in original; italics provided).
[775] According to Rietiker, the principle of effectiveness 'has not been explicitly enshrined in the [VCLT], but it can nevertheless be considered an underlying principle of that instrument.' D. Rietiker, 'Effectiveness and Evolution in Treaty Interpretation' (2019) <oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0188.xml> accessed 21 December 2021, Introduction.
[776] It possibly also forms part of general international law. In this respect, according to the Dutch Supreme Court in *Mothers of Srebrenica*, the Netherlands no longer contested that the right of access to court is part of customary international law. Supreme Court 13 April 2012, ECLI:NL:HR:2012:BW1999, unofficial English-language translation produced by the Dutch Ministry of Foreign Affairs (*Mothers of Srebrenica*), para. 4.3.1.
[777] Cf. UN Doc. A/66/275 (2011), Annex II ('Proposal for recourse mechanisms for non-staff personnel. Outline of Rules for Expedited Arbitration Procedures under United Nations contracts with consultants and individual contractors: concept paper'), para. 4 ('In simplifying arbitration procedures, it must be borne in mind that, pursuant

clearly from its French version, both language versions being equally authentic.[778] The French version reads as follows, in relevant part (emphasis added):

> 'Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera . . . des contestations sur ses droits et obligations de caractère civil.'

Moreover, in its General Comment 32, regarding Article 14 of the ICCPR, the Human Rights Committee

> 'notes that the concept of a "suit at law" or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.'[779]

As Article 14(1) of the ICCPR concerns the determination of rights in the areas of contracts, property and torts, it clearly relates to the issues central to Section 29 of the General Convention, that is, the 'settlement of . . . disputes of a private law character'.

The approach of interpreting Section 29 of the General Convention in light of Article 14(1) of the ICCPR would moreover be in line with the conclusions reached by the Study Group of the International Law Commission on Fragmentation of International Law—Difficulties Arising from the Diversification and Expansion of International Law:

> 'International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.'[780]

In the present case, the matter concerns a 'relationship of interpretation' (as opposed to one of conflict).[781] According to the ILC Study Group:

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to article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, the United Nations must provide an appropriate mode of settlement of disputes arising out of its contracts. Thus, procedures set out in the present concept paper seek to preserve essential features of due process.' [emphasis added]).

[778] Art. 53(1) of the ICCPR.

[779] General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007 (emphasis added), para. 16.

[780] UN Doc. A/CN.4/l.702 (2006), para. 14(1).

[781] Ibid., para. 14(2).

> 'This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.'[782]

In addition to the foregoing legal arguments for interpreting Section 29 of the General Convention in light of Article 14(1) of the ICCPR, there are policy arguments to the same effect. First, to be effective, the UN must be seen to observe the very standards it promotes, notably in discharging its purpose to 'achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all'.[783] More generally, the UN has an interest in preserving its reputation and legitimacy, which requires it to live up to the expectation that it will comply with the principles of rule of law and justice. As seen, the UNSG and the UNGA have firmly embraced those principles; therefore, the UN has itself given rise to such expectations. The UN understands the rule of law to include accountability to laws that are 'consistent with international human rights norms and standards'.[784] Those norms and standards include, the essence of, Article 14(1) of the ICCPR.

The second policy argument is an extension of the abovementioned argument regarding Section 29 offering an 'alternative' to domestic litigation. Chapter 4 of this study concludes that the lower Dutch courts not infrequently reject the jurisdictional immunity of international organisations absent adequate alternative recourse. As seen in chapter 2 of this study, and as further detailed in chapter 4, that immunity remains essential for the independent, and thereby effective, functioning of international organisations. Adequate alternative remedies, therefore, are a means to bolster the immunity and, thereby, the effectiveness of international organisations. Under ECtHR case law, alternative means qualify as 'reasonable' if the 'very essence of the right' under Article 6(1) of the ECHR, being the equivalent to Article 14 of the ICCPR, is not impaired.[785]

The 1997 Report suggests that the UN accepts to comply with such basic standards in practice. This results from the discussion concerning claims review boards. Whilst the 1996 Report stated that '[t]he existing mechanisms and procedures for dealing with third-party claims are not inadequate per se',[786] according to the 1997 Report:

> 'The Secretary-General maintains the view that no new procedures are called for and that the existing mechanisms should, as necessary, be modified and streamlined. He is also of the view that the standing claims commission envisaged in article 51 of the model agreement should be maintained,

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[782] Ibid.
[783] Art. 1(3) of the UN Charter.
[784] <un.org/ruleoflaw/what-is-the-rule-of-law/> accessed 21 December 2021. The UN's ambitions regarding the rule of law and justice are reflected in the UN Sustainable Development Goals <un.org/ruleoflaw/sdg-16/> accessed 21 December 2021.
[785] *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 59 ('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.' [emphasis added]).
[786] 1996 Report, para. 30.

> mainly because it provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par. The mechanism also reflects the practice of the Organization in resolving disputes of a private law character under article 29 of the Convention on the Privileges and Immunities of the United Nations. The local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case. Based on the principle that justice should not only be done but also be seen to be done, a procedure that involves a neutral third party should be retained in the text of the status-of-forces agreement as an option for potential claimants.'[787]

The involvement of said 'neutral party' so as to avoid being 'perceived as acting as a judge in its own case' (nemo iudex in causa sua) corresponds to the requirement of impartiality and independence in Article 14 of the ICCPR, as discussed in chapter 6 (in the context of Article 6 of the ECHR).

Lastly, in discharging its extensive global mandate in the common interest, the UN is particularly exposed to third party claims. That also informs the interpretation of the qualifier 'appropriate'. As seen, as the UN Legal Counsel put it in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* at the time, 'claims of a private law nature could arise in any of the 185 member States, and could arise out of innumerable factual situations.[788] From this (policy) perspective, 'suitable' or 'right' points to processes that are not unduly burdensome for the UN, and also take into account its limited, public, resources.[789] At the same time, this should be balanced against modes of settlement under Section 29 presenting a genuine opportunity for claimants to have their claims adjudicated.[790] These modes must not be unduly burdensome for claimants to the point of rendering dispute settlement 'illusory'.[791]

In sum, 'appropriate modes of settlement' under Section 29 may be interpreted to amount to settlement processes to resolve disputes between the UN and third parties, which:

- do not expose the UN to national court jurisdiction by undermining its immunity from jurisdiction;

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[787] 1997 Report, para. 10.
[788] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 12 (emphasis added).
[789] Cf. 1997 Report, para. 12 ('As a practical matter, limiting the liability of the Organization is also justified on the ground that the funds from which third-party claims are paid are public funds contributed by the States Members of the United Nations for the purpose of financing activities of the Organization as mandated by those Member States. To the extent that funds are used to pay third-party claims, lesser amounts may be available to finance additional peacekeeping or other United Nations operations.')
[790] Cf. Schmalenbach (2016), para. 25 ('the dispute settlement mechanism or process has to be suitable for all parties concerned, not only for the UN'.)
[791] Cf. *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, [1999] ECHR (I) (*Waite and Kennedy*), para. 67 ('It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'. [emphasis added]).

- conform to the essence of Article 14 of the ICCPR; and
- are neither unduly burdensome for the UN nor 'illusory' for the claimants.

3.4.3.1.3 Appraisal of existing 'modes of settlement'

Settlement negotiations

As a rule, the UN, like international organisations generally, seeks to settle third-party disputes amicably.[792] As a general proposition, it is good practice to do so and to resort to contentious proceedings only where amicable settlement efforts fail. Most international disputes are indeed settled by way of negotiation.[793] And, as Blackaby et al. noted: 'Even where commercial interests are at stake, a dispute need not necessarily lead to all-out confrontation. Initially, the opposing parties will generally attempt to settle matters by meeting and negotiating, sometimes with the assistance of an expert mediator.'[794]

Amicable dispute settlement may be in the best interest of the parties' relationship. It may also be less resource-intensive than contentious proceedings, and be perceived to better preserve confidentiality. Nonetheless, to be effective in resolving a dispute, negotiations need to be conducted in good faith.[795] There also needs to be a circumscribed process. Thus, a pre-agreed time-frame may be needed.[796] The services of a mediator or conciliator may be useful to facilitate the process, for example, under the UNCITRAL conciliation rules.[797]

Furthermore, without the potential for subsequent contentious proceedings, there may be too little incentive to reach a solution through a negotiated settlement. Conversely, concerns over aspects of

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[792] Rashkow (2015), at 79; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 9 ('I should emphasize . . . that the overwhelming majority of claims are settled through negotiation'); 1995 Report, para 7.
[793] J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999), at 20.
[794] N. Blackaby et al., *Redfern and Hunter on International Arbitration* (2015), para. 1.95.
[795] Schmalenbach points to the risk of an 'imbalance of negotiating power'. Schmalenbach (2016), para. 25.
[796] Art. 17.2 of the UN's General conditions of contract (contracts for the provision of goods and services) (Rev. April 2012) states: 'Any dispute, controversy, or claim between the Parties arising out of the Contract or the breach, termination, or invalidity thereof, unless settled amicably under Article 17.1, above, within sixty (60) days after receipt by one Party of the other Party's written request for such amicable settlement, shall be referred by either Party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining.' [emphasis added].
[797] Cf. Art. 17.1 of the UN's General conditions of contract (contracts for the provision of goods and services), cited above. Cf. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, statement by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 12.

contentious proceedings that may follow if negotiation fails—such as costs, duration, resource implications and publicity—may incentivise a party to agree to a settlement,[798] even at excessive cost.

Arbitration

It may not be possible to settle a dispute through negotiation. In that case, as Blackaby et al. put it, 'what is needed is a decision by an outside party, which is both binding and enforceable. The choice then is generally between arbitration before a neutral tribunal and recourse to a court of law.'[799]

Arbitration is an 'essentially *private and consensual* system of dispute resolution',[800] resulting in a legally binding decision by one or more arbitrators,[801] who are generally freely chosen by the parties.[802] As explained by Paulsson: 'The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.'[803]

Arbitration has a long history, both regarding disputes involving states and commercial disputes.[804] Indeed, it is 'now the principal method of resolving international disputes involving states, individuals, and corporations.'[805]

The perceived advantages of arbitration over domestic litigation are well-known. They notably include neutrality and enforcement,[806] but also confidentiality and flexibility in tailoring the proceedings to fit the particular requirements of a dispute.[807]

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[798] According to Schmalenbach, the 'UN's amicable settlement practice . . . is markedly influenced by its unwillingness to move on from the negotiation stage to third party adjudication'. Schmalenbach (2016), para. 25. According to Rashkow, in commenting on certain settlements, 'some of these settlements may have prompted questions in certain quarters whether they were overly generous in an effort to avoid the filing of claims in national courts or, possibly, further controversy and adverse publicity.' Rashkow (2015), at 83.
[799] Blackaby et al. (2015), para. 1.95.
[800] Ibid., para. 1.05 (emphasis in original).
[801] Ibid., para. 1.82; Collier and Lowe (1999), at 31.
[802] Blackaby et al. (2015), para. 1.71.
[803] J. Paulsson, *The Idea of Arbitration* (2013) <oxfordscholarship.com/view/10.1093/acprof:oso/9780199564163.001.0001/acprof-9780199564163> accessed 21 December 2021, at 1.
[804] Collier and Lowe (1999), at 32 and 45.
[805] Blackaby et al. (2015), para. 7.04.
[806] Ibid., para. 1.97. Regarding enforcement, one aspect is international enforceability: 'an award also differs from the judgment of a court of law, since the international treaties that govern the enforcement of an arbitral award have much greater acceptance internationally than do treaties for the reciprocal enforcement of judgments'. Ibid., 1.102. Such treaties notably include the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3, ('New York Convention'), and the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 160 ('ICSID Convention').
[807] Blackaby et al. (2015), paras. 1.104-1.105.

Arbitration indeed seems to be the preferred (non-amicable) dispute settlement technique for third-party disputes involving international organisations.[808] However, arbitration does not necessarily qualify as 'appropriate' under Section 29 of the General Convention.

- The unattractiveness of UNCITRAL arbitration

Arbitration may be time-consuming, resource-intensive and costly (notably due to the fees of the tribunal and counsel). Indeed, even a brief review of the UNCITRAL Arbitration Rules, which are the UN's arbitration rules of choice, illustrates how elaborate the process can be:

- By default (Article 7(1)), an UNCITRAL tribunal is composed of three arbitrators. Each party appoints one arbitrator, and these arbitrators together choose the third, presiding, arbitrator (Article 9(1)). If following the appointment of the first arbitrator, the other party has not appointed its arbitrator within a period of 30 days, or if within such a period following the appointment of the latter arbitrator, the presiding arbitrator has not been appointed, the appointing authority may be requested to make the appointment (Article 9);
- The proceedings involve the submission of a statement of claim (Article 20), followed by a statement of defence (Article 21). The tribunal may require further written submissions from the parties (Article 24), such as a reply and rejoinder, and post-hearing briefs. Time periods for the submission of written statements, as fixed by the tribunal, run up to 45 days, but may be extended if the tribunal deems this justified (Article 25);
- The jurisdiction of the tribunal may be challenged (no later than in the statement of defence) (Article 23);
- The tribunal has the power to grant interim measures at the request of a party (Article 26);
- Hearings may take place, at the request of a party or pursuant to the tribunal's own decision, to hear evidence, including expert evidence, or for oral argument (Articles 17(3) and 28);
- The tribunal may request the parties to deposit an equal amount as an advance for certain costs of arbitration (Article 43); and
- The tribunal may resort to evidentiary rules such as the International Bar Association's Rules on the Taking of Evidence in International Arbitration.[809] These rules

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[808] Notwithstanding the limited publicly available information due to the confidential nature of arbitration, this is illustrated, for example, by the cases administered by the PCA, as listed on <https://pca-cpa.org/en/cases> accessed 24 March 2022. See also P. Glavinis, *Les Litiges Relatifs aux Contrats Passés entre Organisations Internationales et Personnes Privées* (1991), para. 312 ('le recours à l'arbitrage pour le règlement des litiges contractuels des Organisations est . . . la seule recommandation qu'on pourrait addresser aux Organisations sans la moindre hesitation.').

[809] IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council, 17 December 2020, International Bar Association <www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> accessed 12 April 2022.

> 'provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations.'[810]

Whilst the parties enjoy large freedom to agree on procedural aspects of the arbitration, any such agreement may be more difficult to reach in the context of a pending dispute. Notwithstanding that UNCITRAL tribunals are to 'conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process' (Article 17.1), in reality arbitration may be complex and cumbersome. In this respect, it has been commented:

> '"In its origins, the concept of arbitration as a method of resolving disputes was a simple one . . . Two traders, in dispute over the price or quality of goods delivered, would turn to a third whom they knew and trusted for his decision." (Redfern & Hunter 2014 at 1-03)
>
> Arbitration has strayed quite far from this rosy picture, as business transactions have grown ever more complex and globalized over the past several decades. The trend has consistently led toward longer, more complex and resource-intensive proceedings, causing some users to complain of arbitrations that are over-lawyered and overly sophisticated and neither quicker nor more efficient than proceedings in national courts.'[811]

The impracticality of arbitration may well render it unattractive for claimants to the point of discouraging them from resorting to this means of dispute settlement. This is particularly so where the claimant is an individual or a small-sized company and the amount in dispute is relatively low.

Rashkow put it as follows:

> 'Of course, the opportunity for arbitration, while attractive and useful to large commercial entities with large claims, is not so attractive to individual contractors or consultants. The United Nations is considering revising its newly reformed internal justice system to address such small claimants that would offer Ombudsman services and/or some form of streamlined, inexpensive arbitration process more appropriate for such smaller claims.'[812]

Rashkow referred to proposals made by the UNSG—on the initiative of and in dialogue with, the UNGA—regarding the settlement of disputes with consultants and individual contractors. In brief, in 2010, the UNGA requested the UNSG

> 'with regard to remedies available to the different categories of non-staff personnel, to analyse and compare the respective advantages and disadvantages, including the financial implications, of the options set out below, bearing in mind the status quo concerning dispute settlement mechanisms for non-staff personnel, including the United Nations Commission on International Trade Law arbitration clause, in his report to be submitted to the General Assembly at its sixty-fifth session pursuant to paragraph 59 of resolution 63/253: (a) Establishment of an expedited special arbitration

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[810] Ibid., at 5. These rules, amongst others, provide for a document production process (Art. 3).
[811] A. Ipp, 'Expedited Arbitration at the SCC: One Year with the 2017 Rules' (*Kluwer Arbitration Blog*, 2018) <arbitrationblog.kluwerarbitration.com/2018/04/02/expedited-arbitration-scc-one-year-2017-rules-2/?output=pdf> accessed 12 April 2022.
[812] Rashkow (2015), at 79 (emphasis added).

> procedure, conducted under the auspices of local, national or regional arbitration associations, for claims under 25,000 United States dollars submitted by personal service contractors'.[813]

The UNSG did so in his 2010 report on the Administration of justice at the UN ('AJUN report'), concluding as regards the option of expedited arbitration, amongst others:

> 'Initial exploration of the possibility of conducting a special arbitration under the auspices of arbitration associations indicates that arbitral organizations do have "fast track" procedures for arbitration, which allow arbitral proceedings to be completed in shorter time frames with some cost savings . . .
>
> . . . Although such expedited procedures exist, arbitrations within the United Nations context take place under UNCITRAL Arbitration Rules, which do not have a fast track procedure. However, the parties can agree on several elements contained in the "fast track" procedures referred to above, such as reduced timelines for the actions envisioned under the Rules; use of a sole arbitrator; and proceeding on the basis of documentary evidence or agreement to a limited number of oral hearings. Such agreements would have the effect of expediting the arbitral process. Arbitral associations having their own special procedures for fast track arbitrations do not necessarily agree to conduct such arbitrations under the UNCITRAL Arbitration Rules, and may require use of their own rules.
>
> . . . Thus, based on the experience of the Organization, and taking into account the foregoing, initiating a formal arbitration even under special procedures, for claims valued at $25,000 or less, would not necessarily be efficient and effective for the Organization, giving the costs associated with such arbitrations, including the staff time and resources for handling of such arbitrations, and considering that they may not then take place on the basis of the UNICTRAL Arbitration Rules. Should the General Assembly wish to adopt such a mechanism for resolution of disputes with non-staff personnel, the Organization would require additional staff resources. Such small claims may continue to be addressed more effectively through direct negotiations with a view to reaching an amicable settlement'.[814]

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[813] UN Doc. A/RES/64/233 (2010), para. 9 (emphasis added). The further options are: '(b) Establishment of an internal standing body that would make binding decisions on disputes submitted by non-staff personnel, not subject to appeal and using streamlined procedures, as proposed by the Secretary-General in paragraphs 51 to 56 of his report on the administration of justice; (c) Establishment of a simplified procedure for non-staff personnel before the United Nations Dispute Tribunal, which would make binding decisions not subject to appeal and using streamlined procedures (d) Granting of access to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, under their current rules of procedure, to non-staff personnel'. Ibid. This follows the UNGA's 2008 request for information and recommendations on: '(a) The different categories of non-staff personnel performing personal services for the Organization, including experts on mission, United Nations officials other than staff members of the Secretariat and daily workers; (b) The types of dispute settlement mechanisms available to the different categories of non-staff personnel and their effectiveness; (c) The types of grievances the different categories of non-staff personnel have raised in the past and what bodies of law are relevant to such claims; (d) Any other mechanism that could be envisaged to provide effective and efficient dispute settlement to the different categories of non-staff personnel, taking into account the nature of their contractual relationship with the Organization'. UN Doc. A/RES/62/228 (2008), para. 66.

[814] UN Doc. A/65/373 (2010), paras. 170-172 (emphasis added). As to option (b), the report stated: 'One possibility for handling grievances raised by non-staff personnel would be the creation of an internal standing body that had the power to make binding decisions. The decisions of this internal standing body would not be subject to appeal and would employ streamlined procedures.' Ibid., para. 173. However, 'the establishment of a separate body would entail additional costs.' Ibid., para. 175. As to option (c), the report stated: 'adding non-staff personnel to the jurisdiction of the Dispute Tribunal at this stage would be detrimental to the new system. Ibid., para. 179. As to option (d), regarding the '[g]ranting of access to the [UNDT] and the [UNAT], under their current rules of procedure, to non-staff personnel', the report stated: 'The Secretary-General reiterates the comments made under subparagraph (c) above, which are equally applicable to this option, except that the costs would be greater given that the non-staff personnel would also have recourse to the Appeals Tribunal.' Ibid., para. 182.

In his 2011 AJUN report,[815] having been requested by the UNGA to provide more concrete information,[816] the UNSG further developed the option of expedited arbitration in a detailed 'Proposal for recourse mechanisms for non-staff personnel Outline of Rules for Expedited Arbitration Procedures under United Nations contracts with consultants and individual contractors: concept paper' ('Expedited Arbitration Concept Paper').[817] The Expedited Arbitration Concept Paper

> 'presents possible means of establishing expedited arbitration procedures for the resolution of disputes between the United Nations and . . . consultants and individual contractors, by incorporating streamlined elements into the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).'[818]

The paper envisages:

> 'A new set of rules, called the Rules for Expedited Arbitration Procedures under United Nations Consultancy Contracts (hereinafter the "Expedited Rules"), would be prepared, using the UNCITRAL Arbitration Rules as a framework. The Expedited Rules would be based on the provisions of the UNCITRAL Arbitration Rules, modified as necessary to incorporate the expedited procedures discussed herein.'[819]

At the request of the UNGA,[820] the UNSG's 2012 AJUN report contained 'a proposal for implementing a mechanism for expedited arbitration procedures for consultants and individual contractors, including the cost implications for various aspects of the proposal' ('Expedited Arbitration Implementation Proposal').[821] On the recommendation of the UNSG, his report having set out the significant additional recourses needed,[822] the UNGA in 2013 took

> 'note of the proposed expedited arbitration procedures for consultants and individual contractors developed by the Secretary-General contained in annex IV to his report on administration of justice at the United Nations, and decides to remain seized of the matter'.[823]

The UNSG's 2017 AJUN report,[824] contained extensive information on the remedies available to non-staff personnel.[825] The UNGA requested the Secretary-General 'to prepare a comprehensive analysis of

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[815] UN Doc. A/66/275 (2011).
[816] UN Doc. A/RES/65/251 (2011), para. 55 ('Requests the Secretary-General, with regard to the scope of the system of the administration of justice, in particular remedies available to the different categories of non-staff personnel, to provide more concrete information for consideration by the General Assembly at its sixty-sixth session, taking into account the different categories of non-staff personnel concerned, as noted in the report of the Secretary-General on administration of justice at the United Nations and paragraph 8 of its resolution 64/233, as well as the options referred to in paragraph 9 of that resolution'. [emphasis added]).
[817] UN Doc. A/66/275 (2011), Annex II.
[818] Ibid., para. 1 (emphasis added).
[819] Ibid., para. 6 (emphasis added).
[820] UN Doc. A/RES/66/237 (2012), paragraph 38(a).
[821] UN Doc. A/RES/67/265 (2012), Annex IV, para. 1.
[822] Ibid., para. 46.
[823] UN Doc. A/RES/67/241 (2013), para. 51.
[824] UN Doc. A/72/204 (2017).
[825] Ibid., Annex II.

that information with a view to informing the discussion at the seventy-third session.'[826] In his 2018 AJUN report, the UNSG reported:

> 'With respect to arbitration, which is the formal dispute resolution remedy for non-staff personnel engaged by the Secretariat, the funds and programmes and other international organizations (as reflected in document A/72/204, annex II, sects. A and D), the Secretary-General notes that such arbitration proceedings are currently conducted under the Arbitration Rules developed by UNCITRAL and adopted by the General Assembly in 1976 and 2010. This is also consistent with the decision of the Assembly that, in accordance with article VIII, section 29 of the Convention on the Privileges and Immunities of the United Nations, the final resolution of disputes arising out of contracts to which the United Nations is party should be arbitration under the UNCITRAL Arbitration Rules. In response to a request from the Assembly, the Secretary-General put forward a proposal for expedited arbitration proceedings for consultants and individual contractors (see A/66/275 and A/67/265). In its resolution 67/241, the General Assembly took note of the proposal for expedited arbitration proceedings and decided to remain seized of the matter.'[827]

According to the 2019 AJUN report:[828] 'Five initiatives, aimed at improving prevention and resolution of disputes involving non-staff personnel, are currently under implementation or are being proposed'.[829] One of these initiatives concerns expedited arbitration, which was described as follows:

> 'In his reports A/66/275 and Corr.1 (annex II) and A/67/265 and Corr.1 (annex IV), the Secretary-General submitted a proposal for implementing a mechanism for expedited arbitration procedures for consultants and individual contractors, including a cost estimate for engaging a neutral entity which would, inter alia, vet arbitrators, promulgate and maintain a roster of arbitrators, appoint an arbitrator when a party initiates arbitration and provide certain administrative functions during an arbitration. Drawing on experience gained in handling formal dispute resolution involving non-staff personnel since the proposal was made in 2012, the Secretary-General proposes to explore more cost-effective means of engaging a neutral entity to undertake the above role'.[830]

In 2020, the UNGA requested the UNSG

> 'to submit new proposals, bearing in mind the need for budgetary discipline, in the context of his next report, on reviewing formal policies and issuances concerning dispute resolution with consultants and individual contractors, including but not limited to drawing on more cost-effective features of the expedited arbitration procedures for consultants and individual contractors'.[831]

The UN's exploration of expedited arbitration as a mode to settle disputes with consultants and individual contractors continues. Notwithstanding the limitation to consultants and individual contractors, the time-lapse in considering the proposals and the emphasis on financial implications, the UNGA seems to have taken an interest in expedited arbitration, as per the UNSG's elaborate proposals.

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[826] UN Doc. A/RES/72/256 (2018), para. 38.
[827] UN Doc. A/73/217 (2018), para. 102 (hyperlinks and fns. omitted, emphasis added).
[828] UN Doc. A/74/172 (2019).
[829] Ibid., para. 95.
[830] Ibid., para. 95(d) (hyperlinks omitted).
[831] UN Doc. A/RES/74/258 (2020), para. 21.

Indeed, as discussed in chapter 5, the UNSG's proposals provide a good basis for developing streamlined arbitration proceedings which, compared to the UNCITRAL Arbitration Rules, are better suited for purposes of Section 29(a) of the General Convention.[832]

- The perceived neutrality of arbitration

The advantage of neutrality of arbitration prompts a more fundamental (and extensive) observation for present purposes. Blackaby et al. explained that

> 'international arbitration gives the parties an opportunity to choose a 'neutral' place for the resolution of their dispute and to choose a 'neutral' tribunal . . .
>
> Parties to an international contract usually come from different countries and so the national court of one party will be a foreign court for the other party. Indeed, it will be 'foreign' in almost every sense of the word: it will have its own formalities, and its own rules and procedures developed to deal with domestic matters, not for international commercial or investment disputes. The court will also be 'foreign' in the sense that it will have its own language (which may or may not be the language of the contract), its own judges, and its own lawyers, accredited to the court . . .
>
> a reference to arbitration means that the dispute will be determined in a neutral place of arbitration, rather than on the home ground of one party or the other. Each party will be given an opportunity to participate in the selection of the tribunal. If this tribunal is to consist of a single arbitrator, he or she will be chosen by agreement of the parties (or by such outside institution as the parties have agreed), and he or she will be required to be independent and impartial. If the tribunal is to consist of three arbitrators, two of them may be chosen by the parties themselves, but each of them will be required to be independent and impartial (and may be dismissed if this proves not to be the case). In this sense, whether the tribunal consists of one arbitrator or three, it will be a strictly 'neutral' tribunal.'[833]

International organisations have a fundamental interest in being independent from states and for that reason enjoy immunity from the jurisdiction of national courts. It is indeed the neutrality of arbitration that makes it particularly attractive for the UN (and international organisations generally) in implementing the obligation under Section 29. That provision being, as seen, the 'counterpart' to the UN's immunity under the General Convention, arbitration is the quintessential alternative to domestic litigation. As Redfern and Hunter put it:

> 'If "alternative dispute resolution" is conceived as an "alternative" to the formal procedures adopted by the courts of law, as part of a system of justice established and administered by the state, arbitration should be classified as a method of "alternative" dispute resolution. It is indeed a very real alternative to the courts of law.'[834]

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[832] Any trimming of the arbitration process to fit the particular requirements of the dispute would depend on agreement amongst the parties. Cf. UN Doc. A/65/373 (2010), para. 171. In the context of a pending dispute, an international organisation may be less inclined to accommodate the needs of the claimant (and *vice versa* where the international organisation submits a counterclaim).
[833] Blackaby et al. (2015), paras. 1.98-1.100.
[834] Ibid., para. 1.137.

However, arbitration is in fact typically *not* disconnected from national courts. To the contrary, as explained by Blackaby et al.:

> 'The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership. Arbitration is dependent on the underlying support of the courts, which alone have the power to rescue the system when one party seeks to sabotage it.'[835]

Indeed,

> 'Arbitration may depend upon the agreement of the parties, but it is also a system built on law, which relies upon that law to make it effective both nationally and internationally. National courts could exist without arbitration, but arbitration could not exist without the courts.'[836]

As explained by another commentator:

> 'It has been argued that to the extent that the phrase "alternative dispute resolution" indicates that the courts have no role in international arbitrations, it is a "serious and misleading oversimplification." Arbitrations are regulated pursuant to national laws and accordingly have a close relationship to the national courts. . . The role of the national court is said to be that of an "executive partner" to provide greater effectiveness to arbitral proceedings.'[837]

The support provided by national courts to arbitrations, which is often described in terms of 'supervision',[838] takes different forms depending on the stage of the arbitration. At the beginning of the arbitration, this includes enforcement of the arbitration agreement,[839] appointment of tribunal members,[840] and ruling on challenges of arbitrators.[841] During the arbitration, the support by national courts notably concerns maintaining the *status quo* and the preservation of evidence.[842] And, perhaps most significantly, at the end of the arbitration, national courts may exercise judicial control over the proceedings and the award in annulment proceedings.[843] In this respect, as one commentator put it, arbitration cannot do without 'emergency procedures . . . to flush out inequity and arbitrariness.'[844] According to the same commentator:

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[835] Ibid., para. 7.01.
[836] Ibid., para. 7.03.
[837] S. Sattar, 'National Courts and International Arbitration: A Double-Edged Sword?', (2010) 27 *Journal of International Arbitration* 51, at 52 (fn. omitted).
[838] See, e.g., ibid., at 52, 53.
[839] See, e.g., Arts. 1022 and 1074 of the DCCP (court declares itself incompetent where the parties entered into an arbitration agreement).
[840] See, e.g., Art. 1027 of the DCCP.
[841] See e.g., Art. 1035 of the DCCP. See generally Blackaby et al. (2015), para. 7.09 ('the enforcement of the arbitration agreement; the establishment of the tribunal; and challenges to jurisdiction.').
[842] See e.g., Arts. 1022a and 1022b of the DCCP. Cf. Blackaby et al. (2015), para. 7.37 ff. See generally Blackaby et al. (2015), paras. 7.22, 7.32 ff, 7.39 ff.
[843] Blackaby et al. (2015), para. 7.62.
[844] J. Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards', (2011) 26 *ICSID Review* 128, at 130.

> 'Arbitrators are human, and not immune to errors. They wield wide powers and are not immune to hubris. Arbitrators' powers cannot reign unfettered; there must be checks and balances to their prerogatives. They come in two forms: transparency and review.'[845]

The relationship between national courts and arbitral tribunals is notably established through the 'place of arbitration'. Under Article 18(1) of the UNCITRAL Arbitration Rules, which are the UN's arbitration rules of choice:

> 'If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.'

The 'place of arbitration' refers to a specific domestic jurisdiction. Rather than a place where (all) the arbitration proceedings take place, the 'seat of arbitration is . . . often intended to be its legal centre of gravity.'[846] The arbitration law of the place of arbitration (the '*lex arbitri*') sets forth the legal framework for the arbitration, including the involvement of national courts described above.[847]

The supervision by national courts, particularly when it comes to the review of an arbitral award, comes at a price insofar as arguably 'judicial interference is contrary to the very idea of arbitration'.[848] The 'Model Law on International Commercial Arbitration' of the United Nations Commission on International Trade Law ('UNCITRAL Model Law'), which inspired the development of national arbitration laws in many states, seeks to strike a balance when it comes to the annulment of an award. The balance is struck on the basis of four principles, which may be summarised as follows:

> '• Any party that feels aggrieved is entitled to seek protection from the courts at the place of arbitration;
> • Such judicial protection is limited to the annulment of the award;
> • The reasons for annulment are analogous to the reasons considered under the New York Convention for denying exequatur;
> • There is no appeal mechanism: the arbitrators' decision as regards the merits of the dispute cannot

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[845] Ibid., at 128. See also Sattar (2010), at 55 ('One of the other advantages why parties choose to make the arbitration subject to a system of national law is that it allows the national courts to review the awards made within its jurisdiction. This acts as a safeguard to ensure that the basic elements of fairness and impartiality are met and has been described as a "bulwark against corruption, arbitrariness, bias, improper conduct and-where necessary-sheer incompetence."' [fn. omitted]).

[846] Blackaby et al. (2015), para. 3.56.

[847] Ibid., para. 3.42 ('It is appropriate, at this stage, to consider what is meant by the *lex arbitri*. The question was posed rhetorically by a distinguished English judge: "What then is the law governing the arbitration? It is, as the present authors trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (eg filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (eg removing an arbitrator for misconduct".'). For a more extensive overview of the role of national courts during the arbitration proceedings, see ibid., chapter 7.

[848] Fernández-Armesto (2011), at 129.

> be corrected by a judge, even if the judge finds that the award is premised on errors of fact or of law.'[849]

Concerning the reasons for annulment of an award by the courts at the place of arbitration (see the third bullet in the above quotation), based on Article V of the New York Convention, Article 34(1) of the UNCITRAL Model Law provides a limitative enumeration:

> '(2) An arbitral award may be set aside by the [competent court at the place of arbitration] only if:
> (a) the party making the application furnishes proof that:
> (i) a party to the arbitration agreement . . . was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
> (b) the court finds that:
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
> (ii) the award is in conflict with the public policy of this State.'

The annulment system in commercial arbitration has been evaluated as follows:

> 'In practice, judges in most countries have shown a high level of deference towards arbitral awards, and decisions have only been annulled in exceptional circumstances. But this statement must be qualified: certain "problem jurisdictions" show a tendency to annul awards for unforeseeable reasons, especially if the home State is a party. Even in jurisdictions with a friendly attitude, from time to time polemic decisions are issued. But, all in all, the system has worked, because by choosing as place of arbitration a jurisdiction where judges are experienced and have shown a favourable attitude to arbitration, the risk of improper annulment of commercial awards can be minimized.'[850]

The potential for far-reaching involvement of courts in reviewing arbitral awards, for example, on the basis of the elusive notion of 'public policy', is in fact all but theoretical.[851] Indeed, 'there is still discontent amongst practitioners regarding the impact of local laws that are seen to operate unfairly and, at times, almost arbitrarily'.[852] In addition to interference by way of annulment of awards at the end of

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[849] Ibid., at 130 (fns. omitted).
[850] Ibid., at 130 (fn. omitted, emphasis added). Cf. Blackaby et al. (2015), para. 10.04 ('It is usually the law of the seat of the arbitration that contains these limited provisions for challenging an arbitral award. They are principally focused on ensuring that the arbitration has been conducted in accordance with basic rules of due process, respecting the parties' equal right to be heard before an independent and impartial arbitral tribunal within the boundaries of their arbitration agreement. Grounds of challenge are rarely concerned with a review of the merits of the tribunal's decision, thus distinguishing challenge from an appeal.' [fns. omitted]).
[851] Sattar (2010), at 62-64.
[852] Blackaby et al. (2015), para. 3.88.

the arbitration, another example of such impact concerns 'the problems caused by local courts that issue injunctions at the seat of the arbitration to prevent arbitral tribunals from carrying out their task.'[853] Furthermore, national courts may interfere with the power of tribunals to determine their own jurisdiction,[854] or revoke their authority.[855]

One commentator, writing with specific reference to the Asian subcontinent, upon discussing various examples of national court involvement before, during and after arbitration, went as far as stating:

> 'Notwithstanding the advantages, the supportive role of the national court through various forms of ancillary orders is overshadowed when one comes to the heart of the problem, which is the abuse of the powers of supervision and control exercised by the national courts over the arbitral process.'[856]

The abuse of supervisory powers by national courts may directly affect the outcome of the arbitration contrary to the interests of the international organisation. For example, to the extent an award is favourable to the international organisation, it may be annulled, in whole or in part, on grounds of conflict with 'public policy'. And, other forms of court interference, such as issuing an anti-arbitration injunction or revoking the authority of an arbitral tribunal, could be equally problematic for international organisations. After all, where the arbitration is frustrated, the dispute remains unresolved. This may impact negatively on the international organisation's reputation and thereby its effectiveness. It may moreover lead the claimant to initiate a case in a national court, with the respondent's claim to jurisdictional immunity being weakened due to the lack of available alternative recourse. In view of the international *modus operandi* of international organisations, a dispute with them may affect the interests of more than one state, including for example the state of nationality of the claimant. The courts of various states may potentially interfere in an arbitration.

In short, national courts are able to interfere in the functioning of international organisations by abusing their supervisory powers in connection with an arbitration. Even if such interference in connection with an arbitration is less direct than in the case of national courts adjudicating disputes against international organisations, the need to protect these organisations' independence applies no less. As seen, it is precisely for that purpose that international organisations have been endowed with immunity from jurisdiction. The problem, however, is that international organisations risk forfeiting their jurisdictional immunity before domestic courts in connection with their arbitral supervisory function. This is because

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[853] Ibid., para. 3.90. See likewise Sattar (2010), at 60-61.
[854] Sattar (2010), at 57-59.
[855] Ibid., at 59-60. Local courts outside the place of arbitration may also conceivably seize jurisdiction over matters related to the arbitration, for example, in connection with the appearance of witnesses.
[856] Ibid., at 55 (emphasis added). According to Sattar, 'what is needed more importantly is a harmonious balance which, on the one hand, supports the arbitral process and, on the other, ensures that such support does not unduly interfere with an independent arbitral process.' Ibid., at 73.

the arbitration agreement may be interpreted as a waiver from jurisdiction. A decision by the Paris Court of Appeal to this effect is cited with approval by Gaillard and Pingel-Lenuzza.[857] They add:

> 'For States, the agreement to submit disputes to arbitration is understood to encompass an implicit acceptance of the mechanisms enabling the proper functioning of the arbitral proceedings. It is for this reason that the waiver of immunity resulting from the acceptance of an arbitration agreement is deemed to cover ancillary proceedings as well. This reasoning has nothing to do with the nature of immunity and should, therefore, apply in the same way to both international organisations and States.'[858]

In arbitrations against *states*, the exercise of jurisdiction by national courts in connection with the arbitration is bolstered by the adoption of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property,[859] which provides in Article 17 ('Effect of an arbitration agreement'):

> 'If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
> (a) the validity, interpretation or application of the arbitration agreement;
> (b) the arbitration procedure; or
> (c) the confirmation or the setting aside of the award,
> unless the arbitration agreement otherwise provides.'

Insofar as the position in regard to states is therefore that their consent to arbitration precludes them from invoking their immunity from jurisdiction before domestic courts supervising the arbitration, courts may reach the same conclusion with respect to international organisations (as per the decision of the Paris Court of Appeal, cited with approval by Gaillard and Pingel-Lenuzza).

In an attempt to avoid that conclusion by national courts, international organisations may decline to agree on a place of arbitration.[860] Yet, absent an agreement amongst the parties, under Article 18(1) of the UNCITRAL Arbitration Rules, it is for the arbitral tribunal to determine the place of arbitration. It could be reasoned that in consenting to arbitration under the UNCITRAL Arbitration Rules, the international organisation merely delegated the determination of the place of arbitration to the tribunal.

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[857] E. Gaillard and I. Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass', (2002) 51 *International and Comparative Law Quarterly* 1, at 13, referring to CA Paris, 19 June 1998, *UNESCO v Boulois*, 1999 REV ARB 343.
[858] Gaillard and Pingel-Lenuzza (2002), at 14 (fn. omitted, emphasis added).
[859] UN Doc. A/59/508 (2004), Annex, (not yet in force) ('2004 UN State Immunity Convention').
[860] However, it is noted that according to UN Doc. ST/SGB/230 (1989) (abolished pursuant to UN Doc. ST/SGB/2017/3 (2017), para. 6, where, following review by the Tort Claims Board, claims arising in the UN Headquarters District could not be settled, the UN agreed to arbitration under the UNCITRAL rules (and administered by the American Arbitration Association), with New York City as the place of arbitration. See also 1995 Report, para. 12.

And, the courts at the place of arbitration potentially reject the jurisdictional immunity of the international organisation.

This explains why international organisations may make reservations with respect to their privileges and immunities, including in connection with arbitration agreements. The 1995 Report states regarding the settlement of disputes arising out of commercial agreements by way of arbitration:

> 'The United Nations also has a standard clause on privileges and immunities, which is incorporated in all of its commercial agreements. The clause normally used reads as follows:
>
> > "Nothing in or relating to this Contract shall be deemed a waiver of any of the privileges and immunities of the United Nations, including, but not limited to, immunity from any form of legal process."
>
> This provision, which usually follows the arbitration clause, makes clear to the contractor/lessor that the United Nations, by entering into contractual relations with private firms or individuals and by accepting arbitration as the method of dispute settlement, has not agreed to waive its immunity from legal process, which the Organization enjoys in accordance with section 2 of the General Convention . . .
>
> It is clear, however, that the "privileges and immunities clause" does not adversely affect the commitment to arbitration since the Organization has agreed to be bound by the arbitration award as the final adjudication of the dispute, controversy or claim; the privileges and immunities clause provides protection to the Organization against possible court proceedings initiated prior to or after the award unless a waiver of immunity is expressly granted.'[861]

This statement suggests that, as a rule, the UN does not accept supervisory jurisdiction by national courts.

More recently, the UNSG proposed that the UN explicitly reserved its jurisdictional immunity in connection with arbitration. That is, the following clause is proposed for inclusion in the proposed 'Expedited Rules' for the settlement of disputes with consultants and individual contractors:

> 'Nothing in or related to these [use full name of Rules] shall be interpreted or applied in a manner inconsistent with the privileges and immunities of the United Nations, including its subsidiary organs, or be deemed a waiver of such privileges and immunities. For the avoidance of doubt, any arbitration conducted under these [use full name of Rules] shall not be subject to any local laws, and any reference to a 'place of arbitration' shall not be deemed or construed as a waiver of such privileges and immunities or an agreement of the United Nations to subject itself to any national jurisdiction.'[862]

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[861] 1995 Report, para. 6 (emphasis added). See also Art. 18 of the UN's General conditions of contract (contracts for the provision of goods and services) (Rev. April 2012): 'PRIVILEGES AND IMMUNITIES: Nothing in or relating to the Contract shall be deemed a waiver, express or implied, of any of the privileges and immunities of the United Nations, including its subsidiary organs.' Art. 17 of the UN's General conditions of contract contains the dispute settlement clause, the arbitration agreement being contained in para. 17.2.

[862] UN Doc. A/66/275 (2011), Annex II ('Proposal for recourse mechanisms for non-staff personnel. Outline of Rules for Expedited Arbitration Procedures under United Nations contracts with consultants and individual contractors: concept paper'), para. 40 (emphasis added).

The absence of jurisdiction by national courts in connection with an arbitration may be favourable to international organisations insofar as the courts would have no such powers to abuse. At the same time, however, both the international organisation and the private claimant would be denied the support of domestic courts to ensure the effectiveness and fairness of the arbitration. Without supervisory oversight, deficiencies in the arbitration cannot be remedied and the arbitration's legal framework is incomplete.

Where an international organisation maintains its immunity from jurisdiction in a given case before a national court, it remains to be seen whether the immunity is accepted by the court. This depends on such matters as the wording of the reservation of jurisdictional immunity, as well as the interplay between that reservation, the arbitration agreement and the determination of a place of arbitration. The uncertainty regarding the application of the immunity is detrimental to claimants; the very possibility of the arbitration's legal framework being incomplete due to the court denying itself jurisdiction may discourage claimants from resorting to arbitration. That uncertainty is equally unsatisfactory to international organisations as they cannot be certain that there will be no interference by the courts.

There have been efforts to 'denationalise' (or 'delocalise') arbitration, that is, to exclude national courts from the arbitration process. The disparities amongst *lex arbitri* seem to have motivated such efforts,[863] the aim being to create a level playing field for international arbitrations in general.[864] Blackaby et al. explained that the idea behind the delocalisation theory is that

> 'instead of a dual system of control, first by the *lex arbitri* and then by the courts of the place of enforcement of the award, there should be only one point of control: that of the place of enforcement. In this way, the whole world (or most of it) would be available for international arbitrations, and international arbitration itself would be "supranational", "a-national", "transnational", "delocalised", or even "expatriate". More poetically, such an arbitration would be a "floating arbitration", resulting in a "floating award".'[865]

As to the rationale underlying the denationalisation theory, it

> 'takes as its starting point the autonomy of the parties— the fact that it is their agreement to arbitrate that brings the proceedings into being—and rests upon two basic (yet frequently confused) arguments. The first assumes that international arbitration is sufficiently regulated by its own rules, which are either adopted by the parties (as an expression of their autonomy) or drawn up by the arbitral tribunal itself. The second assumes that control should come only from the law of the place of enforcement of the award.'[866]

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[863] Blackaby et al. (2015), para. 3.74 ('it is inconvenient (to put it no higher) that the regulation of international arbitration should differ from one country to another—and this has led to the search for an escape route.').
[864] Ibid., para. 3.73.
[865] Ibid., para. 3.76.
[866] Ibid., para. 3.78.

According to Blackaby et al., the success of the denationalisation theory in reality depends on the extent to which *lex arbitri* permit it.[867] A case in point is the Belgian arbitration law, which was amended on 27 March 1985 to allow for a substantial degree of de-localisation.[868] However, 'it appears that this legal provision discouraged parties from choosing Belgium as the seat of the arbitration and the law has since been changed.'[869] That is, 'Belgium set out to attract international arbitrations by denying any right of review for the local courts only to discover that such 'anational' arbitration dissuaded potential users and reintroduced supervisory control unless both parties agreed expressly to exclude it.'[870]

This goes to show that judicial overview by national courts over international arbitrations is in fact valued. In the end, notwithstanding certain proponents of the denationalisation theory, including notably Gaillard,[871] Blackaby et al.'s assessment is that '[i]t seems, for now, that the movement in favour of total delocalisation, in the sense of freeing an international arbitration from control by the *lex arbitri*, remains aspirational.'[872] And, according to Born,

> 'whatever the outcome of the foregoing debate about "a-national" or "international" arbitrations on a theoretical level, it is clear that the law of the seat has extraordinary practical importance. Indeed, as discussed below, even ardent proponents of "a-national" or "delocalized" arbitrations regard the possibility of a delocalized award as exceptional, with the law of the seat ordinarily and presumptively playing a central role in defining the legal framework for international arbitral proceedings.'[873]

There is one significant exception to the role of *lex arbitri*, and domestic courts, in international arbitration: the ICSID Convention. Arbitrations under this multilateral treaty, which currently has 155 states parties,[874] are directly governed by international law.[875] As Schreuer explained:

> 'The purpose of the ICSID Convention, as expressed in its Preamble, is to stimulate economic development through the promotion of private international investment. The recognition that private foreign investment is an important element in development has led many countries to strive to create conditions that attract foreign investors. An important part of a favourable legal framework for foreign investment is the availability of appropriate mechanisms for the settlement of disputes.
>
> In the absence of international mechanisms, dispute settlement between a State and a foreign investor takes place in the host State's domestic courts. Foreign investors frequently do not perceive the courts of the host State as sufficiently impartial to settle investment disputes. In addition, domestic courts are bound to apply domestic law even if that law should fail to protect the investor's rights under international law. Domestic courts of States other than the host State are usually not available since they will either lack territorial jurisdiction over investment operations taking place in another country

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[867] Ibid., para. 3.82. Likewise see G. Born, *International Commercial Arbitration* (2014), at 1590.
[868] However, according to Born 'For the most part . . . national legislatures have declined to follow the suggestions of proponents of "delocalized" international arbitration.' Born (2014), at 1589.
[869] Blackaby et al. (2015), para. 3.83.
[870] Ibid., para. 7.05. See also ibid., para. 10.69.
[871] Ibid., para. 3.82.
[872] Ibid., para. 3.88.
[873] Born (2014), at 1592.
[874] <icsid.worldbank.org/resources/rules-and-regulations/convention/overview> accessed 21 December 2021.
[875] Blackaby et al. (2015), para. 3.82.

> or be prevented from exercising jurisdiction by the host Sate's sovereign immunity. A further factor militating against the use of domestic courts is the often complex nature of investment disputes necessitating specialized knowledge.'[876]

As explained by Delaume:

> 'Within the framework of the Convention and of the Regulations and Rules adopted for its implementation, ICSID arbitration constitutes a self-contained machinery functioning in total independence from domestic legal systems.'[877]

The rationale underlying the ICSID Convention is therefore the same as the objective of the UN, and international organisations generally, namely, to settle disputes by way of arbitration to the exclusion of domestic courts. In the case of foreign investment protection, this is primarily in the interest of the claimants. In the case of the settlement of third-party disputes against international organisations, this would be primarily in the interests of organisations, namely, to preserve their independence. The ICSID Convention as a system of de-nationalised arbitration, 'in total independence from domestic legal systems',[878] therefore serves as a model for the proposals developed in chapter 5.

Internal boards: Tort Claims Board and Claims Review Boards

The 1995 Report discusses two types of internal boards: the Tort Claims Board for disputes arising in the UN Headquarters District,[879] and Claims Review Boards for disputes arising in connection with peacekeeping operations.

The Tort Claims Board and claims review boards are composed exclusively of UN representatives.[880] As such, therefore, they do not conform to the core requirements of independence and impartiality under Article 14 of the ICCPR.[881] As seen, the 1997 Report acknowledged as much with respect to local claims

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[876] C. Schreuer, 'International Centre for Settlement of Investment Disputes (ICSID) (Last updated May 2013)', in A. Peters and R. Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law* (2008) <mpepil.com> accessed 21 December 2021, paras. 3-4.
[877] G.R. Delaume, 'ICSID Arbitration and the Courts', (1983) 77 *American Journal of International Law* 784, at 784 (emphasis added).
[878] Ibid.
[879] Subject to its continued existence (see above).
[880] Also, as explained by Schmalenbach: 'The internal claims review system has been criticized as "less than transparent" . . . for the local population which is—in the absence of a protective host State—often uninformed about the UN process or hesitant to address it due to language and other barriers.' Schmalenbach (2016), para. 58. Furthermore, the proceedings of claims review boards are not public. That may be taken to contrast with the 'fair and public hearing' requirement under Art. 14 of the ICCPR. A further concern may be the legal quality of the work of claims review boards since their members do not necessarily have legal expertise, as seen from the 1996 Report: 'Normally, a typical claims review board consists of a minimum of three staff members performing significant administrative functions. Wherever possible, a Legal Adviser, or a staff member with legal training should also be a member'. 1996 Report, fn. 6 (emphasis added)].
[881] Zwanenburg (2008), at 28.

review boards, stating that these boards 'just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case.'[882]

That very same question arises with respect to procurement-related disputes. There is in fact an internal mechanism regarding such disputes, involving the Award Review Board ('ARB').[883] The ARB

> 'will review procurement challenges by unsuccessful bidders. The ARB is a UN administrative board that renders independent advice to the Under-Secretary-General for Management Strategy, Policy and Compliance (DMSPC). The Registrar of the ARB will make an initial assessment of the procurement challenge and determine its receivability and eligibility for a review by the ARB. The Registrar's determination is final and not subject to appeal by any party. Following a review of the case and upon receipt of the recommendation by the ARB, the USG, DMSPC takes a final decision, which is final and not subject to appeal by any party.'[884]

According to a 2012 report by the Secretary-General:

> 'Independent procurement challenge system. For the purpose of strengthening internal control measures and promoting ethics, integrity, fairness and transparency in the procurement process, an independent procurement challenge system was established by creating the Award Review Board in November 2010 at Headquarters as a pilot project. The purpose of the Review Board is to offer unsuccessful bidders who participated in tenders the opportunity of filing a procurement challenge on a post-award basis and to render independent advice on the merits of the procurement challenge to the Under-Secretary-General for Management, who takes the final administrative decision on the matter.'[885]

The addendum to said SG report clarified:

> 'The pilot project was launched in November 2009 with the establishment of the Award Review Board. The Chair of the Headquarters Committee on Contracts serves as the Registrar of the Board, and two staff members from the Committee's secretariat administratively support its operations. The Board has a roster of approved independent experts in procurement and procurement-related disputes who are called upon to provide written advice on the merits of a procurement challenge.'[886]

The ARW, in short, is an administrative board, made up of 'independent experts', that renders advice to the Under-Secretary-General for Management Strategy, Policy and Compliance, who takes the final decision on the challenge. Whilst independent, as a mere advisory board, the ARW may not conform to

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[882] 1997 Report, para. 10. Cf. Schmalenbach (2016), para. 24. This applies equally to the central review bodies involved in staff appointments (UN Doc. ST/SGB/2011/7 (2011)). In light of their composition and mere advisory powers, these bodies fail to meet the requirements of independence and impartiality. However, as discussed above, it remains to be seen whether disputes concerning staff appointments qualify as disputes of a 'private law character'.

[883] There also is a 'debrief procedure': 'The UN Secretariat offers UN vendors who participated in solicitations resulting in awards above US$ 200,000 an opportunity to obtain additional information on their unsuccessful proposals or bids through the debrief process described below. The debrief is not an adversarial proceeding; rather, it is a collaborative learning opportunity for unsuccessful bidders and for the UN to exchange additional information on the reasons why the bid/proposal was not successful.' UN Procurement Manual, Ref. No.: DOS/2020.9, 30 June 2020, para. 10.2.2.

[884] UN Procurement Manual, Ref. No.: DOS/2020.9, 30 June 2020, para. 10.2.3.

[885] UN Doc. A/67/683 (2012), para. 25(b) (emphasis added). The terms of reference of the ARB are not known to the present author.

[886] Ibid., para. 4.

the essential requirements of Article 14 of the ICCPR. That is relevant since, as discussed, it is not inconceivable that such claims give rise to disputes of a 'private law character'.

Returning to claims review boards, their aforementioned lack of independence and impartiality led the claimants in the Haiti cholera dispute to seek the establishment of a standing claims commission. [887]

Standing claims commission

The establishment of a standing claims commission is foreseen in the MINUSTAH SOFA.[888] That is in line with the 1997 Report, which expressed

> 'the view that the standing claims commission envisaged in article 51 of the model agreement should be maintained, mainly because it provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par. The mechanism also reflects the practice of the Organization in resolving disputes of a private law character under article 29 of the Convention on the Privileges and Immunities of the United Nations. The local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case. Based on the principle that justice should not only be done but also be seen to be done, a procedure that involves a neutral third party should be retained in the text of the status-of-forces agreement as an option for potential claimants.'[889]

Standing claims commissions, if established, could potentially make the UN's implementation of Section 29 compliant with the requirements of independence and impartiality under Article 14 of the ICCPR, notwithstanding the aforementioned shortcomings of claims review boards. It arguably is the appropriateness of the entirety of the claims review board, settlement negotiation and claims commission that needs to be assessed as a single mode of settlement under Section 29 of the General Convention. Similarly, in the case of claims arising in the UN headquarters district, it is the entirety of the Tort Claims Board,[890] settlement negotiations and arbitration that needs to be considered.

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[887] They contended that a claims review board 'fails to meet the requirement of independence and impartiality', Petition, para. 92.g.

[888] The MINUSTAH SOFA, in relevant part, is representative of modern SOFAs. See, e.g. Art. VII, paras. 54 and 55 Agreement between the United Nations and Sierra Leone concerning the status of the United Nations Mission in Sierra Leone, 4 August 2000, 2118 UNTS 190; Art. VII, paras. 54 and 55 Agreement between Ethiopia and the United Nations concerning the status of the United Nations Mission in Ethiopia, 23 March 2001, 2141 UNTS 34; Art. VII paras 54 and 55 Agreement between the United Nations and Sudan concerning the status of the United Nations Mission in Sudan (with Supplement Arrangements) 28 December 2005, 2351 UNTS 64 ; Accord entre l'Organisation des Nations Unies et le Gouvernement de la République du Mali relatif au statut de la Mission multidimensionnelle intégrée des Nations Unies pour la stabilisation au Mali, 1 July 2013, 51015 UNTS 25.

[889] 1997 Report, para. 10. According to the 1997 Report, however, 'the Secretary-General would propose the deletion from article 51 of the model agreement of the option of an appeal on the standing commission's award. 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 standing claims commission, and may in fact be seen as a duplication of the proceedings in the standing claims commission.' Ibid., fn. 2. Indeed, modern SOFAs, such as the MINUSTAH SOFA, do not provide for the option of such a further appeal.

[890] Subject to its continued existence.

The problem arises with respect to the implementation of the contentious limb of these respective modes of settlement. The problems regarding the legal framework of arbitrations (following proceedings before the Tort Claims Board) have been discussed above. As to standing claims commissions, they are problematic not least as no such commission has ever been established.[891] With 12 peacekeeping operations ongoing,[892] that is a striking reality. This warrants enquiry into the legal framework of such commissions under the relevant SOFA provisions.

The MINUSTAH SOFA,[893] is particularly suited for present purposes since it takes into account UNGA resolution 52/247 (1998) and is directly relevant to the Haiti cholera dispute, discussed elsewhere in this study. Its relevant provisions read as follows, in full (emphasis added):

> 'VII. Limitation of liability of the United Nations
>
> 54. 'Third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH, except for those arising from operational necessity, 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 paragraph 55 of the present Agreement, provided that the claim is submitted within six months following the occurrence of the loss, damage or injury, or, if the claimant did not know or could not have reasonably known of such loss or injury, within six months from the time he or she had discovered the loss or injury, but in any event not later than one year after the termination of the mandate of MINUSTAH. Upon determination of liability as provided for in the present Agreement, the United Nations shall pay compensation within such financial limitations as are approved by the General Assembly in its resolution 52/247 of 26 June 1998.'
>
> VIII. Settlement of disputes
>
> 55. Except as provided in paragraph 57, any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement shall be settled by a standing claims commission to be established for that purpose. 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 by the two parties within 30 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 party, appoint the chairman. Any vacancy on the commission shall be filled by the same method prescribed for the original appointment, provided that the 30-day period there prescribed shall start as soon as there is a vacancy in the chairmanship. The commission shall determine its own procedures, provided that any two members shall constitute a quorum for all purposes (except for a period of 30 days after the creation of a vacancy) and all decisions shall require the approval of any two members. The awards of the commission shall be final. The awards of the commission shall be notified to the parties and, if against a member of MINUSTAH, the Special

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[891] Schmalenbach (2016), para. 56. According to Schmalenbach, even though standing claims commissions have never been put to practice, 'the SOFA/SOMA dispute settlement clause implements Art. VIII Section 29 General Convention.' Schmalenbach (2016), para. 13.

[892] <peacekeeping.un.org/en/where-we-operate> accessed 21 December 2021.

[893] Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations Operation in Haiti. Port-au-Prince, 9 July 2004, entered into force on the same day. Included in United Nations Juridical Yearbook 2004, Part One. Legal status of the United Nations and related intergovernmental organizations, Chapter II. Treaties concerning the legal status of the United Nations and related intergovernmental organizations, at 28 ff.

> Representative or the Secretary General of the United Nations shall use his or her best endeavours to ensure compliance.'

These provisions warrant several observations, including notably regarding the establishment of the claims commission (point six, below). First, Paragraph 54 clearly envisages the approach involving an internal and external component for the resolution of third-party disputes arising in connection with peacekeeping operations:[894]

> 'Third party claims . . . 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 paragraph 55 of the present Agreement' (emphasis added).

These 'internal procedures' may be understood to refer to the mission's claims review board, followed by settlement negotiations; Paragraph 55 (discussed below) refers to the subsequent settlement of disputes by a standing claims commission. The wording of Paragraph 55 suggests that the standing claims commission will not consider a claim admissible (or 'receivable', in UN vocabulary) unless it has first been submitted to the claims review board, followed by settlement negotiations.[895] There is no further remedy following the claims commission: under Paragraph 55 of the MINUSTAH SOFA, '[t]he awards of the commission shall be final'. The option of an appeal to a tribunal in Article 55 of the 1990 Model SOFA has been struck as per the proposal in the 1997 Report.[896]

Second, apart from declaring applicable the financial limitations under UNGA resolution 52/247 (1998), Paragraph 54 of the MINUSTAH SOFA also reproduces the temporal limitations set forth in that resolution. Paragraph 54 moreover excludes claims arising from operational necessity. It is recalled that in resolution 52/247 (1998), the UNGA endorsed the Secretary-General's proposal that in the case of operational necessity 'liability is not engaged'. That rather is a substantive exemption from liability, which Paragraph 54 of the MINUSTAH SOFA seems to convert into a limitation of subject-matter jurisdiction of the standing claims commission:

> 'Third-party claims . . . except for those arising from operational necessity, which cannot be settled through the internal procedures . . . shall be settled . . . in the manner provided for in paragraph 55 of the present Agreement' (emphasis added).

Paragraph 55 repeats the exclusion of operational necessity as a limitation of the subject-matter jurisdiction of the standing claims commission.[897]

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[894] Art. 51 of the 1990 model SOFA (UN Doc. A/45/594 (1990)), to which the 1995 Report referred, does not clearly state the two-step process.
[895] Cf. Schmalenbach (2016), para. 55.
[896] 1997 Report, para. 10, fn. 2.
[897] Para. 55 does not repeat the temporal and financial limitations included in para. 54, though the intention appears to be for these limitations to apply to the proceedings before the claims commission.

Third, Paragraph 55 reflects Section 29 of the General Convention insofar as it limits the jurisdiction of the commission to 'any dispute or claim of a private-law character' (emphasis added).[898] As a result, any dispute or claim that lacks that character is not admissible (or 'receivable') as it falls outside the commission's subject-matter jurisdiction.

Fourth, as to the reference in Paragraph 55 to Paragraph 57 of the MINUSTAH SOFA, the latter provision concerns the settlement of disputes between MINUSTAH and the Government of Haiti concerning the interpretation or application of the SOFA. Such disputes are to be submitted to a three-member arbitration panel, to be established in the same way as the standing claims commission (discussed below). The reference in Paragraph 55 to Paragraph 57 suggests that a dispute between MINUSTAH and the Government may have a private-law character ('Except as provided in paragraph 57, any dispute or claim of a private-law character'. [emphasis added]). The Government's exclusion from the scope of claimants under Paragraph 55 underscores that that provision concerns the settlement of disputes of a private-law character between MINUSTAH and *third non-state parties*, although it does not state so explicitly.[899]

Fifth, as to the commission's procedural features, its 'tripartite' composition does not necessarily guarantee that, as the 1997 Report envisaged, 'both the Organisation and the claimant are treated on a par'.[900] Paragraph 55 does not in fact include any requirement to this effect, that is, to treat the parties 'on a par', meaning 'equally'.[901] Paragraph 55 merely tasks the commission to determine its own procedures, subject only to the requirements (discussed below) 'that any two members shall constitute a quorum for all purposes . . . and all decisions shall require the approval of any two members.'

In providing such considerable leeway to the commission to determine its own procedures, Article 55 of the MINUSTAH SOFA rather resembles the dispute settlement clause between international organisations and *states*. Indeed, for example, Article 44(2) of the IRMCT Headquarters Agreement, concerning the settlement of differences between the UN and the Netherlands on the interpretation or application of that agreement, is identical in relevant part to Paragraph 55 of the MINUSTAH SOFA. (In fact, as discussed below, there is one notable exception between the dispute settlement clauses: the default appointment procedure of members other than the chairman.)

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[898] Para. 54 does not explicitly refer to claims of a 'private law character', though presumably the reference is implied in wording '[t]hird-party claims for property loss or damage and for personal injury, illness or death'.
[899] This interpretation of para. 55 is furthermore supported by the 1997 Report, para. 10 ('claims commission envisaged in article 51 of the model agreement . . . provides for a tripartite procedure for the settlement of disputes, in which both the Organization and the claimant are treated on a par.' [emphasis added]).
[900] 1997 Report, para. 10.
[901] Cf. Schmalenbach (2016), para. 56 ('the host State (and thus its representative on the panel) does not necessarily advocate the interests of the complainant.').

Such broad leeway given to determine the applicable procedures contrasts with the more limited leeway given to arbitration tribunals. Arbitration, which, as seen, seems to be the preferred (non-amicable) dispute settlement technique for third-party disputes involving international organisations, may serve as a useful point of reference. Thus, for example, Article 17(1) of the UNCITRAL Arbitration Rules provides (emphasis added):

> 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'

Accordingly, under Article 17 of the UNCITRAL Arbitration Rules, the power of a tribunal to determine its own procedures is qualified. In addition to the general qualifications set forth in Article 17(1), paragraphs (2) to (5) set forth rules regarding timetable, hearing, communications and joinder by third parties.

Similarly, according to Article 44 of the ICSID Convention:

> 'Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'

The ICSID Arbitration Rules include detailed procedural prescripts.

Furthermore, the core requirements of independence and impartiality under Article 14 of the ICCPR correspond to the requirements of impartiality and independence of arbitrators under arbitration rules. Thus, for example, Article 11 of the UNCITRAL Arbitration Rules provides (emphasis added):

> 'When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.'

Article 14(1) of the ICSID Convention provides regarding the Panel of Arbitrators (and the Panel of Conciliators) (emphasis added):[902]

> 'Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise

[902] Art. 40 of the ISCID Convention provides: '(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38. (2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.'

> independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.'

According to Schreuer:

> 'The debates that led to the insertion of the words concerning the ability "to exercise independent judgment" show that the delegates were actually concerned with the impartiality of members of individual conciliation commissions or arbitral tribunals and not so much with the qualities of Panel members in general . . . Therefore, the issue of independence and impartiality is prominent in the appointment of conciliators and arbitrators to particular commissions or tribunals'.[903]

In contrast, Paragraph 55 of the MINUSTAH SOFA is silent on the standing claims commission's compliance with such fundamental principles and requirements.

Paragraph 55 of the MINUSTAH SOFA does provide that 'any two members shall constitute a quorum for all purposes . . . and all decisions shall require the approval of any two members'. With reference to 'Art. VIII para 55 post-1998 SOFAs/SOMAs',[904] Schmalenbach asserts that

> 'decisions on the jurisdiction, admissibility, and merits of a . . . claim are not made by the majority vote as foreseen, for example, in commercial arbitration (UNCITRAL) but require the approval of the two members nominated by the UN and the host State; the jointly appointed or independently nominated chairman can be outvoted.'[905]

However, Paragraph 55 refers to 'any two members', which seems to mean: any two of the three members of the commission. Whilst the chairman is only referred to in that capacity (the others being referred to as 'members'), the chairman arguably is no less a 'member' of the commission. The reference to 'any two members' suggests that several combinations of two commission members are possible, including combinations involving the chairman. If the members appointed by the UN and the host state, respectively, would need to approve decisions, the text would likely have stated so clearly.

Majority decision-making as foreseen in Paragraph 55 is not unusual in arbitration. Thus, for example, Article 29 of the UNCITRAL Model Law (1985, as amended in 2006) provides:[906]

> 'In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.'

Article 48 of the ICSID Convention, concerning the award, provides in relevant part:

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[903] C. Schreuer, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2009), at 49, para. 5.
[904] Schmalenbach (2016), para. 56.
[905] Ibid., para. 56.
[906] Cf. Art. 33 of the UNCITRAL Arbitration rules: '1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. 2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.'

> '(1) The Tribunal shall decide questions by a majority of the votes of all its members. (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.'

Article 16(1) of the ICSID Arbitration Rules provides more generally: 'Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.' The reason for the majority rule, amongst others, is that striving for unanimity may be neither realistic nor practical.[907]

Paragraph 55 contains a quorum requirement, namely, that 'any two members shall constitute a quorum for all purposes'. Like majority decision-making, a provision regarding quorum is not, as such, foreign to arbitration. Thus, for example, Rule 14 ('Sittings of the tribunal'), paragraph (2) of the ICSID Arbitration Rules provides: 'Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.' In that connection, Rule 20(1) provides in relevant part:

> 'As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure . . . He shall, in particular, seek their views on the following matters: (a) the number of members of the Tribunal required to constitute a quorum at its sittings'.

But, 'sittings of the Tribunal' is distinct from 'Deliberations of the Tribunal' (Rule 15), and 'Decisions of the Tribunal' (Rule 16) under the ICSID Arbitration Rules. Insofar as those rules only refer to a quorum in connection with 'sittings' of the tribunal, the implication may be that all members of the Tribunal are to participate in the arbitration in all other respects.

In this connection, as Gomez explained in the context of the UNCITRAL Model Law:

> 'When an arbitrator has been chosen and has accepted her mandate, she is expected to participate in the proceedings and contribute to the making of the decisions relevant to them. Hence, if the tribunal is composed of more than one member, all of them should contribute to the arbitration, and every decision made during the proceedings is deemed to emanate from all of the arbitrators, unless a dissent has been expressed. One of the reasons why the parties choose a panel instead of a sole arbitrator, after all, is to benefit from their collective wisdom.'[908]

This contrasts with Paragraph 55 of the MINUSTAH SOFA insofar as it provides that 'any two members shall constitute a quorum for all purposes' (emphasis added). This may be taken to mean that the commission is able to go about its entire business so long as two members participate. The risk is that

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[907] M.A. Gómez, 'Decision-Making by Panel of Arbitrators', in I. Bantekas and others (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020), 759 at 767, adding: 'A similar approach is taken by some of the leading sets of arbitration rules.' Ibid.
[908] Ibid., at 767.

one of its members—for example, the member appointed by either the UN or the host state—is structurally side-lined. That would fundamentally undermine the commission's integrity.

Sixth, and lastly, the commission's establishment process is set forth in Paragraph 55 of the MINUSTAH SOFA. The relevant part reads 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 by the two parties within 30 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 party, appoint the chairman. Any vacancy on the commission shall be filled by the same method prescribed for the original appointment, provided that the 30-day period there prescribed shall start as soon as there is a vacancy in the chairmanship.'

The procedure ensures that neither the UN nor the state can block the appointment of the chairman: the President of the ICJ may be requested to make the appointment in case of disagreement amongst the parties. But, that default procedure concerns only the appointment of the chairman – it does not concern the other two members of the commission who are to be appointed by the respective parties.[909] Of note, the notable difference between Paragraph 55 of the MINUSTAH SOFA and the aforementioned UN-Netherlands dispute settlement clause in Article 44(2) of the IRMCT Headquarters Agreement is that the default appointment procedure in the latter *does* extend to the appointment of *all* members of the tribunal:

> 'Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairperson of the Tribunal. If, within thirty days of the request for arbitration, a Party has not appointed an arbitrator, or if, within fifteen (15) days of the appointment of two arbitrators, the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint the arbitrator referred to.'

Conversely, in the case of the standing claims commission under Paragraph 55 of the MINUSTAH SOFA, if either party refuses to make the appointment, the commission does not come into existence. Thus, either party controls the coming into being of the commission. The clause governing the establishment of the standing claims commission is therefore incomplete, even defective.

This problem is far from theoretical, as the UN's position regarding the Haiti cholera dispute illustrates. As seen, according to Higgins et al.: 'As a result of the view that the claims were not receivable, the UN . . . declined a request for a standing claims commission'.[910]

Similarly, as seen, in the matter of the Kosovo lead poisoning, the UN rejected the claims on the basis that they lacked a private law character. It apparently did so without resorting to the claims commission

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[909] The passage regarding 'vacancy' appears to apply only when the member who was the subject of the 'original appointment' seizes to be a member.
[910] Higgins et al. (2017), at 709-710, para. 21.09, fn. 39.

foreseen in the applicable legal framework. The UN could equally decline to establish a standing claims commission if, in its view, any damage was incurred as a matter of operational necessity, thus exempting the UN from liability.

Even if Haiti had been minded to appoint its member on the commission, the UN would have been unlikely to appoint its member, thereby effectively blocking the establishment of the commission. The state party might consider that the UN's position to refuse to appoint its member triggers a dispute concerning the interpretation or application of the MINUSTAH SOFA under Paragraph 57. Under that provision, as seen, disputes are to be settled by a three-member tribunal. However, as that tribunal is to be established in the same manner as the claims commission, its coming into being may similarly be illusory.

In reality, it may never come to the UN or, for that matter, the state party refusing to appoint its respective member, thereby blocking the establishment of the commission. The 1997 Report speculated that the failure to establish standing claims commissions rather is

> 'due to the 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. But whatever the reason, 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.'[911]

This perceived 'lack of political interest' on the part of host states may in fact reflect the political reality that the state lacks the leverage to draw the UN into dispute settlement. Host states are unlikely to spend political capital for this purpose, particularly in the knowledge that a defective, or incomplete, dispute settlement clause awaits in case of disagreement. In the recent and particularly controversial case concerning the UN's alleged liability for cholera in Haiti, the state of Haiti was sued in a domestic court in an, unsuccessful, attempt to compel it to pursue the establishment of a standing claims commission.[912] Had it done so, as seen, the UN would have refused to appoint its member on the commission in view of its stated position that the claim lacked a 'private law' character and, therefore, is 'not receivable'.

The absence of a default appointment procedure for all commission members does raise a serious question as to whether the dispute settlement procedure under the MINUSTAH SOFA is, in the words of the 1997 Report, 'realistic or effective'. Indeed, the question arises whether the UN discharges its

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[911] 1997 Report, para. 8.

[912] F. Mégret, 'Beyond UN Accountability for Human Rights Violations: Host State Inertia and the Neglected Potential of Sovereign Protection', (2019) 16 *International Organizations Law Review* 68, at 100. See also F. Mégret, 'Remedying UN Abuses by Forcing the Host State's Hand: Current Case Calls for the Haitian Government to Trigger a Standing Claims Commission' (*Opinio Juris*, 2013) <opiniojuris.org/2018/10/24/remedying-un-abuses-by-forcing-the-host-states-hand-current-case-calls-for-the-haitian-government-to-trigger-a-standing-claims-commission/> accessed 21 December 2021.

obligation to 'make provisions' for an appropriate mode of settlement for claims arising in connection with peacekeeping operations.[913] The 1997 Report stated that as a standing claims commission

> 'has never been activated, it is difficult to suggest ways in which its procedure might be modified or amended. If, however, on the basis of future experience the procedure proves to be inadequate, the Secretary-General would revert to the matter.'[914]

More than twenty years since the 1997 Report, and with 12 peacekeeping operations currently underway, still no such commission has ever been 'activated'. That in itself is 'experience' that warrants review. Apart from procedural safeguards,[915] and quorum requirements, such review ought to concern first of all the procedure for the establishment of claims commissions.

Lump-sums

Contrary to 'modern' SOFAs like the MINUSTHA SOFA, which provide for the claims settlement mechanisms just discussed, the 1961 ONUC SOFA allowed for arbitration between individual complainants and the UN.[916] However, according to Schmalenbach: 'From the UN perspective, the conclusion of lump-sum agreements with Belgium, Switzerland, Greece, Italy, Luxembourg, and Zambia was *inter alia* procured by the wish to avoid case-by-case arbitration'.[917]

As seen, in the case of a lump-sum arrangement, claims by third parties are espoused by their state of nationality. Upon reaching a settlement with the UN, the state then pays proportionate shares to the claimants on whose behalf it acted.[918]

The 1996 Report proposed lump-sum agreements as one of two modified procedures for the settlement of third-party claims in connection with peacekeeping operations in view of problems with existing procedures (the second modified procedure concerned the strengthening of claims review boards). However, as seen, there was no follow-up to this proposal: neither the 1997 Report nor UNGA resolution

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[913] Cf. Schmalenbach (2016), para. 57 ('The fact that for the last 60 years of peacekeeping, the establishment of a SOFA/ SOMA standing claims commission has never been successfully pursued in practice strongly indicates that the individual claimant is not entitled or practicably able to make such a request.')
[914] 1997 Report, para. 11.
[915] Cf. Schmalenbach (2016), para. 56 ('with host States taking no interest in setting up the commission and the UN's efforts to reach amicable claims settlements, the judicial independence of the SOMA/SOFA standing claims commission will remain academic for the foreseeable future.' [fn. omitted]).
[916] Art. 10(b) of the 1961 ONUC SOFA, 414 UNTS 229, as reported in Schmalenbach (2016), fn. 199.
[917] Schmalenbach (2016), para. 59 (fns. omitted).
[918] According to Schmalenbach: 'Indisputably, Art. VIII Section 29 is not applicable if the UN chooses to forestall or handle individual private law claims directly with the host or home State on the international level'. Schmalenbach (2016), para. 19.

52/247 (1998) refers to lump-sum agreements. Indeed, the agreements regarding ONUC in the second half of the 1960s remain the only known example in the practice of the UN.[919]

The exclusivity of the ONUC settlement is telling. The complexities of diplomatic protection in general have been discussed above. These were exemplified in the *Manderlier* case, which arose in connection with the lumpsum agreement between Belgium and the UN in the context of ONUC. Mr Manderlier, a Belgian national, sought compensation from the UN for loss of property allegedly caused by UN forces. Dissatisfied with his share of the lumpsum settlement, Mr Manderlier sued Belgium and the UN before the Belgian courts. In seeking compensation, he asserted that the lumpsum agreement did not satisfy the requirement under Section 29 of the General Convention. Though upholding the jurisdictional immunity of the UN, which it found to be unconditional, the Brussels Court of Appeal agreed with this assertion:

> 'The [United Nations] consider quite wrongly that the [lump sum] Agreement, reached between the U.N. and Belgium on 20 February 1965, constitutes the appropriate method of settlement provided for by Section 29.…The defendant has thus in reality been judge in its own case. Such a procedure in no sense constitutes an appropriate method of settlement for deciding a dispute.' [920]

Insofar as this implies that the UN had unilaterally determined the lump-sum amount, that is incorrect: the settlement was the result of negotiations between Belgium, exercising diplomatic protection, and the UN.[921]

The Court of Appeal in *Manderlier* further considered that there was no court to which the claimant could submit his dispute with the UN, and that this 'does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights'.[922] That is in line with the advent of human rights, as set forth notably in the ECHR, as well as the ICCPR,[923] which had been adopted not long before the judgment in *Manderlier*.

Around the same time, the increased significance of human rights also impacted other fields of the law, notably, the protection of foreign investment. Following the adoption of the 1907 Convention on the Peaceful Resolution of International Disputes, diplomatic protection had become the norm. Thus, where a national of state A would invest in state B and a dispute would ensue concerning the investment, state A would exercise diplomatic protection, by espousing the claim, and resolve it with state B, including

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[919] Cf. ibid., para. 25 ('In recent peacekeeping missions, host and home States have by and large refused or failed to espouse tort claims.'), para. 26 (In practice, this mode of dispute settlement has been implemented by the UN only once, in the course of the ONUC mission (1960-64).').
[920] *Manderlier v. United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, United Nations Juridical Yearbook 1969, 236, cited in Schmalenbach (2016), para. 23, fn. 71.
[921] Cf. ibid.
[922] *Manderlier v. United Nations and Belgian State*, Brussels Appeals Court, Decision of 15 September 1969, United Nations Juridical Yearbook 1969, 236 at 237.
[923] Adopted and opened for signature, ratification and accession by A/RES/2200 A (XXI) (1966), entry into force on 23 March 1976.

as necessary through arbitration.[924] The foreign investor did not have a direct (international) cause of action.

In the second half of the 20th century, that became problematic from the perspective of the individual claimant. As Brierley explained in 1963:

> 'He has no remedy of his own, and the state to which he belongs may be unwilling to take up his case for reasons which have nothing to do with its merits; and even if it is willing to do so, there may be interminable delays before, if ever, the defendant state can be induced to let the matter go to arbitration … It has been suggested that a solution might be found by allowing individuals access in their own right to some form of international tribunal for the purpose, and if proper safeguards against merely frivolous or vexatious claims could be devised, that is a possible reform which deserves to be considered. For the time being, however, the prospect of states accepting such a change is not very great.'[925]

But times changed, as explained by Blackaby et al.:

> 'Since that text was written in 1963, the situation has changed dramatically and what Professor Brierley thought unlikely has become a commonplace reality. The validity of his concerns, and the inevitable 'politicisation' of disputes 'leaving investors, particularly small and medium-sized enterprises, with little recourse save what their government cares to give them after weighing the diplomatic pros and cons of bringing any particular claim', led to a radical reform in the dispute-settlement provisions of many [bilateral investment treaties].[926]

That is,

> 'the rise of individuals as actors of international public law brought the development of investor state dispute settlement . . . in which investors were empowered to bring direct claims against their host states via international arbitration tribunals.'[927]

This development in the field of foreign investment protection is indicative of a climate in which individual rights were generally being increasingly protected. The Brussels Court of Appeal recognised this with respect third-party claims against the UN in *Manderlier*.

It is perhaps no surprise that the ONUC settlements are an isolated example of third-party claim settlement, and that the 1996 Report's proposal to revive lump-sum agreements was ignored. Diplomatic protection is difficult to reconcile with individual rights, much less with the procedural safeguards in

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[924] Blackaby et al. (2015), para. 8.04 ('the Convention [on the Peaceful Resolution of International Disputes] provided the framework for the conclusion of bilateral arbitration treaties. In accordance with these treaties, in the event of a dispute between two states arising out of the particular interests of a national of the other state, an independent arbitral tribunal would be formed. In effect, a state could espouse the claim of its national (the so-called right of diplomatic protection) by means of a horizontal inter-state procedure. There was no direct cause of action by the foreign national whose interests had been harmed.'

[925] Blackaby et al. (2015), para. 8.06, citing J.L. Brierley, *The Law of Nations* (1963), at 277.

[926] Ibid., para. 8.07 (fn. omitted).

[927] European Parliamentary Research Service, 'From Arbitration to the Investment Court System (ICS). The Evolution of CETA Rules' (PE 607.251, 2017), at 6, para. 2.1 (emphasis added).

Article 14 ICCPR. If diplomatic protection was ever an 'appropriate' mode of settlement under Section 29 of the General Convention, it is unlikely to be so today.[928]

Waiver of immunity: national courts

The one exception to the UN's absolute immunity from jurisdiction under Article II of the General Convention is 'insofar as in any particular case it has expressly waived its immunity'. To be clear, where the UN feels able to do so and have a dispute adjudicated by a national court, this does not qualify as a mode of settlement under Section 29 of the General Convention.

The 1995 Report discusses the option of waiver exclusively in connection with Section 29(b) of the General Convention, concerning disputes involving UN officials. That said, under Section 29(a), concerning disputes to which the UN is a party, the 1995 Report states that the UN has taken out commercial liability insurance with worldwide coverage against third party claims arising in connection with accidents involving UN vehicles.[929] As seen, the 1985 supplement to the 1967 Study clarifies that cases involving third party liability insurance represent the only instance 'in which the Organization might normally waive its immunity'.[930] The need for a waiver would arise only where the claim cannot be settled: absent a waiver, the insurer would not be able to defend claims against the UN.

Indemnification and holding harmless

Lastly, regarding operational activities for development conducted by UNDP and UNEP, the 1995 Report states that arbitration agreements are included in contracts.[931] But, what about 'other disputes of a private law character'? According to the 1995 Report,

> 'it has been the practice of both UNDP and UNICEF to include in their agreements with recipient Governments a provision to shift liability to the latter in respect of third-party claims. In effect, the provision ensures that the Government concerned will be responsible for dealing with, and satisfying, third-party claims and will hold harmless the United Nations in respect of any such claims that may arise, except in cases of gross negligence or wilful misconduct on the part of the United Nations organ or its representatives'.[932]

[928] But it has not been forgotten as a potential remedy. In 2013, a suit was brought against the Haitian government 'summoning the Head of State, his Prime Minister and the Minister for Foreign Affairs, to intervene on behalf of the victims of the cholera epidemic by exercising diplomatic protection within 30 days or be sued.' The suit was dismissed. See Mégret (2019), at 100 (emphasis added).
[929] 1995 Report, para. 14.
[930] 1985 Supplement to the 1967 Study, at 159.
[931] 1995 Report, para. 22.
[932] Ibid., para. 22 (emphasis added).

It would be conceivable to 'shift liability' in the sense of agreeing that a state will hold the UN 'harmless' by 'satisfying' third-party claims. That is an internal arrangement between the UN and the state, which does not concern the claimant.

As to the undertaking by a state that it will be 'responsible for dealing with' third-party claims, the state could attempt to negotiate a settlement with a third-party claimant against the UN. However, it is unclear what contentious proceedings would look like in the event that an attempt fails. As the UN is the addressee of the claim, it is not clear how an agreement with a state could 'by and large relieve the UN from its obligations under Art. VIII Section 29 General Convention'.[933] Those obligations apply to the UN pursuant to the General Convention and are not extinguished by virtue of a bilateral agreement between the UN and a state. Where a third-party claim is maintained against the UN, the 1995 Report does not clarify what mode of settlement would apply, including, in any event, in the case of gross negligence or wilful misconduct (which would fall outside the scope of any agreement with the state).[934]

3.4.3.2 Applicable law: the UN Liability Rules

The appropriateness of modes of settlement under Section 29(a) of the General Convention is moreover impacted by the substantive rules governing dispute settlement and the remedies available thereunder. This subsubsection concerns the UN Liability Rules, which apply to third-party disputes in connection with peacekeeping operations. This paragraph discusses the legal basis for the adoption of the UN Liability Rules and their legal qualification, scope of application and implementation, as well as with aspects of their contents.[935]

As will be seen, the UN Liability Rules give rise to important questions. To resolve these questions authoritatively and allow the UN Liability Rules to mature into a third-party liability regime proper, these rules are in need of consistent interpretation and application. That is needed to foster legal certainty, as required by the rule of law.[936]

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[933] Schmalenbach (2016), para. 17.
[934] It may be that the UN would resort to arbitration as the 'backstop' mode of settlement. Cf. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, statement by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, President Schwebel presiding, verbatim record 1998/17 <icj-cij.org/en/case/100/oral-proceedings> accessed 21 December 2021, para. 14. ('[the UN] will attempt to negotiate a settlement with the plaintiffs; if this is not possible, the United Nations will make provision for an appropriate means of settlement, for example, by submission of the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules.')
[935] See generally Schmalenbach (2016), para. 73 ff.
[936] <un.org/ruleoflaw/what-is-the-rule-of-law/> accessed 21 December 2021.

3.4.3.2.1 Legal basis for adoption by UNGA

According to the 1997 Report, the power to limit financial liability results from Article 17 of the UN Charter.[937] Article 17(1) provides that the UNGA 'shall consider and approve the budget of the Organization'.[938] According to the 1997 Report:

> 'Article 17 entrusts the Assembly with the control over the finances of the Organization, the levying of the amounts necessary to defray the costs of carrying out its functions and the apportionment of such expenses among Members of the Organization in a legally binding manner. The budgetary authority of the Assembly to determine the expenses of the Organization also includes the power to limit such expenses in the form of a limited financial liability.'[939]

Considering that the principle of 'attributed powers' requires international organizations to have a legal basis for their activities,[940] the issue is whether the power to 'consider and approve the budget' includes the power to limit liability, as the UNSG contended. The purpose of budgeting is to estimate and control income and expenditure. The purpose of limiting liability is to reduce expenses. While those purposes are different, limiting liability will have a decreasing effect on the budget (even if the aggregate amount of claim-related expenditure remains unforeseen). One might accordingly argue that the power to budget as formulated in Article 17 of the UN Charter does encompass the power to limit liability.[941]

But even if one were to construe the wording of Article 17 of the UN Charter narrowly, the power to limit liability might be implicit in that provision under the doctrine of 'implied powers'. The international law doctrine concerning implied powers can be traced back to early advisory opinions of the ICJ. In *Reparation for Injuries*, the Court held: 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'[942]

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[937] 1997 Report, para. 39.
[938] Art. 17 continues: '2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly. 3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.'
[939] 1997 Report, para. 39.
[940] Schermers and Blokker (2018), para. 232.
[941] But see Schmalenbach (2016), para. 82 ('For all other member States, especially home States of injured persons, the authority of the General Assembly to limit the organization's liability stems from its budgetary authority under Art. 17 UN Charter. This is at least the legal opinion of the UN Secretary-General, which can be contested in the light of the ICJ's ruling that "[T]he function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the organization."' [fns. omitted]). The reference is to *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,* Advisory Opinion of 13 July 1954, [1954] ICJ Rep. 47 (*Effect of Awards*), at 59.
[942] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174 (*Reparation for Injuries*), at 182.

The ICJ's advisory opinion in *Certain Expenses* arose out of the UNGA establishing UNEF and exercising authority over ONUC. Peacekeeping is not foreseen in the UN Charter and the question before the Court was whether expenses in relation to such operations under auspices of the UNGA qualified as 'expenses of the organization' in the sense of Article 17 of the UN Charter. The Court concluded that this was the case, having considered that

> 'such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an "expense of the Organization".'[943]

As the Court further held,

> 'when the Organization 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 Organization.'[944]

According to Schermers and Blokker, there are 'at least four limits' to the scope of implied powers.[945] One such limit concerns the existence of certain explicit powers in the relevant area. Campbell argued that 'the exercise of powers would have to be such as would not substantially encroach on, detract from, or nullify other powers.'[946] In the present case, that limitation would not seem to be at issue, the only other relevant power being that of the UNGA in relation to the budget of the UN under Article 17 of the UN Charter.

A further limit is that the use of such powers may not infringe on fundamental international legal principles and rules. In the present case, as discussed above, general international law arguably does not recognize a remedial right to compensation. This limit therefore does not seem to apply. Yet another limit is that implied powers may not change the division of functions within the organization. This would not be the case at present in view of the exclusive control of the UNGA over the finances of the UN. No other UN body would be more appropriately placed to decide on liability caps.

It is the limit that is mentioned first by Schermers and Blokker—[947] that implied powers must be 'necessary or essential' for the performance of the functions of the organization—that gives pause for thought. To determine whether the UNGA's limitation of financial liability meets that test, one must

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[943] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ. Rep. 151 (*Certain Expenses*), at 167.
[944] Ibid., at 168.
[945] Schermers and Blokker (2018), para. 233A. See also N.M. Blokker, 'Beyond "Dili": On the Powers and Practice of International Organizations', in G. Kreijen (ed.), *State, Sovereignty, and International Governance* (2002), 299 at 305-307. According to Amerasinghe, 'powers implied must bear some relationship to the functioning of the organization, the performance of its duties, or the achievement of its purposes'. Amerasinghe (2005), at 48.
[946] A.I. Campbell, 'The Limits of the Powers of International Organisations', (1983) 32 *International and Comparative Law Quarterly* 523, at 528, cited with approval in Schermers and Blokker (2018), para. 233A.
[947] Schermers and Blokker (2018), para. 233A.

consider the rationale of the limitation. The 1996 Report states that 'the principle of limitation on financial liability has been recognized in international practice.'[948] The report refers to the following treaties:[949]

- The 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface;[950]
- the 1960 Convention on Third Party Liability in the Field of Nuclear Energy;[951]
- the 1978 United Nations Convention on the Carriage of Goods by Sea;[952]
- the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by the 1955 Hague Protocol and the 1975 Montreal Protocol No. 4;[953] and
- the 1969 International Convention on Civil Liability for Oil Pollution Damage.[954]

These treaties limit liability for damages arising in diverse situations, which are quite different from those that give rise to the UN's third-party liability. These treaties envisage liability on the part of entities which typically are private entities, not governmental agencies, much less international organizations. For example, the 1969 International Convention on Civil Liability for Oil Pollution Damage concerns the limited liability of the owner of a ship, who is defined under Article 1(3) as 'the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship.'[955] The liability under, at least some of, these treaties is 'strict', 'as opposed to general tort law which is based on fault or negligence.'[956]

Notwithstanding these differences, the rationale underlying these treaties appears to have inspired the UN Liability Rules. Preambular paragraph 3 of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy states (emphasis added):

> 'Desirous of ensuring adequate and equitable compensation for persons who suffer damage caused by nuclear incidents whilst taking the necessary steps to ensure that the development of the production and uses of nuclear energy for peaceful purposes is not thereby hindered.'[957]

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[948] 1996 Report, para. 39.
[949] Ibid., para. 39, fn. 10; para. 40, fn. 11.
[950] 310 UNTS 181.
[951] 1519 UNTS 329.
[952] 1659 UNTS 3.
[953] 2145 UNTS 36.
[954] 973 UNTS 3.
[955] The 1960 Convention on Third Party Liability in the Field of Nuclear Energy, provides a further example: it limits the liability of the '"operator" in relation to a nuclear installation', who under Art. 1(a)(vi) of that convention is defined as 'the person designated or recognized by the competent public authority as the operator of that installation.'
[956] <oecd-nea.org/jcms/pl_20196/paris-convention-on-third-party-liability-in-the-field-of-nuclear-energy-paris-convention-or-pc> accessed 21 December 2021. Similarly, <imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx> accessed 21 December 2021.
[957] See likewise 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface,

Transposed to the UN, the rationale of limiting liability is that meeting the liabilities of the UN must not hinder the attainment of its vast purposes. That is, the risk of excessive financial exposure must not stifle the proper functioning of the UN. Thus, in limiting its financial exposure, the organisation is guided by its functional demands. The 1997 Report states in this respect:

> 'As a practical matter, limiting the liability of the Organization is also justified on the ground that the funds from which third-party claims are paid are public funds contributed by the States Members of the United Nations for the purpose of financing activities of the Organization as mandated by those Member States. To the extent that funds are used to pay third-party claims, lesser amounts may be available to finance additional peacekeeping or other United Nations operations.'[958]

However, this may not make limiting liability 'necessary or essential' for the performance of the functions of the organization. It arguably amounts to a moral justification of a policy that is ultimately self-serving. One could, therefore, debate whether the implied powers limit in point is met with respect to the UN Liability Rules.

Nonetheless, support for the legality of the UN Liability Rules may be found in two factors, which '[i]n practice are decisive in . . . discussions'[959] concerning alleged *ultra vires* actions of international organizations: the member states' views, and those of the organisation as expressed in practice. As to the former, as Blokker explained: 'If [the Member States] all support a particular act of the organization, they will find a way . . . to justify the conclusion that the organization has not exceeded its powers.'[960]

As to the UN Liability Rules, according to the available records, there was no debate concerning the powers of the UN to exempt and limit the liability of the organization. The financial exposure of the UN seems to have been the only matter of concern. Thus, in recommending that the UNSG prepare, what would become, the 1996 Report, the ACABQ expressed its concern over 'the magnitude and the number of outstanding third-party claims submitted to [United Nations Peace Forces].[961]

The 1996 Report, the 1997 Report and UNGA resolution 52/247 (1998) were channelled through the Fifth Committee.[962] One would have expected any debate over the powers of the UN to have taken place

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preamble, para. 1: 'moved by a desire to ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of the liabilities incurred for such damage in order not to hinder the development of international civil air transport'.

[958] 1997 Report, para. 12. The 1997 Report elsewhere justifies the financial limitations on 'economic, financial and policy grounds'. Ibid., para. 37.

[959] Blokker (2004, 'Beyond Dili'), at 309.

[960] Ibid., referring to explicit and implied powers, as well as customary powers.

[961] UN Doc. A/50/903/Add.1 (1996), para. 19. The ACABQ is a subsidiary organ of the UNGA composed of individuals in their personal capacity. Its operations are governed by A/RES/14(I) (1946) and A/RES/32/103 (1977), and rules 155 to 157 of the rules of procedure of the UNGA <un.org/en/ga/about/ropga/> accessed 21 December 2021. In A/RES/50/235, para. 16 (1996), the General Assembly endorsed the ACABQ's recommendation for the preparation of the 1996 Report.

[962] Regarding the 1996 Report, see, e.g., UN Doc. A/C.5/51/SR.14; regarding the 1997 report, see, e.g., UN Doc. A/C.5/52/SR.7 (1997); regarding UN Doc. A/RES/52/247 (1998), see, e.g., UN Doc. A/52/PV.88 (1998), at 16.

in the Sixth (legal) Committee. However, in spite of the several legal questions that arise in connection with the UN Liability Rules—including the legal basis for their promulgation—that Committee does not appear to have been involved. Like the Fifth Committee, the UNGA adopted resolution 52/247 (1998) without a vote.[963]

In light of the clear resolve to limit the UN's liability, and in part exempt it from liability, the absence of discussion as to whether the UN had the power to do so suggests that according to the member states it did. Unanimous acceptance by member states is more than is legally required for powers to be implied.[964]

Still, however, one might contend that this acceptance has more to do with practical convenience than law: limiting liability saves expenses. It is here that the second factor becomes relevant: the practice of the organisation.[965] Such practice 'has increasingly been recognized as an independent legal basis for' the actions of international organizations.[966] Going back to the 1986 VCLT,[967] that notion is reflected in the definition of 'rules of the organization' in Article 2 of the ARIO, which includes 'established practice of the organization' (emphasis added). According to Schermers and Blokker,

> 'the qualifier "established" is somewhat vague. Its purpose is to add a legal dimension to a practice of an organization, as a requirement for this practice to qualify as a rule of the organization. In this way, it resembles *opinio iuris* as a requirement for rules of customary international law'[968]

The UN's third-party liability practice may qualify as 'established' in that sense insofar as the UN Liability Rules had developed in practice, in part at least, before being promulgated in UNGA resolution 52/247 (1998). The 1997 Report states this much with respect to, for example, the temporal limitation of liability and the types of compensable injury.[969] As part of a process of 'standardisation', discussed below, the UN Liability Rules also drew on rules applicable in other contexts at the UN. The liability exemption concerning military and operational liability developed in the practice of UN claims review

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[963] UN Doc. A/52/PV.88 (1998), at 16.
[964] Blokker (2004, 'Beyond Dili'), at 311.
[965] Ibid., at 309-310 ('if the views of the Member States were the only factor, the question whether the organization has or has not exceeded its powers would in most cases essentially be the same as the question whether there is enough political support for a particular decision. Hence, the importance of a second factor to these discussions; *the views of the organization*.' [emphasis in original]).
[966] Ibid., at 322.
[967] According to Art. 2(1)(j) of the 1986 VCLT, '"rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization'.
[968] Schermers and Blokker (2018), para. 1144B.
[969] 1997 Report, para. 20 (referring, amongst others, to the 'practice of the Organization') and para. 25 (referring, amongst others, to 'the practice of United Nations peacekeeping operations').

boards.[970] According to Schmalenbach:

> 'the legal justification of an act on the grounds of its operational and military necessity can be said to be a general principle of international liability law, because this principle has been pleaded as a defense with impressive consistency by international organizations with military operations such as NATO, OAS, and the UN in order to ward off claims for damages.'[971]

Since their promulgation in 1998, the UN Liability Rules have moreover been included (by reference) in SOFAs,[972] and continue to be applied in the practice of UN claims review boards. Against this backdrop, the UN's third party-practice underlying the UN Liability Rules arguably is 'established'. This would support the conclusion that, in promulgating those rules, the UNGA was empowered to limit the UN's third-party liability.

In conclusion, it is submitted that there are good arguments that the UNGA was empowered to adopt the UN Liability Rules, if not explicitly then implicitly. The question of the legality of the adoption of the UN Liability Rules could conceivably come before the ICJ in advisory proceedings pursuant to Section 30 of the General Convention. However, as the rules were uncontroversial in the UNGA, it is unlikely that there will be sufficient political support for such a request. It is more likely that the question would arise in third-party litigation, although standing claims commissions have never been established (but the question could come before the Mechanism proposed in chapter 5).

3.4.3.2.2 Legal nature of the UN Liability Rules and their relationship to general international law

The legal nature of the UN Liability Rules is particularly relevant in the context of their relationship to general international law. Zwanenburg, writing with reference to the then ongoing ILC discussions concerning the responsibility of international organisations, raised the issue of the compatibility of the liability limitations under the UN Liability Rules 'with the law of international responsibility'.[973] He referred to the requirement under the draft ARIO to make 'full reparation' for damage.[974] The relevant provision in the ARIO's final version is Article 36 ('Compensation'):

> '1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.'

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[970] 1996 Report, para. 15. According to Schmalenbach, 'A pattern was begun with the UNEF mission where the claims review board refused to settle claims related to damages that were caused by actions considered necessary from an operational point of view.' Schmalenbach (2016), para. 79.
[971] Schmalenbach (2006), at 51. On this basis, the UNSG may not have found it necessary to link the exemption from liability for operational and military necessity to Art. 17 of the UN Charter.
[972] See, e.g., Para. 54 of the MINUSTAH SOFA.
[973] Zwanenburg (2008), at 35.
[974] Ibid., at 35-36.

That obligation to compensate 'any financially assessable damage' contrasts with the financial limitations to compensation under the UN Liability Rules. However, Article 36 of the ARIO is included in Part Three of the ARIO, the scope of application of which does not extend to obligations owed to private parties.[975] Nor has the purported 'right to a remedy' under general international law developed to the point of entitling private parties to compensation, as discussed in paragraph 2.4.2.2 of this study.[976]

Zwanenburg also points to the incompatibility between 'operational necessity', as an exemption from liability under the UN Liability Rules, and 'necessity' as a 'circumstance precluding wrongfulness' under Article 25 of the ARIO. That provision features in Part Two of the ARIO, which *does* apply in the relationship between international organisations and private parties. The incompatibility between 'operational necessity' and 'necessity' arises insofar as the four-pronged test for the former under the UN Liability Rules is less burdensome than the test for the latter.[977] Consequently, the UN might simultaneously be exempt from liability under its own rules and incur responsibility under general international law.[978] However, the matter is inconsequential insofar as, as seen in subsubsection 2.4.2.2., general international law does not include a general entitlement of private parties to compensation.

However, as the right to a remedy may develop from *lex ferenda* to *lex lata*,[979] the question remains as to whether the internal law of the international organisation could lawfully deviate from general international law. The matter may be approached from the perspective of Article 64 to the ARIO ('*Lex specialis*') (emphasis added):

> 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.'

[975] As to the temporal limitations under the UN Liability Rules, they correspond to the provisions on the implementation of responsibility in Part Four of the ARIO, which, like Part Three, does not apply in the relationship between international organisations and private parties.
[976] Cf. Johansen (2020), at 37, fn. 46. Johansen considers the right to an (effective) remedy to be *lex ferenda*. Ibid., at 93ff.
[977] Notably, under Art. 25(1)(a) of the ARIO, the wrongfulness of an act may be precluded if it 'is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest'.
[978] Leaving aside questions that arise regarding the status, and definition, of the right to property under international law.
[979] Johansen (2020), at 93 ff.

The question arises, therefore, whether the UN Liability Rules qualify as 'special rules of international law'. Such rules may be included in the 'rules of the organization applicable in the relations between an international organization and its members'.

The UN Liability Rules qualify as 'rules of the organization' under the broad definition of Article 2(b) of the ARIO: [980]

> '"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'

The UN Liability Rules would fit this definition under the head of 'resolutions' (having been promulgated by the UNGA in resolution 52/247 (1998)). Additionally, as seen, they may qualify as 'established practice of the organization' insofar as these rules had developed in practice prior to their formal promulgation by said resolution.

That being so, the UN Liability Rules would not be 'applicable in the relations between an international organization and its members', as per Article 64 of the ARIO.[981] The UN Liability Rules, as laid down in UNGA resolution 52/247 (1998) address the UN in its settlement of claims by private parties. The external effect of these rules is limited to third parties (through their incorporation in the terms of reference of claims review boards[982]).

Then again, the 'special rules of international law' contemplated in Article 64 of the ARIO are not limited to 'rules of the organisation applicable to the relations between an international organization and its members'. The question is whether the UN Liability Rules, being rules of the organisation, qualify as 'rules of international law' and, if so, whether they are 'special'. The drafting history of the UN Liability Rules does not suggest that their legal status was considered.

According to ILC Rapporteur Gaja: 'The question of the legal nature of the rules of the organization is controversial'.[983] As a general proposition, according to the report: 'It may well be that the legal nature of the rules of the organization depends on the organization concerned.'[984] Of note, however, the report

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[980] That definition is largely taken from the one contained in Art. 2(1)(j) of the 1986 VCLT. The main difference between the two definitions is that the ARIO definition is somewhat broader insofar as it includes a reference to 'other acts of the international organization'.
[981] The ARIO refer to 'rules of the organization' concerning the relations between the international organization and its members in several respects. See, for example, Art. 10 of the ARIO ('Existence of a breach of an international obligation'), para. 2.
[982] A/RES/52/247 (1998), para. 13
[983] G. Gaja, Third Report on Responsibility of International Organizations, UN Doc. A/CN.4/553 (2005), para. 18.
[984] Ibid., para. 21.

continued to state that 'one may conclude that, according to the International Court of Justice, rules of the organization are part of international law at least insofar as the United Nations is concerned.'[985]

That would bring the UN Liability Rules, insofar as they can be deemed to be 'special', within the scope of the *lex specialis* provision in Article 64 of the ARIO. That seems to correspond to the views of the UN Secretariat, as articulated in an additional reply upon the ILC's adoption of the ARIO on first reading. The reply argued

> 'that full recognition of the "principle of speciality" is fundamental to the treatment of the responsibility of international organizations. As the International Court of Justice observed in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*
>
> > "… international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."
>
> It is, therefore, of the essence that in transposing the full range of principles set forth in the articles on the responsibility of States for internationally wrongful acts *mutatis mutandis* to international organizations, the International Law Commission should be guided by the specificities of the various international organizations: their organizational structure, the nature and composition of their governing organs, and their regulations, rules and special procedures — in brief, their special character. The Secretariat notes that, while some effect is given to the principle through the application of draft article 63 on *lex specialis*, the principle of "speciality" cuts across many of the Secretariat's comments.'[986]

More specifically, and precisely on point for present purposes, the UN commented with respect to the draft provision in the ARIO on *lex specialis*:

> 'The most notable examples of *lex specialis* in the practice of the United Nations include the principle of "operational necessity", which precludes responsibility for property loss or damage caused in the course of United Nations peacekeeping operations under the conditions set out by the Secretary-General and endorsed by the General Assembly (see the comments on draft article 24), and the temporal and financial limitations adopted in the same resolution for injury or damage caused in the course of the same operations. Resolution 52/247 on third-party liability: temporal and financial limitations, adopted on 26 June 1998, sets temporal and financial limitations on the liability of the United Nations in respect of third-party claims arising out of United Nations peacekeeping operations, and as such prevails over the duty to provide full reparation under draft article 33. The resolution specifies, *inter alia*, that "no compensation shall be payable by the United Nations for non-economic loss", and that the amount of compensation payable for injury, illness or death of any individual, including for medical and rehabilitation expenses, loss of earnings, loss of financial support etc., "shall not exceed a maximum of 50,000 United States dollars". Pursuant to paragraph

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[985] Ibid., para. 20 (emphasis provided), referring to *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, [1992] ICJ Reports 3.

[986] UN Doc. A/CN.4/637/Add.1 (2011), at 4 (fn. omitted, emphasis added). According to Boon, 'most organizations took the position that the founding premise of the international legal framework applicable to them should be speciality not generality.' K. Boon, 'The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 135 at 135.

> 12 of General Assembly resolution 52/247, the Secretary-General consistently includes the limitations on liability in the status-of-force agreements concluded between the United Nations and the States where peacekeeping operations are deployed.'[987]

The assertion that the UN Liability Rules qualify as *lex specialis* remains to be tested,[988] the ARIO Commentaries having left the matter of the status of rules of the organisation open.[989] Careful consideration is to be given not only to the ILC's work on the ARIO and comments such as those of the UN cited above,[990] but also to the ILC's work on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,'[991] and scholarship on the matter.[992]

3.4.3.2.3 Scope of application

Zwanenburg concluded that

> 'the limitations in resolution 52/247 only apply to peace operations that operate with the consent of the host state. This is not stated in the resolution itself, but follows from the justification given by the UN for the limitations, namely that the host state has expressly or implicitly agreed to the deployment of a peacekeeping operation in its territory. Consequently, the limitations do not apply to so-called "peace-enforcement" operations.'[993]

It is true that the 1997 Report states:

> 'The limitation on the liability of the Organization as a means of allocating the risks of peacekeeping operations between the United Nations and host States is premised on the assumption that consensual

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[987] UN Doc. A/CN.4/637/Add.1 (2011), at 35 (fn. omitted, underlining added).
[988] Bodeau-Livinec challenged the qualification of the UN Liability Rules as *lex specialis* in the sense of Article 64 of the ARIO ('Ainsi qu'en témoigne l'exemple de la résolution 52/247, par laquelle l'Assemblée générale a entendu apporter des limitations temporelles et financières à la responsabilité des Nations Unies, l'invocation d'une *lex specialis* s'avère d'un maniement peu aisé en pratique. Pour neutraliser les effets du cadre général, encore faudrait-il que le régime de responsabilité invoqué soit, notamment, opposable à ceux qu'il vise. De ce point de vue, la résolution 52/247 apparaît moins comme une veritable *lex specialis* que comme une simple pétition de principe.'). P. Bodeau-Livinec, 'Les Faux-semblants de la lex specialis—l'exemple de la résolution 52/247 de l'Assemblée générale des Nations Unies sur les limitations temporelles et financières de la responsabilité de I'ONU', (2013) 46 *Revue Belge de Droit International* 117, at 117. See also Klein (2016), at 1028, who refers to the aforementioned publication by Bodeau-Livinec.
[989] Thus, for example, the ILC Commentaries stated concerning the existence of a breach of an international obligation pursuant to in the context of Art. 10 of the ARIO: 'Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present draft articles, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from the rules of the organization, paragraph 2 does not attempt to express a clear-cut view on the issue'. ARIO Commentaries, Art. 10, at 98, para. 7 (emphasis added).
[990] Together with other relevant provisions under the ARIO, including notably Art. 32 ('Relevance of the rules of the organization') and Art. 67 ('Charter of the United Nations').
[991] See, e.g., UN Doc. A/CN.4/L.702 (2006).
[992] See, e.g., B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', (2006) 17 *European Journal of International Law* 483.
[993] Zwanenburg (2008), at 35 (emphasis added).

> peacekeeping operations are conducted for the benefit of the country in whose territory they are deployed'.[994]

However, its precursor, the 1996 Report, stated:

> 'In view of the fact that such damage has occurred both in traditional peacekeeping operations (the so-called "Chapter VI" operations) and in enforcement actions conducted under Chapter VII of the Charter, the approach of the present study to the question of United Nations third-party liability cuts across the peacekeeping/peace-enforcement divide. It distinguishes instead between the tortious liability of the Organization for damage caused in the ordinary operation of the force regardless of the type of operation and its liability for combat-related damage whether in the course of a Chapter VII operation or in a peacekeeping operation where force has been used in self-defence'.[995]

To cut across the divide between peacekeeping and peace-enforcement operations avoids complexities associated with the notion of 'consent'. UNPROFOR, which Schmalenbach considered a peace-enforcement operation,[996] illustrates such complexities.[997] Gray concluded:

> 'The early problems in securing the consent of the "concerned parties" to the deployment of UNPROFOR in Yugoslavia were ominous, and the Secretary-General's fears that the force would not be able to operate effectively without the cooperation of all those involved proved prophetic. The initial consent to the establishment of UNPROFOR was grudgingly given by some of the parties, and the formal consent of the host-state governments, even though accompanied by consent to the details of the initial mandate of UNPROFOR, was not sufficient to guarantee cooperation. The lack of active support for UNPROFOR on the ground was made manifest when host-state governments were reluctant to conclude SOFAs to protect the forces' rights and freedom of movement.'[998]

The UNSC eventually resorted to Chapter VII of the UN Charter, among other things, to secure cooperation with UNPROFOR. According to Gray:

> 'This sequence of events not only shows the practical problems encountered by the U.N. peacekeeping forces in Yugoslavia with regard to consent, it also vividly illustrates the complexity and multifaceted nature of the concept of consent in the context of peacekeeping.'[999]

It may be that 'consent' similarly is an unworkable criterion for determining the application of the UN Liability Rules. This might explain the 1996 Report's aforementioned proposal to cut across the peacekeeping-peace-enforcement divide and suggests that the UNGA used the term 'UN peacekeeping

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[994] 1997 Report, para. 12 (emphasis added).
[995] 1996 Report, para. 4 (emphasis added).
[996] Schmalenbach (2006), at 48.
[997] By way of background, UNPROFOR was replaced by the United Nations Confidence Restoration Operation in Croatia (UNCRO) and the United Nations Preventive Deployment Force (UNPREDEP) in the Republic of Macedonia, <peacekeeping.un.org/en/past-peacekeeping-operations> accessed 21 December 2021. It is the financing of, amongst others, these operations that gave rise to the 1996 Report and the 1997 Report. As to UNCRO, Croatia consented to its deployment to a degree, see C. Gray, 'Host-State Consent and United Nations Peacekeeping in Yugoslavia', (1996) 7 *Duke Journal of Comparative & International Law* 241, at 270. As to UNPREDEP, its mandate has been extended at the request of the Republic of Macedonia. S.T. Ostrowski, 'Preventive Deployment of Troops as Preventive Measures: Macedonia and Beyond', (1998) 30 *New York University Journal of International Law & Politics* 793, at 817.
[998] Gray (1996), at 270.
[999] Ibid.

operations' in UNGA resolution 52/247 (1998) in a general sense. That is, the UNGA intended it to apply to UN operations irrespective of the particular type of operation and the extent of consent.

Indeed, that seems to be the case in practice, as the experience with the claims review board set up by UNMIK seems to underscore. According to Schmalenbach, 'the liability rules applied by the UNMIK claims review board appear to be derived from the well-established liability practice in the course of peacekeeping missions.'[1000] UNMIK is a 'territorial administration,' as opposed to a peacekeeping (or peace-enforcement) operation. In its resolution establishing UNMIK, the UNSC welcomed that the FRY accepted the principles and other required elements for a political solution for the Kosovo crisis, including the deployment of UNMIK.[1001] Yet, the resolution was adopted under Chapter VII of the UN Charter and it 'demands the full cooperation of the Federal Republic of Yugoslavia in [the] rapid implementation' of said principles and elements'.[1002] The UNSC is unlikely to have done so if the FRY had unequivocally consented to the deployment of UNMIK.

However, if host state consent is not legally relevant for the application of the UN Liability Rules, their underlying premise—that the host state shares in the liability of the UN towards third-party claimants—is problematic.

Shared liability?

The above-cited passage in the 1997 Report that led Zwanenburg to conclude that the UN Liability Rules apply only to consensual operations reads in full:

> 'The limitation on the liability of the Organization as a means of allocating the risks of peacekeeping operations between the United Nations and host States is premised on the assumption that consensual peacekeeping operations are conducted for the benefit of the country in whose territory they are deployed, and that having expressly or implicitly agreed to the deployment of a peacekeeping operation in its territory, the host country must be deemed to bear the risk of the operation and assume, in part at least, liability for damage arising from such an operation.'[1003]

It may appear reasonable to expect the host state to share that liability as the UN operation is deployed for its benefit. However, the premise of shared liability seems flawed for several reasons. Leaving aside that host state consent arguably is not required, even if the state consents, it may not be prepared to share in the UN's liability.

The 1997 Report merely postulates the premise of shared liability. That premise does not appear to have been operationalized, for example, by obliging the host state to share liability under the SOFA. Any

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[1000] Schmalenbach (2006), at 47.
[1001] S/RES/1244 (1999), para. 2.
[1002] Ibid. (emphasis in original).
[1003] 1997 Report, para. 12 (emphasis added).

obligation to share liability with the UN towards private parties may depend on national law.[1004] Furthermore, the question would arise as to how to determine the respective share of the UN and the host state.

In the end, even if a host state were legally obliged to pay supplemental compensation, and if the UN and the state came to an arrangement on their respective shares, it may well be illusory for a private claimant to receive such compensation. This is because UN operations typically take place in underdeveloped or failed states that are unlikely to have the necessary funds.[1005]

3.4.3.2.4 Observations on implementation

The UNGA endorsed the proposals for implementing the principles of limitations on the liability of the UN.[1006] The 1997 Report envisaged three levels of legislative action. The first level is an UNGA resolution on the basis of Article 17 UN Charter. According to the 1997 Report: 'A General Assembly resolution stipulating the temporal and financial limitations is necessary to give the Organization the legislative authority for limiting its liability vis-à-vis Member States.'[1007] That is UNGA resolution 52/247 (1997).

The second level is a liability clause in the relevant status of forces agreement with the host state which 'would set out the principles of the limitations and incorporate them in the agreement by reference to the General Assembly resolution limiting the Organization's liability'.[1008] According to the 1997 Report, such a clause

> 'would ensure that in the relationship between the Organization and the host country, the temporal and financial limitations on the liability of the Organization would be binding within the territory of the host State on the basis of its express consent.'[1009]

As explained by Schmalenbach: 'The limitation of UN liability is part of all SOFAs/SOMAs concluded after 1998'.[1010] Even so, however, the issue is whether the liability clause would have the intended effect, that is, whether it is 'binding within the territory of the host state'.[1011] The direct application of

[1004] Cf. Zwanenburg (2008), at 35 ('There is no obligation on the host state to compensate individuals, unless this is part of that state's domestic law.').
[1005] Ibid.
[1006] UN Doc. A/RES/52/247 (1998), para. 3.
[1007] 1997 Report, para. 39.
[1008] Ibid., para. 40.
[1009] Ibid.
[1010] Schmalenbach (2016), para. 82. However, it is conceivable that there is no such agreement, for example, in the case of a 'failed state'.
[1011] 1997 Report, para. 40.

international law within the domestic legal order of a state, and its relationship to domestic law, depends on the particular legal system of the state in point.

This is perhaps all academic in light of the third level of implementation referred to in the 1997 Report. That is:

> 'Temporal and financial limitations along the lines adopted by the General Assembly should also be included in the terms of reference of the local claims review boards as a basis for their jurisdiction. As such they would be binding upon any potential claimant who would choose to institute proceedings before such boards.'[1012]

The UNGA specifically requested the UNSG to ensure that the limitations on liability are included in the terms of reference of the local review boards and that they rely on those limitations 'as a basis for their jurisdiction and recommendations for compensation for third-party claims against the organization resulting from its peacekeeping operations.'[1013] Indeed, the claimant is faced with a *fait accompli*. According to Schmalenbach:

> 'For individual complainants, the liability limitation is of no direct legal effect; it merely forestalls the compensation offer made by the local claims review board. However, when assessing the limited offer the aggrieved person has to take into consideration that the standing claims commission will apply the resolution as it is integrated into the SOFA/SOMA dispute settlement clauses. In the unlikely case that outside of the SOFA/SOMA dispute settlement clause an ad hoc arbitral tribunal is established to adjudicate a case, the financial limitation will certainly be introduced by the UN in the *compromis* to be negotiated with the claimant.'[1014]

3.4.3.2.5 Observations on the content of the UN Liability Rules

Origin and development

As to the origins of the UN Liability Rules, they appear to be based on, as Schmalenbach explained, 'general provisions on national law of torts and on local provisions of the host states. The former are mainly deduced from Anglo-American law of tort. The latter are limited to issues concerning the amount of compensation.'[1015]

The UN Liability Rules developed in the practice of the UN. Having initially served as guidance for the UN in settlement negotiations,[1016] the UNGA promulgated them in UNGA resolution 52/247 (1998).

[1012] Ibid., para. 41.
[1013] UN Doc. A/RES/52/247 (1998), para. 13.
[1014] Schmalenbach (2016), para. 83 (fn. omitted).
[1015] Schmalenbach (2006), at 43 (fns. omitted).
[1016] Ibid.

The UN Liability Rules evidence a development anticipated by Jenks in exploring, as far back as 1962, the 'proper law of international organisations'.[1017] Jenks highlighted the need for 'an approach to the problem of the law governing the legal transactions of international organisations'.[1018] That law 'may not be limited to a choice between different systems of municipal law but may provide for the application of rules of an international character, including the domestic law of an international organisation.'[1019]

The UN Liability Rules are succinct and rudimentary. They are primarily of a 'secondary nature' insofar as they concern the consequences of liability (financial limitations) and its implementation (temporal limitations), and exempt liability in the case of operational/military necessity. Certain aspects are implied; for example, the obligation of the UN to pay compensation where it is liable. Substantive (or 'primary') rules may also be implied. For example, for the UN to incur liability for personal injury and death implies that the UN is bound to observe the rights to health and life. Similarly, liability for property loss or damage implies that the UN is bound to respect property rights. Other issues, however, remain unclear. For example, as to the definition of 'personal property', does it exclude intangible property/economic rights? And, regarding compensation for loss or damage to personal property, when can it be said that damage is 'arising from the activities of the operation or in connection with the performance of official duties by its members'?[1020]

If the UN Liability Rules are to develop into a liability regime proper, they are in need of clarification and development through consistent interpretation and application, just as domestic tort law regimes develop through regulation, jurisprudence and scholarship. From the perspective of the rule of law, as understood by the UN, that development is required to foster legal certainty.[1021]

The process of developing the UN Liability Rules ought to further the *sui generis* nature of these rules.[1022] The *sui generis* nature of the rules is amplified by an underlying policy objective to *standardize* the legal regime governing the UN's third-party liability. That objective is clearly expressed in the 1997

[1017] C.W. Jenks, *The Proper Law of International Organisations* (1962).
[1018] Ibid., at xxxi.
[1019] Ibid. (emphasis added).
[1020] UN Doc. A/52/RES/247 (1998), para. 11(a) (emphasis added).
[1021] UN Doc. S/2004/616 (2004), para. 6 (referring to 'measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' [emphasis added]).
[1022] Local rules are relevant insofar as the actual amount of compensation payable for injury, illness or death 'is to be determined by reference to local compensation standards. UN Doc. A/RES/52/247 (1998), para. 9(d). The only other reference to local standards is: 'Compensation for non-consensual use of premises shall either: (i) be calculated on the basis of the fair rental value, determined on the basis of the local rental market prices that prevailed prior to the deployment of the peacekeeping operation as established by the United Nations pre-mission technical survey team'. Ibid., para. 10(a) (emphasis added).

Report, which states the following regarding the compensable types of personal injury, death and illness in the context of peacekeeping operations:

> 'In the practice of peacekeeping operations, compensation payable to third-party claimants for personal injury is based on the types of injury and loss compensable under local law and the prevailing practice in the mission area, in particular, as well as on the past practice of the Organization. In the view of the Secretary-General, a list of compensable types of personal injury or loss should now be established on a global basis regardless of the place where the act causing the injury or loss took place. Such an approach would be simple to implement and create the least disparities among claimants worldwide. It is also the approach adopted in Headquarters regulation No. 4 limiting the liability of the Organization in respect of compensation for injury or loss occurring in the United Nations Headquarters district in New York and by the United Nations Compensation Commission.'[1023]

Thus, with respect to *compensable types of damages*, the objective is for claimants with claims arising in the *same context*, that is, peacekeeping operations, across the world to be treated alike.

In doing so, the UN Liability Rules standardize the treatment of claims arising in certain *different contexts*. Thus, said *types of compensable injury and loss* under the UN Liability Rules regarding injury, illness or death in peacekeeping operations are based, amongst others, on Headquarters Regulation No. 4, concerning the tort liability of the UN within its headquarters district (i.e. an area including and surrounding the UN building in New York).[1024]

Moreover, in establishing *maximum amounts of compensation* for third party claimants, the UN Liability Rules draw on such amounts applicable to claimants that are 'associated' with the organisation, as opposed to third parties proper, who are external to it. That is, regarding such maximum amounts, the 1997 Report drew on the 'Notes for guidance of military/police observers on assignment' and the 'Rules governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations (Rules Governing Compensation to Members of Commissions)',[1025] whilst the 1997 Report also referenced the 'Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations', which apply to UN staff.[1026]

Such members, observers and staff consent to perform official duties on behalf of the UN and are in that sense 'associated' with the organisation. Conversely, third parties proper have no such relationship with

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[1023] 1997 Report, para. 24 (fns. omitted, emphasis added).
[1024] Ibid., para. 25. Other sources are the criteria developed by the UN Compensation Commission as well as the practice of UN peacekeeping operations. Non-economic loss and punitive or moral damages are excluded, as are homemaker services and legal expenses. Ibid., para. 26. The exclusion of the last-mentioned services and expenses contrasts with Headquarters Regulation No. 4.
[1025] UN Doc. ST/SGB/103/Rev.1 (1980). These rules are in turn 'based on those governing compensation for staff members for service-incurred death, injury or illness as set out in ST/SGB/Staff Rules/Appendix D/Rev.1 (1966) and Amend.1 (January 1976).' See 1995 Report, fn. 6.
[1026] 1997 Report, para. 27, fn. 13.

the organisation. Yet, the rules applicable to such associated persons lay the foundation for the UN Liability Rules, applicable to third parties proper, thus 'externalising' the application of the former rules.[1027]

A further example of this process of 'externalisation' concerns the temporal limitations under the UN Liability Rules. In that regard, the proposals contained in the 1997 Report drew inspiration from the Rules Governing Compensation to Members of Commissions and the 'Notes for guidance of military/police observers on assignment'.[1028]

Liability 'exemptions'

As seen, there are two liability exemptions in the practice of the UN: military necessity and operational necessity. Regarding the former, according to the 1996 Report, the liability of the UN 'would be entailed if the damage was caused in violation of international humanitarian law rules and could not be justified on grounds of "military necessity".'[1029] While the UNGA did not endorse the concept as a liability exemption in UNGA resolution 52/247 (1998),[1030] it has been applied in UN practice, as explained by Schmalenbach, 'for example, in the ONUC claims settlement'.[1031]

Military necessity reflects a fundamental principle of international humanitarian law. As Hayashi warns, the principle

> 'may appear straightforward and easily grasped; yet few concepts so fundamental to warfare and its regulation are more elusive. It is prone to misunderstanding, manipulation and invocation at cross-purposes.'[1032]

According to Hayashi, most commentators consider that military necessity only has a role to play where rules of international humanitarian law state so *explicitly*.[1033] An example is Article 53 of Convention

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[1027] Conversely, the UNSG did not deem it fit to apply the maximum compensation standards set out in UN Doc. ST/AI/149/Rev.4 (1993) on compensation for loss of or damage to personal effects attributable to service (usually incorporated by reference in the 'Notes for guidance of military/police observers on assignment' issued for a particular peacekeeping operation) to compensation for personal property of third parties. 1997 Report, para. 36.
[1028] 1997 Report, para. 19.
[1029] 1996 Report, para. 16. It is referred to twice more: in para. 36, in connection with the ONUC settlement, and in fns. 5 and 8.
[1030] Nonetheless, according to Schmalenbach: 'Since 1998, the operational necessity principle has been incorporated in all SOFAs/SOMAs, which include military necessity considerations'. Schmalenbach (2016), para. 79.
[1031] Ibid.
[1032] N. Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law', (2010) 28 *Boston University International Law Journal* 39, at 41.
[1033] Ibid., at 55 and literature cited in fn. 54. Hence, according to Hayashi, military necessity comes into play as exceptional clauses to principal international humanitarian law rules where such rules envisage such clauses 'expressly and in advance.' Ibid., at 139. Hayashi develops a four-pronged cumulative test of what he terms 'exceptional military necessity': 'that the measure was taken primarily for the attainment of some specific military

(IV) relative to the Protection of Civilian Persons in Time of War ('Geneva Convention (IV)') (emphasis added):[1034]

> 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.'

This suggests that military necessity operates at the level of *primary rules*: it is prohibited to destroy property, pursuant to Article 53 of Geneva Convention (IV), except where such destruction is 'required by military necessity'. Likewise, ILC Special Rapporteur Crawford stated with respect to military necessity:

> 'That doctrine "appears in the first place as the underlying criterion for a whole series of substantive rules of the law of war and neutrality", and not in the confined context of necessity as a circumstance precluding wrongfulness. As to the question whether military necessity is an excuse for non-compliance with international humanitarian law, the answer is clearly that it cannot be: "even in regard to obligations of humanitarian law which are not obligations of *jus cogens* ... to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with" the relevant conventions: necessity is thus excluded by the terms of the very obligation itself. Although no specific conclusion is reached, the commentary by implication denies any separate existence to a doctrine of "military necessity".'[1035]

Conversely, it seems that in the practice of the UN, the notion of military necessity did develop as a circumstance precluding wrongfulness. This is suggested by the above-quote passage from the 1996 Report.[1036] This is reinforced by a footnote to the 1996 Report, according to which

> 'the concept of "operational necessity" as used herein has been developed in the practice of United Nations operations. It is distinguishable from the concept of "military necessity", which is limited to combat operations and is governed by the laws of war. Both concepts are, however, conceptually similar in that they serve as an exemption from liability, or a legitimization of an act that would otherwise be considered unlawful.'[1037]

ILC Special Rapporteur Gaja indeed referred to the notions of military and operational necessity in the practice of the UN in the context of 'necessity', as a 'circumstance precluding wrongfulness' under

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purpose, that the measure was required for the purpose's attainment, that the purpose was in conformity with international humanitarian law, and that the measure itself was also otherwise in conformity with the law.' Ibid.

[1034] 75 UNTS 287.

[1035] A/CN.4/498/Add.2, Addendum (1999), para. 280.

[1036] 1996 Report, para. 16. The exemption from liability in the case of military necessary under the ONUC settlement is referred in ibid., para. 36. The UNOC settlements excluded claims for damages 'which were found to be solely due to military operations or military necessity'. See letter of UNSG to the Permanent Representative of the USSR, reproduced in 1967 Study, para. 56. See also 1996 Report, fn. 8. As seen, in discussing the 1996 Report, the ACABQ recalled that 'the concept of "operational necessity" . . . has been formally presented in a document for the first time, although it has already been applied in the practice of Claim Review Boards as an exception from liability.' UN Doc. A/51/491 (1996), para. 8.

[1037] 1996 Report, para. 13, fn. 5 (emphasis added).

Article 25 of the ARIO.[1038] Rather than extinguishing an international obligation, such circumstances justify or excuse non-performance.[1039]

The end result may be the same: the UN does not incur responsibility. But the notion of military necessity has developed out of sync with international law. That is, the UN applies a *sui generis* concept that originates from international law, but is distinct from it. That is to be borne in mind in interpreting and applying the notion of military necessity in practice.

The notion of operational necessity is 'conceptually similar' to that of military necessity.[1040] Having developed in practice,[1041] the notion was described in the 1996 Report, which set forth the circumstances under which it applies as an exemption from liability. This involves a cumulative four-pronged test. As parallel notions, the rationale of operational necessity may be understood with reference to the rationale of military necessity. The rationale of the latter arises in the context of international humanitarian law. That body of law 'has been developed with a view to striking a realistic balance between military necessity and humanitarian considerations whenever they collide.'[1042] Similarly, operational necessity reflects the public interest in international organisations carrying out non-combat operations. Provided the cumulative four-pronged test is met, that interest outweighs private property interests. Where operational necessity applies, the organisation is exempt from liability and compensation.

According to Schmalenbach,

> 'the legal justification of an act on the grounds of its operational and military necessity can be said to be a general principle of international liability law, because this principle has been pleaded as a defense with impressive consistency by international organizations with military operations such as NATO, OAS, and the UN in order to ward off claims for damages.'[1043]

Indeed, the consistent interpretation and development of these liability exemptions, and the UN Liability Rules generally, in view of their *sui generis* nature, is of significant importance to ensure legal certainty.

[1038] G. Gaja, Fourth Report on Responsibility of International Organizations, UN Doc. A/CN.4/564 (2006), para. 37.
[1039] ARIO Commentaries, at 109, para. 1 (preceding Art. 20). Thus, for example, the ICJ stated that 'the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.' *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Merits, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at 40, para. 51 (emphasis added).
[1040] 1996 Report, para. 13, fn. 5 (emphasis added).
[1041] Ibid., para. 15.
[1042] Hayashi (2010), at 50.
[1043] Schmalenbach (2006), at 51. See also ibid., at 44.

Substantive remedies

The UN Liability Rules do not stipulate the substantive remedies applicable in case the UN is liable towards third parties. However, the financial limitations necessarily imply that compensation is due. As Schmalenbach concluded,

> 'on account of the widespread compensation practice by international organizations with military operations, that the principal obligation to compensate harmful acts attributable to the relevant organization – provided that the facts of the case fulfill certain conditions – is a general principle of liability law of international organizations. The refusal to pay compensation to individuals unlawfully damaged through negligence or intent would therefore constitute a violation of international law.'[1044]

The position of OLA is that the UN's internal financial organisation has no bearing on its liability. That is,

> 'the fact that funds have not been appropriated to pay legal obligations is not an excuse for failing to pay these obligations. This has been recognised in two advisory opinions of the International Court of Justice and it follows from general principles of law.'[1045]

In its advisory opinion *Effect of Awards*, the ICJ held that

> 'the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements.'[1046]

In its subsequent Advisory Opinion in *Certain Expenses of the United Nations*, the ICJ cited that finding and added:

> 'Similarly, obligations of the Organization may be incurred by the Secretary-General, acting on the authority of the Security Council or of the General Assembly, and the General Assembly "has no alternative but to honour these engagements".'[1047]

Thus, according to OLA: 'If for some reason a legal liability arising under a contract or other agreement exceeds the amount that the General Assembly has appropriated for that contract, additional funding would have to be obtained'.[1048]

[1044] Ibid., at 51.
[1045] 2001 OLA Memorandum to the Controller, para. 16. Likewise, ARIO Commentaries, Art. 31, at 122, para. 4.
[1046] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,* Advisory Opinion of 13 July 1954, [1954] ICJ Rep. 47 (*Effect of Awards*), at 59.
[1047] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ. Rep. 151 (*Certain Expenses*), at 169.
[1048] 2001 OLA Memorandum to the Controller, para. 14.

The remedial scope of the UN Liability Rules is limited in two respects. First, as seen, these rules limit both the type of compensable damages and the amount of compensation payable to third parties. Second, they do not foresee (or imply) any consequences of liability other than payment of compensation.

Insofar as one can generalize, these limitations seem to contrast with domestic laws. That is, domestic laws may provide for *full* reparation and they may provide remedies other than compensation. Thus, according to one author, seemingly with reference to Anglo-American law: 'The point of tort damages is to compensate, to restore the *status quo ante*, to make the plaintiff whole.'[1049] The same may be said to be the case under Dutch, Belgian, German and, indeed, English law.[1050] As to remedial relief other than compensation, restitution is a case in point. Dutch law, whilst awarding primacy to pecuniary compensation,[1051] confers the right to restitution, for example, in the case of undue payment ('onverschuldigde betaling').[1052] Furthermore, as a parallel to 'cessation' under general international law, a claimant may be able to obtain injunctive relief under domestic law.[1053]

The Legal Complaint in *Georges et al.* before the US courts may reflect the type of damages available under domestic law in the United States. That is, the claimants sought

> 'declaratory relief, and . . . actual, injunctive, compensatory and punitive damages to remedy the injuries sustained by the Plaintiffs and the Class, including remediation of Haiti's waterways and provision of adequate sanitation to Plaintiffs and Class members in amounts to be determined at trial, including $2.2 billion that the Haitian government requires to eradicate cholera.'[1054]

Such claims would have little prospect of success under the UN Liability Rules. For one, those rules explicitly exclude punitive damages.[1055]

Conversely, compared to applicable international law, the remedies under the UN Liability Rules are rather more extensive. It is true that the scope of remedies under international law is *generally* broad.

[1049] J.C. Goldberg, 'The Conceptions of Tort Damages: Fair v. Full Compensation', (2006) 55 *De Paul Law Review* 435, at 435.
[1050] S.D. Lindenbergh, *Schadevergoeding: Algemeen, Deel 1* (2020), Nr. 7. ('In dat verband pleegt als doel van schadevergoeding te worden genoemd het goedmaken van de schade . . . In ons omringende landen is dat niet anders.' With references to Dutch law, as well as Belgian, German and English law).
[1051] Cf. Art. 6:103 of the Dutch Civil Code ('Schadevergoeding wordt voldaan in geld. Tekst kan de rechter op vordering van de benadeelde schadevergoeding in andere vorm dan betaling van een geldsom toekennen. Wordt niet binnen redelijke termijn aan een zodanige uitspraak voldaan, dan herkrijgt de benadeelde zijn bevoegdheid om schadevergoeding in geld te verlangen.'). For the position under English law, see, e.g., G. Virgo, *The Principles of the Law of Restitution* (2006).
[1052] Art. 6:203 of the Dutch Civil Code.
[1053] On the role of injunction in English, French and German tort law, see, e.g., W.H. Van Boom, 'Comparative Notes on Injunction and Wrongful Risk-Taking', (2010) 17 *Maastricht Journal of European and Comparative Law* 10.
[1054] *Georges et al. v. United Nations et al.*, United States District Court, Southern District of New York, 9 October 2013, Legal complaint, prayer for relief.
[1055] UN Doc. A/RES/52/247 (1998), para. 9(b).

The ASR and the ARIO reflect that an internationally wrongful act has two 'general consequences':[1056] cessation (Article 30 of the ASR and the ARIO) and reparation (Article 31 of the ASR and the ARIO).

Article 31 of the ARIO provides:

> '1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.'

According to Article 34 of the ARIO: 'Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.'

The authority often cited in connection with 'full reparation' is the *Factory at Chorzów* case in which the Permanent Court of International Justice formulated the obligation to 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[1057] Article 35 of the ARIO affirms the primacy of restitution as a matter of legal principle. Under Article 36 of the ARIO:

> '1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.'[1058]

In general, there is therefore a broad pallet of remedies under international law. However, the scope of application of these remedies under the ARIO does *not* include the relationship between private parties and international organizations. And, the right to a remedy under international law has not developed to the point of granting substantive remedies to private. The implication, therefore, is that in (implicitly) granting compensation to private parties where the UN is liable towards them, the UN Liability Rules go beyond applicable international law.

Temporal limitations

Under the UN Liability Rules, claims arising in the context of peacekeeping operations must be submitted within six months of sustaining, or discovering, the damage, loss or injury, and in any event

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[1056] ASR Commentaries, Art. 30, at 89, para. 4.
[1057] *Factory at Chorzów*, Merits, Judgment of 13 September 1928, Rep. PCIJ Series A No. 17, at 47.
[1058] The ILC commented in the context of the ASR that restitution is 'frequently unavailable or inadequate'. ASR Commentaries, at 99, para. 3. And, '[o]f the various forms of reparation, compensation is perhaps the most commonly sought in international practice.' Ibid, at 99, para. 2.

within a year of the termination of the mandate of the operation. The 1997 Report explained the considerations underlying these temporal limitations:

> 'A temporal limitation on the submission of claims against the Organization is designed to ensure that third-party claims are submitted within a reasonable period of time and before witnesses and evidence disappear and memories fade. It is also intended to free the Organization from unknown and possibly large financial liabilities for past operations which could otherwise be asserted against the Organization at any time in the future. Furthermore, in many peacekeeping operations of limited duration, the Organization withdraws from the area when the mandate of the operation ends. This means that the United Nations personnel with knowledge of the circumstances of claims arising in the area are dispersed to other posts in the Organization or leave the Organization altogether. As a consequence, unless the Organization is given timely notice of a claim, its ability to investigate the claim and defend itself is severely restricted
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> . . . At the same time, any temporal limitation must be of a reasonable duration so as not to unduly deprive claimants of their right to seek compensation in the event they suffer injury or loss in situations which entail the liability of the Organization.'[1059]

The temporal limitations are cast in terms of jurisdiction *ratione temporis* of claims review boards. Claims filed out of time are inadmissible (or, in UN terminology: 'not receivable'). The policy reasons underlying such periods under domestic law include legal certainty and the availability of evidence. Such reasons are amplified by the operational challenges facing a UN peacekeeping operation, as highlighted in the aforementioned excerpt from the 1997 Report.

As such, temporal limitations may therefore be reasonable. The question, however, is whether the period of *six months* is reasonable. By comparison, under domestic laws, prescription periods typically are several years. For example, under Article 3:310 of the Dutch Civil Code, the prescription period for compensation claims for damages is five years. As seen, the temporal limitations are based on rules applicable between the UN and those internal to the organization.[1060] As a result of their 'consensual' relationship, such persons are likely to have taken note of the applicable periods and they may have been well aware of, and have easy access to, claims settlement procedures. The same cannot necessarily be said of third non-state parties that did not enter into a consensual relationship with the UN.[1061] The six-month period may indeed be overly short, which underscores the importance of the discretionary power to accept, in exceptional circumstances, the consideration of claims submitted at a later date.[1062]

[1059] 1997 Report, paras. 15-16.
[1060] 1997 Report, para. 19, took note of the 'Notes for guidance of military/police observers on assignment', as well as the 'Rules Governing Compensation to Members of Commissions', UN Doc. ST/SGB/103/Rev.1. (1980).
[1061] Likewise, Ferstman (2019), at 60-61.
[1062] 1997 Report, para. 20; UN Doc. A/RES/247 (2008), para. 8. One exceptional circumstance is the one described in para. 20 of the 1997 Report, concerning claims arising during the wind-up period of the operation.

3.4.3.3 Interim conclusions

The phrase ‘appropriate modes of settlement’ under Section 29 may be interpreted to amount to settlement processes to resolve disputes between the UN and third parties. In light of the international organisations law framework governing third party remedies, to qualify as ‘appropriate’, such processes arguably must: (i) conform to the essence of Article 14 of the ICCPR; (ii) not expose the UN to national court jurisdiction by undermining its immunity from jurisdiction; and (iii) not be unduly burdensome for either the UN or the claimants (so as to render dispute settlement ‘illusory’ for claimants).

The UN’s practice in implementing Section 29 of the General Convention is fragmented—there is a wide variety of disparate modes of settlement under Section 29 of the General Convention. Concretely, the UN, like other international organisations, pursues the amicable settlement of third-party disputes as a matter of course. Whilst that may be good practice in general, a circumscribed process would benefit good faith and timely negotiations.

Arbitration is a key dispute settlement technique resorted to by the UN, as well as other international organisations, and indeed in international practice generally. However, two distinct challenges arise. First, arbitration under the UNCITRAL Arbitration Rules is not necessarily an ‘appropriate’ mode of settlement insofar as, in reality, it may be overly burdensome, particularly for private claimants.

The second challenge concerns the perceived neutrality of arbitration, being a private and consensual form of dispute settlement, as a principal advantage over domestic litigation. Indeed, because of its perceived neutrality, arbitration is an attractive alternative to domestic litigation for international organisations. However, arbitration is subject to the supervision of national courts, which is aimed to ensure the arbitration’s effectiveness and fairness. The link between arbitration and national courts is notably established through the ‘place of arbitration’, as per Article 18 of the UNCITRAL Arbitration Rules.

The problem is that national courts may abuse of their arbitral supervisory powers in a variety of ways. This may amount to interference in the independent functioning of international organisations. Therefore, in addition to potentially declining to agree on a place of arbitration, international organisations may reserve their privileges and immunities in connection with arbitrations. This unsettles the arbitration, it being unclear whether the court will uphold the immunity. The result is unsatisfactory either way. Where the court accepts the international organisation’s immunity, the potential for abuse is removed, but the arbitration is not ‘anchored’ and lacks the necessary safeguards for the claimant and international organisation alike. Where, conversely, the court rejects the jurisdictional immunity, the international organisation’s independence is at risk due to the potential for interference.

In arbitration generally, attempts to remove national courts from the arbitration process, that is, by 'de-nationalising' arbitration, have not been successful. But, the objective of arbitration without national court involvement *has* been successfully pursued in another context: the protection of foreign investment under the ICSID Convention. This multilateral treaty provides for properly 'internationalised' arbitration that is 'self-contained', that is, separate from domestic jurisdictions. The ICSID Convention provides a useful model for re-designing an alternative arbitration regime for purposes of implementing Section 29 of the General Convention.

Claims review boards, like the Tort Claims Board for the UN headquarters district,[1063] do not meet the core requirements of independence and impartiality under Article 14 of the ICCPR. This is because they are composed of UN representatives. The Award Review Board for procurement-related challenges suffers the same fate as it has mere advisory powers. Claims review boards (as well as the Tort Claims Board) are elements of a broader settlement process. In addition to settlement discussions, that process was designed to include standing claims commissions. However, no such commission has ever been established, their legal framework being peculiar and problematic in several respects.

Thus, for example, the standing claims commission's jurisdiction over disputes of a 'private law character' with third-parties excludes disputes arising from 'operational necessity'. This, while in resolution 52/247 (1998), the UNGA recognised 'operational necessity' as a *substantive* exemption from liability. Furthermore, in tasking the commission to determine its own procedures, the MINUSTAH SOFA does not require compliance with fundamental requirements like independence and impartiality under Article 14 of the ICCPR, though that is common in arbitration. And, the quorum requirement of two commission members 'for all purposes' risks side-lining the third member, thus undermining the commission's integrity.

Most significantly, the procedure for the commission' establishment is incomplete. This is because of the absence of a default appointment procedure for the members to be appointed by the UN and the host state, respectively. Thus, in the matter of the Haiti cholera epidemic, the UN rejected the establishment of a standing claims commission on the basis that, in its view, the dispute lacked a private law character as a consequence of which the claims were not 'receivable'. The outcome with respect to the claims against UNMIK regarding the Kosovo lead poisoning was the same—the claims were rejected on the basis that they were not 'receivable', apparently without a claims commission having been established.

In the case of a lump-sum arrangement, a state espouses third-party claims of its nationals against the UN, by way of diplomatic protection. In such a case, the UN incurs international responsibility towards

[1063] Subject to its continued existence (see above).

the state of nationality. The ONUC settlement, which dates back to the 1960s, is the only known example of this kind. The 1996 Report's proposal to revive this technique received no follow-up. The ONUC settlement exemplified the complexities surrounding diplomatic protection. Coupled with the advent of human rights over time, as witnessed also, for example, in the area of foreign investment, diplomatic protection is unlikely to be an 'appropriate' mode of settlement under Section 29 of the General Convention today, if it ever was.

As to the UN waiving its immunity from jurisdiction, it may do so in the case of traffic accidents involving UN vehicles. However, such waiver is governed by Article II of the General Convention; it does not qualify as a 'mode of settlement' under Article VIII, Section 29 of the General Convention. Lastly, as to arrangements whereby recipient states of operational activities for development agree to indemnify the UN and hold it harmless, it is not clear what 'modes of settlement' apply in the event of a dispute with the UN.

The appropriateness of modes of settlement is moreover impacted by the rules governing dispute settlement and the remedies available thereunder. The UN Liability Rules, promulgated in UNGA resolution 52/247 (1998), are an important component of the UN's nascent liability regime. However, they give rise to several legal questions, and require clarification and development through consistent interpretation and application.

As to the adoption of the UN Liability Rules, the UNGA's power to approve the budget under Article 17 of the UN Charter arguably encompasses the power to limit liability. The power to do so may also be implicit in that provision under the doctrine of 'implied powers'. As to the legal nature of the UN Liability Rules, whilst they fit the definition of 'rules of the organization' under the ARIO, their international law status remains resolved, as does their relationship to general international law.

As to the scope of application of the UN Liability Rules, in practice they apply irrespective of the consent of the host state, that is, they apply both in peacekeeping and peace-enforcement operations, as well in regard to UNMIK as Kosovo's (temporary) interim administration. But if host state consent is not relevant, a problem arises with respect to the premise underlying the UN Liability Rules, namely that the host state shares in the UN's third-party liability. That premise is flawed if only because it has not been operationalised and states are indeed unlikely to share in the UN's third-party liability. Further, the UN Liability Rules have been implemented in modern-day SOFAs. These rules are binding on claimants insofar as their inclusion in the terms of reference of local claims review boards presents them with a *fait accompli*.

In terms of substance, the UN Liability Rules are succinct and encompass a developing liability system. These rules are primarily of a 'secondary nature' insofar as they concern the consequences of liability

(financial limitations) and its implementation (temporal limitations), and exclude liability in the case of operational (and military) necessity. The nature of the liability regime developing on the basis of the UN Liability Rules is *sui generis*. Underlying this regime is a policy objective to standardize rules governing the third-party liability of the UN, whilst drawing on rules applicable to persons associated with the organisation.

As to exemptions from liability, whilst the doctrine of military necessity is not part of the UN Liability Rules as promulgated in UNGA resolution 52/247 (1998), it seems to form part of UN practice. The doctrine has developed as a 'secondary rule' of international law (namely as a circumstance precluding wrongfulness), whereas under (general) international law it is considered in terms of 'primary rules'. This underscores the *sui generis* character of military necessity as a liability exemption. Operational necessity, which was endorsed as an exception to liability in the aforementioned resolution, is 'conceptually similar' to military necessity. It embodies the public interest in the achievement of the goals of the international organization in non-combat situations. Where the cumulative four-pronged test set forth in the 1996 Report is met, that interest outweighs private property interests. The UN Liability Rules' *sui generis* nature underscores the need for consistent interpretation and application.

As to substantive remedies under the UN Liability Rules, their remedial scope is limited in two respects. First, as seen, these rules limit both the type of compensable damages and the amount of compensation payable to third parties. Second, they do not foresee (or imply) any consequences of liability other than the payment of compensation. As such, they are more limited than domestic law, but more extensive than applicable (general) international law. The temporal limitations under the UN Liability Rules operate as prescription periods. As such, they serve a legitimate purpose, but the six-month period seems to be overly short. This underscores the importance of the discretionary power to extend the period where warranted.

3.5 Conclusions

This chapter examined the first research question of this study: how to interpret Section 29(a) of the General Convention and assess its implementation by the UN in light of the international organisation law framework governing third-party remedies and against the broader backdrop of the rule of law?

The UN is significantly exposed to a variety of third-party claims as a result of its many and diverse operations across the world. In dealing with such claims, and whilst the primary focus of the member states seems to be on curbing expenses, the UN's implementation of Section 29(a) of the General Convention has largely developed in practice. Various complexities arise in interpreting Section 29(a) of the General Convention, not least as the provision lacks specificity.

This chapter set out to discuss the binding nature of the General Convention for the UN. It concluded that failure on the part of the UN to implement Section 29 of the General Convention has no bearing on its entitlement to immunity from jurisdiction. In particular, the UN's immunity from jurisdiction is not conditional on its implementation of that provision.

Next followed an overview of the UN's practice in implementing Section 29 of the General Convention on the basis of available information. That practice can be gleaned from a variety of documents; the 1995 Report remains the most comprehensive document to date.

The discussion of Section 29(a) of the General Convention that followed began with general observations. Notably, the question arises as to *who* determines the legal character of third-party claims. In reality, it is the UN that does so unilaterally, thereby effectively controlling its own accountability. This is at odds with core notions of justice and the rule of law (and arguably Article 14 of the ICCPR), which are central to the UN's very purposes and operations, and which it has embraced.

The discussion then addressed the main elements of Section 29(a) of the General Convention: 'private law character' and 'appropriate modes of settlement'. As to the former, the interpretation of the term 'private law character' is particularly complex. From the perspective of the travaux préparatoires, the UN's categorical exclusion of disputes based on 'political or policy-related grievances' appears problematic, as does its characterisation of the dispute in connection with the Haiti cholera epidemic.

As to the latter, for 'modes of settlement' to qualify as 'appropriate', they arguably must comply with (the essence of) Article 14 of the ICCPR. Furthermore, they must neither expose the UN to national court jurisdiction by undermining its immunity from jurisdiction, nor be unduly burdensome, particularly for private claimants. Considered in light of these requirements, the various modes of settlement to which the UN resorts in practice give rise to various problems.

The UN's implementation of Section 29(a) of the General Convention is due to be revised if it is to amount to, in the words of the UN Legal Counsel in the ICJ advisory proceedings in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, a 'complete remedy system to private parties' in accordance with present-day requirements. Whilst the broad variety of modes of settlement currently resorted to bear little resemblance to a 'system', the main problems with the implementation of Section 29(a) identified in this chapter may be summarised as follows:

1. Only disputes of a 'private law character' qualify for dispute settlement under Section 29. That triggering criterion is complex and illusive. Arguably the single biggest challenge with the current implementation of Section 29, as illustrated in the disputes in connection with the

Kosovo lead poisoning and the Haiti cholera epidemic, is that the UN itself determines whether a dispute has a 'private law character'. In doing so, the UN in effect controls its own accountability;

2. Standing claims commissions for peacekeeping operations are hardly appropriate modes of settlement if only because they have never been established. Their legal framework, notably regarding their establishment, is peculiar and problematic in several respects. Furthermore, the UN Liability Rules, promulgated in UNGA resolution 52/247 (1998), are an important component of the UN's liability regime. However, they give rise to several legal questions and require clarification and development through consistent interpretation and application; and
3. Arbitration under the UNCITRAL Arbitration Rules is not necessarily an 'appropriate' mode of settlement. In reality, arbitration under those rules may be overly burdensome, particularly for private claimants. More fundamentally, arbitration is subject to the supervisory oversight by national courts. That risks undermining the independence of international organisations;

To solve these problems properly, a structural revision of the implementation of Section 29(a) of the General Convention is required, as discussed in chapter 5 of this study. Such a revision is warranted if Section 29 is to operate as the counterpart to the UN's jurisdictional immunity. The premise underlying that idea is that jurisdictional immunity is effective in shielding international organisations against third-party claims before domestic courts. That premise, first of all, remains to be verified.