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The Haiti Cholera case – Limits to the Immunity of the United Nations from Domestic Jurisdiction?

Abstract

Die zunehmenden Aktivitäten der Vereinten Nationen (VN), insbesondere im Bereich der Friedenssicherung, sind eine Herausforderung für die Balance zwischen individuellem Rechtsschutz und funktioneller Immunität der VN wie sie im Übereinkommen über die Vorrechte und Immunitäten der VN von 1946 und im Völkergewohnheitsrecht niedergelegt sind. Am Beispiel der Cholera-Krise in Haiti wird das Für und Wider einer Aufhebung der Immunität der VN abgewogen. Hierbei werden Entwicklungen in der Rechtsprechung nationaler und internationaler Gerichte sowie Argumentationslinien aus dem Recht der Staatenimmunität einbezogen. Der folgende Beitrag kommt zu dem Schluss, dass eine Aufhebung der Immunität der VN durch staatliche Gerichte in der Abwesenheit eines alternativen Streitbelegungsmechanismus gerechtfertigt ist.

The every expanding activities of the United Nations (UN), especially its peace-keeping missions, challenge the equilibrium of access to justice and the UN's functional immunity as recognized under the Convention on the Privileges and Immunities of the United Nations and customary international law. Using the Haiti Cholera case as a case study, this article discusses why the UN's immunity may or may not prevail. Taking into account the case-law of national and international courts and analogous developments in the law of State immunity, this article concludes that national courts may lift the UN's immunity if the the UN fails to provide for an alternative dispute settlement mechanism.

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I. The Haiti Cholera case

The Republic of Haiti had not encountered a single case of cholera for over a century until a cholera epidemic broke out in late 2010.[1] As of October 8, 2013, the epidemic killed over 8,300 Haitians.[2] Several forensic studies, including one established under the auspices of the United Nations (UN) Secretary-General, have found the culprit bacteria as an Asian strain that was brought to Haiti by Nepalese members of the UN Stabilization Mission in Haiti (MINUSTAH).[3]

On November 3, 2011, the Institute for Justice and Democracy in Haiti (IJDH), a Boston-based group, filed a complaint on behalf of over 5,000 plaintiffs.[4] The complaint demanded compensation of $50,000 and $100,000 for injured and deceased persons respectively based on Art. 54 of the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti (SOFA Agreement). No standing claims commission under paragraph 55 of the SOFA Agreement has been established.[5]

On February 21, 2013, the UN rejected the claim, arguing that the consideration of these claims would include a review of political and policy matters and is thereby not receivable pursuant to Art. 29 of the Convention on the Privileges and Immunities of the United Nations (CPIUN).[6]

The plaintiffs challenged this in another letter to the UN, dated May 7, 2013.[7] After the UN did not change its position, the IJDH filed suit on October 9, 2013 in the US District Court, Southern District of New York.[8]

For the purpose of this paper, I will treat the available evidence as clear and convincing. Furthermore, I will assume that the UN is responsible for the cholera crisis.

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[1] *Doyle*, Haiti cholera epidemic 'most likely' started at UN camp - top scientist, online: http://www.bbc.co.uk.
[2] *Gladstone*, Rights Advocates Suing U.N. Over the Spread of Cholera in Haiti, online: http://www.nytimes.com.
[3] *Ibid.*
[4] *Institute for Justice and Democracy in Haiti*, Petition for Relief, online: http://ijdh.org.
[5] *Ibid*, para. 5.
[6] *O'Brien*, Letter to Mr Brian Concannon, online: http://opiniojuris.org.
[7] *Institute for Justice and Democracy in Haiti*, Cholera Victims' Response to UN Letter, online: http://www.ijdh.org.
[8] *Institute for Justice and Democracy in Haiti*, Class Action Complaint, online: http://www.ijdh.org.

II. Introduction

The *Haiti Cholera* case challenges the legal principles on UN immunity. Because the UN has grown from a small organization to an ever expanding body with numerous and wide-ranging tasks, its impact on human rights becomes more apparent. As the international protection of human rights progressed during the latter half of the 20th century, the immunity of the UN may become a gross denial of justice to victims.

This article explores possible limits to the immunity of the UN and their legality under international law. Part III describes the underlying rationale of UN immunity. Part IV outlines the legal framework of UN immunity. Part V surveys the application of the legal framework in judicial practice before assessing the legality of the denial of immunity of the UN under international law in Part VI. and concluding the topic in Part VII.

III. The Rationale of the Immunity of the UN

To analyze the rationale of the immunity of the UN is to explore theoretical limits of its immunity. Because the rationale derives from the nature of international organizations, this paper will endeavor a brief comparison of the nature of States and international organizations and the resulting rationales of their immunity. It will then deal with the related question about the relevance of considerations of both immunity regimes to each other.

1. The Different Nature of States and International Organizations

The *ICJ* described the fundamental differences between States and the UN as follows:

> Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.[9]

Because States are sovereign,[10] their powers are, in principle, absolute. Conversely, the powers of international organizations are limited.[11] While territory

[9] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174 (180).
[10] Art. 2 para. 1 UN Charter.
[11] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996, 66 (78).

is a precondition for statehood,[12] international organizations function in the territory of States.

The different characteristics of States and international organizations warrant a different approach to their immunities. The rationale of the law of State immunity, based upon the sovereign equality of States, is that an equal cannot have jurisdiction over an equal.[13] Because international organizations are not sovereign, the law of State immunity is, without further justification, inapplicable to the UN. Accordingly, a different rationale is needed.

2. The Functional Immunity of the UN

The *Modus Vivendi* between the League of Nations and the Swiss government stipulated immunities based on an analogy to States.[14] As such, it could only be sued in Swiss Courts with its express consent.[15] Although domestic courts occasionally refer to the "sovereign powers" of international organizations,[16] Arts 104 and 105 of the Charter abandoned this concept with the notion of functional necessity being the theoretical basis for the immunities of the UN.[17] Functional necessity is based on the idea that international organizations are entitled to such immunities which are necessary for the exercise of their functions in the fulfillment of their purposes.[18] The functional necessity thesis has several shortcomings as well.

In judicial practice, the functional necessity doctrine leads to absolute immunity.[19] This holds especially true for the UN. The *ICJ* acknowledged the broad purposes of the UN.[20] Consequently, if an action is appropriate to fulfill purposes of the UN Charter, this action is presumed not to be *ultra vires* the Charter.[21] Given the UN's broad mandate under the Charter and slight prospect of

[12] Art. 1 Convention on the Rights and Duties of States.
[13] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ Reports 2012, 99 (161) (separate opinion of Judge Keith).
[14] *Miller*, The Privileges and Immunities of the United Nations, International Organizations Law Review 6 (2009), 7 (10-11).
[15] *Ibid*, 11.
[16] *Food and Agriculture Organization v INPDAI*, ILR 87, 1 (8) (Court of Cassation 1982) (Italy).
[17] *Miller* (note), 19.
[18] *Klabbers*, An Introduction to International Institutional Law, 2nd ed. (2009), p. 148.
[19] *Company Baumeister Ing Richard L v O*, ILDC 362, para. 12 (Supreme Court of Justice 2004) (Austria).
[20] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, ICJ Reports 1962, 151 (168).
[21] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, ICJ Reports 1962, 151 (168).

ultra vires action,[22] it will rarely be deemed not immune under the functional necessity doctrine.

Furthermore, the functional necessity doctrine of UN immunity is elusive and has different, sometimes contradictory implications for different judges and States.[23] This is because determination of the functional needs of an international organization is in the eye of the beholder.[24]

3. The Applicability of State Immunity Considerations to UN Immunity

Although the law of State and UN immunity rests on different rationales, it is possible that considerations in one field are irrelevant to the other field. Judges[25] and courts[26] regularly apply considerations of the law of State immunity to the immunity of international organizations and *vice versa*. Applying these considerations by analogy is not automatic, but depends on the strength of the argument.

IV. The Legal Framework for the Immunity of the UN

1. Immunity from Legal Process

Having developed the theoretical premise of UN immunity, it is necessary to determine the basis for the UN immunity from legal process under international law. Under Art. 38 para. 1 ICJ Statute, treaties and customary international law may form the basis of the immunity of the UN. Because treaty law and customary international law on UN immunity are not necessarily identical, a distinct analysis is required to resolve possible conflicts under Art. 31 para. 3 lit. c VCLT.

a) Treaties

There are two treaties governing the immunity of the UN under international law: the UN Charter and CPIUN.

Under Art. 105 para. 1 UN Charter, the UN shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

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[22] *Miller* (note), 19-20.
[23] *Reinisch*, International Organizations before National Courts, 2000, p. 206, 331.
[24] *Klabbers* (note), p. 149.
[25] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ Reports 2012, 99 (298-299) (dissenting opinion of Judge Yusuf).
[26] *Stichting Mothers of Srebrenica and others v the Netherlands*, 11.6.2013, No. 65542/12, para. 158.

Art. 105 para. 3 UN Charter authorizes the General Assembly to propose conventions determining the details of Art. 105 para. 1 UN Charter. The General Convention sets the legal framework for those details. Under Art. 2 CPIUN, the UN, its property and assets shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.

The differences between the two instruments are apparent: whereas Art. 105 para. 1 UN Charter links the immunity to the fulfillment of the organization's purposes, Art. 2 CPIUN dictates "immunity from every form of legal process".

Their different wording raises the issue whether Art. 2 CPIUN expands the immunity compared to Art.105 para. 1 UN Charter.[27] The UN has taken the position that Art. 2 CPIUN defines the meaning of Art. 105 para. 1 UN Charter.[28] It argued that the CPIUN does not expand the obligations under the UN Charter, but rather particularizes them.[29] This argument is persuasive: under Art. 31 para. 3 lit. a VCLT, the CPIUN is a subsequent agreement on the application of Art. 105 para. 1 UN Charter. Accordingly, both treaties must be interpreted in light of each other.

Paras 3, 4 and 15 SOFA Agreement adopt the privileges under the General Convention and extend them to MINUSTAH.

b) Customary International Law

Contrary to a treaty-based immunity claim, the customary international law on the immunities of international organizations, and the UN in particular, is less settled. Contrary to the law of State immunity, the law on the immunities of international organizations did not develop historically through the practice of national courts, but through host agreements and rules in the constituent treaties.[30] Nonetheless, the immunities of international organizations, and the UN in particular, have a second basis in customary international law.

[27] *Brockman-Hawe*, Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation, Washington Global Studies Law Review 10 (2011), 727 (735).
[28] *United Nations*, Amicus Curiae Brief in *Broadbent v Organization of American States*, UNJYB 1980, 227 (232).
[29] *Ibid*, 231.
[30] *Möldner*, International Organizations or Institutions, Privileges and Immunities, in: Wolfrum, MPEPIL, 2014, para. 11.

Settled State practice and *opinio juris* are required to establish a customary international law rule.[31] As stated by the *ICJ* in the *Continental Shelf* case, treaties may form evidence of State practice.[32]

The Dutch Supreme Court in *Iran-United States Claims Tribunal v AS* is one of the rare examples of State practice that deals with an international organization's immunity in the absence of a treaty.[33] Iran and the US concluded a treaty, establishing the *Iran-US Claims Tribunal* in The Hague with the consent of the Dutch government; a treaty between the three States conferring privileges and immunities was not concluded.[34] The Supreme Court inferred a rule of "unwritten international law" from the general State practice in the form of agreements with host States of international organizations.[35] An international organization is immune from jurisdiction if it acts within the scope of the performance of its task with an exception made for certain forms of extra-contractual liability.[36] Interestingly, the Supreme Court linked the grant of immunity with imposing an obligation upon the international organization to provide for arbitration in contracts.[37]

The *Restatement* also takes the position that international organizations enjoy immunity from domestic legal process of a Member State as is necessary for the fulfillment of the purposes of the organization.[38]

The Italian Supreme Court of Cassation seems to take the contrary position.[39] However, the Court rather rejected to expand the law of State immunity to

[31] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, ICJ Reports 1969, 3 (44).
[32] *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, ICJ Reports 1985, 13 (29-30).
[33] *Iran-United States Claims Tribunal v AS*, ILR 94, 327 (Supreme Court 1985) (Netherlands).
[34] *Iran-United States Claims Tribunal v AS*, ILR 94, 327 (Supreme Court 1985) (Netherlands).
[35] *Iran-United States Claims Tribunal v AS*, ILR 94, 327 (329) (Supreme Court 1985) (Netherlands).
[36] *Iran-United States Claims Tribunal v AS*, ILR 94, 327 (329) (Supreme Court 1985) (Netherlands).
[37] *Iran-United States Claims Tribunal v AS*, ILR 94, 327 (329) (Supreme Court 1985) (Netherlands).
[38] *American Law Institute*, Restatement (Third) of the Foreign Relations Law of the United States, 1987, para. 467(a).
[39] *Pistelli v European University Institute*, ILDC 297, para. 9 (Supreme Court of Cassation 2005) (Italy).

international organizations and turned to the headquarters agreement for the basis of immunity.[40]

Judicial decisions on the immunity of international organizations under customary international law are scarce because this law did not develop through domestic court decisions but through treaties. However, these treaties are State practice and, as the Dutch Supreme Court shows, States feel compelled to grant immunities to international organizations even in the absence of agreements. It follows that the immunity of the UN is grounded in customary international law as well.

2. The Obligation to Provide for Modes of Settlement of Disputes

To counter the immunity of the UN, Art. 29 lit. a CPIUN requires the UN to make provisions for appropriate modes of dispute settlement for contractual or private law disputes to which the UN is a party. For employment disputes, the *ICJ* grounded this obligation in the UN Charter itself, noting that a failure to provide dispute settlement mechanisms would prove inconsistent with the express aim of the UN Charter to promote freedom and justice for individuals.[41]

In the Haitian context, Art. 55 SOFA Agreement foresees a standing claims commission. The UN did not constitute this commission in Haiti.

The obligation under Art. 29 CPIUN and under Art. 55 SOFA Agreement is reinforced by a customary obligation to provide remedies for human rights violations. Since international organizations are subjects of international law, they are bound by any obligation under general international law.[42]

The Dutch Supreme Court held that the right to access an independent and impartial tribunal is a rule of customary international law.[43] This rule is embodied in Art. 6 ECHR and Art. 14 ICCPR. Because multilateral conventions are important in recording and defining customary international law,[44] and given that the ICCPR has 167 State parties, the conclusion by the Dutch Supreme Court is persuasive.

[40] *Pistelli v European University Institute*, ILDC 297, para. 9 (Supreme Court of Cassation 2005) (Italy).
[41] *Effect of Awards of Compensation Made by the UN Administrative Tribunal*, ICJ Reports 1953, 47 (57).
[42] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, 73 (89-90).
[43] *Stichting Mothers of Srebrenica and ors v Netherlands and United Nations*, ILDC 1760, para. 4.3.1 (Supreme Court 2012) (Netherlands).
[44] *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, ICJ Reports 1985, 13 (29-30).

The *International Criminal Tribunal for the former Yugoslavia* (*ICTY)* reinforces this conclusion. It referred to Art. 14 ICCPR as reflecting an "imperative norm of international law", thereby feeling obliged to adhere to Art. 14 ICCPR.[45]

Consequently, the UN is bound by a customary obligation to provide a remedy for individuals.

3. Remedies in Case of Violation of Art. 29 CPIUN

The UN immunity regime should work smoothly and be able to achieve both its fundamental aims. Member States recognize UN immunity in domestic law-suits against the UN, securing the institution's independence and preventing States from unduly influencing the UN through their domestic courts. Moreover, the UN provides alternative dispute settlement mechanisms, securing human rights by providing a remedy and preventing the UN from deciding in its own cause.

The problem is: what if the UN fails to provide an adequate alternative dispute settlement mechanism?

a) Art. 30 CPIUN

Art. 30 CPIUN provides that if a difference arises between the UN and a Member, a request shall be made for an advisory opinion that shall be accepted as decisive by the parties on any legal question involved in accordance with Art. 96 UN Charter and Art. 65 ICJ Statute.

This rule allows for dispute settlement between the UN and a Member State. Since Art. 34 ICJ Statute limits the jurisdiction *rationae personae* to States, an advisory opinion shall be requested. Albeit not legally binding under the ICJ Statute, the CPIUN indirectly gives them legally binding effect.

Art. 30 CPIUN is good policy. Instead of leaving the interpretation of the CPIUN to domestic courts, it authorizes the *ICJ* to solve disputes. It must be a dispute between a Member State and the UN. If there is a dispute between individuals and the UN and the home State is unwilling or unable to advance the cause of individuals, Art. 30 CPIUN is inapplicable.

b) Intervention in the Competent Political Organs

Should the UN violate its obligation to provide for alternative modes of dispute settlement, a Member State can intervene in the competent political organs. The UN itself has foreseen this avenue to hold the UN accountable.[46]

[45] *Prosecutor v Tadic*, 27.2.2001, No. IT-94-1-A-AR77, p. 3.

Individuals seeking relief are beholden to a State's willingness to intervene, given the potential for vast political cost. This holds true for Haiti since the 2010 earthquake is dependent upon the UN.

c) The Denial of Immunity by Domestic Courts

Individuals seeking relief in the absence of a State willing to intervene politically in the General Assembly or employing Art. 30 CPIUN have a means of last resort: domestic or regional courts.

V. The Application of the Legal Framework in Judicial Practice

This part reviews case law on UN immunity to explore limits of UN immunity. Case law on the immunity of other international organizations is relevant as the immunities of the UN and other international organizations are based on the same legal rationale.

1. The International Court of Justice

In the context of the immunity of UN agents, the *ICJ* announced that if the UN Secretary-General claims immunity, this claim should be given the greatest weight by national courts and can only be set aside for the most compelling reasons.[47] The *ICJ* held Art. 22 lit. b CPIUN to be applicable to Mr. Cumaraswamy, an expert on a special mission.[48]

The language of Art. 22 lit. b CPIUN ("immunity from legal process of every kind") is similar of Art. 2 CPIUN ("immunity from every form of legal process"). The slight difference in wording ("every kind" versus "every form") does not indicate a different meaning. Consequently, this reasoning applies to Art. 2 CPIUN.

Although the *ICJ* accepts only the most compelling reasons for national courts to lift the UN's immunity, it is striking that the *ICJ* accepts that UN immunity has limits. The *ECtHR* interpreted this reasoning as accepting a balancing test.[49]

2. The *ECtHR*

The parallel cases of *Beer and Regan v Germany*[50] and *Waite and Kennedy v Germany*[51] are the starting point for conditioning a legitimate claim to immunity upon

[46] *United Nations* (note), 233.
[47] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* ICJ Reports 1999, 62, (87) – *Cumaraswamy*.
[48] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* ICJ Reports 1999, 62 (86) – *Cumaraswamy*.
[49] *Stichting Mothers of Srebrenica and others v the Netherlands*, 11.6.2013, No. 65542/12, para. 159.

providing an alternative remedy. Both cases were employment disputes with the European Space Agency (ESA).[52] The German labor courts dismissed the lawsuits because of ESA's immunity.[53]

The issue was whether ESA's immunity was compatible with Art. 6 para. 1 ECHR. The *ECtHR* held that the immunity of international organizations is essential to ensure their proper functioning free from unilateral interference by individual governments.[54] Accordingly, the restriction on Art. 6 para. 1 ECHR served a legitimate objective.[55]

In its proportionality analysis, the *ECtHR* stated that "a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."[56] Being satisfied that the applicants had reasonable alternative means, the Court found no violation of Art. 6 para. 1 of the European Convention.[57]

In *Mothers of Srebrenica v the Netherlands*, the *ECtHR* did not apply the *Waite and Kennedy* test.[58] Similar to the *Haiti Cholera* case, the UN failed to establish a claims commission under the SOFA Agreement.[59] The *ECtHR* distinguished this case from *Waite and Kennedy*: whereas *Waite and Kennedy* was an employment dispute, *Mothers of Srebrenica* challenged actions by the UN Security Council under Chapter VII of the UN Charter.[60]

The *ECtHR*'s case law is especially instructive since Art. 6 para. 1 ECHR closely mirrors Art. 14 para. 1 ICCPR. Because Art. 14 para. 1 ICCPR reflects customary international law, it binds the UN. Consequently, customary international law may open the door for domestic courts to deny immunity to the UN for, to paraphrase the *ICJ*, the most compelling reasons.

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[50] *Beer and Regan v Germany* [GC], 18.2.1999, No. 28934/95.
[51] *Waite and Kennedy v Germany* [GC], 18.2.1999, No 26083/94.
[52] *Waite and Kennedy v Germany* [GC], 18.2.1999, No 26083/94, para. 15.
[53] *Waite and Kennedy v Germany* [GC], 18.2.1999, No 26083/94, para. 17.
[54] *Waite and Kennedy v Germany* [GC], 18.2.1999, No 26083/94, para. 63.
[55] *Waite and Kennedy v Germany* [GC], 18.2.1999, No 26083/94, para. 63.
[56] *Waite and Kennedy v Germany* [GC], 18.2.1999, No 26083/94, para. 68.
[57] *Waite and Kennedy v Germany* [GC], 18.2.1999, No 26083/94, paras 73-74.
[58] *Stichting Mothers of Srebrenica and others v the Netherlands*, 11.6.2013, No. 65542/12, para. 169.
[59] *Stichting Mothers of Srebrenica and others v the Netherlands*, 11.6.2013, No. 65542/12, paras 162-163.
[60] *Stichting Mothers of Srebrenica and others v the Netherlands*, 11.6.2013, No. 65542/12, paras 149, 159, 165.

The German Federal Constitutional Court in its *Solange* jurisprudence is the historical antecedent to the *Waite and Kennedy* test.[61] In *Solange I*, it held that it will exercise judicial review over acts of the European Economic Community that are inconsistent with fundamental rights as long as the Community does not guarantee fundamental rights equivalent to those guaranteed by the German constitution.[62] In the case at hand, it found the Community act to be consistent with fundamental rights.[63] As a consequence of that case, the *ECJ* developed fundamental rights, leading the Federal Constitutional Court to conclude in 1987 that it would refrain from exercising judicial review over Community acts as the *ECJ* guaranteed legal protection similar to the German constitution.[64]

3. France

The French Court of Cassation lifted the immunity of the African Development Bank (ADB) in an employment dispute.[65] Although not referring to *Waite and Kennedy*, but rather to international public policy, the absence of an employment tribunal instituted by the ADB was deemed a denial of justice, justifying the denial of immunity.[66]

4. Switzerland

The Swiss courts also apply the *Waite and Kennedy* test under Art. 6 of the European Convention. The Federal Supreme Court had to consider a case in which the plaintiffs, a consortium of construction companies, had entered into contracts with the European Centre for Nuclear Research (CERN), an international organization based in Geneva, Switzerland.[67] Due to a contractual dispute, the consortium demanded arbitral proceedings in accordance with headquarters agreement, but the consortium was not satisfied with the outcome.[68] However, the Federal Supreme Court deemed the recourse to arbitration under the head-

[61] *Reinisch*, Conclusion, in: Reinisch (ed), Challenging Acts of International Organizations Before National Courts, 2010, p. 263-264.
[62] BVerfGE 37, 271 (285) – *Solange I*.
[63] BVerfGE 37, 271 (288) – *Solange I*.
[64] BVerfGE 73, 339 (378) – *Solange II*.
[65] *African Development Bank v Haas*, Journal des tribunaux 2005, 454 (Court of Cassation 2005) (France).
[66] *African Development Bank v Haas*, Journal des tribunaux 2005, 454 (Court of Cassation 2005) (France).
[67] *Consortium X v Switzerland*, ILDC 344, para. A (Federal Supreme Court 2004) (Austria).
[68] *Consortium X v Switzerland*, ILDC 344, para. B (Federal Supreme Court 2004) (Austria).

quarters agreement to be compatible with Art. 6 of the European Convention and the *Waite and Kennedy* test.[69]

5. Belgium

In an early case, the Court of Appeal of Brussels upheld the immunity of the UN in a lawsuit seeking compensation for damage allegedly caused by UN forces in the Congo in 1962.[70] The court rejected the notion that immunity under Art. 2 CPIUN is conditional upon the UN providing an alternative remedy under Art. 29 CPIUN.[71] Being dissatisfied with its conclusion, the court stated that this outcome ran counter to the Universal Declaration of Human Rights (UDHR).[72] This is even more interesting as the court rejected the argument that the UDHR had changed the immunity of the UN as the UDHR was a mere recommendation.[73]

The *Lutchmaya* case, although concerned with an international organization's immunity from execution, is one of the few cases denying immunity by relying on *Waite and Kennedy*.[74] Being satisfied that the African, Caribbean and Pacific Group of States failed to provide a reasonably available remedy, the court rejected the immunity claim.[75]

6. The United States of America

Courts in the United States uphold the UN immunity, interpreting Art. 2 CPIUN to confer *de facto* absolute immunity to the UN.[76]

VI. Is the Denial of Immunity Legal?

Having laid out the framework for UN immunity, it must be answered whether denying immunity to the UN in the absence of an alternative remedy accords with international law.

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[69] *Consortium X v Switzerland*, ILDC 344, para. 4.3.2 (Federal Supreme Court 2004) (Austria)
[70] *M v United Nations and Belgium (Minister for Foreign Affairs)*, ILR 69, 139 (143) (Court of Appeals 1969) (Belgium).
[71] *M v United Nations and Belgium (Minister for Foreign Affairs)*, ILR 69, 139 (142) (Court of Appeals 1969) (Belgium).
[72] *M v United Nations and Belgium (Minister for Foreign Affairs)*, ILR 69, 139 (143) (Court of Appeals 1969) (Belgium).
[73] *M v United Nations and Belgium (Minister for Foreign Affairs)*, ILR 69, 139 (143) (Court of Appeals 1969) (Belgium).
[74] *General Secretariat of the ACP Group v Lutchmaya*, ILDC 1573, para. 39 (Court of Cassation 2009) (Belgium).
[75] *General Secretariat of the ACP Group v Lutchmaya*, ILDC 1573, para. 42 (Court of Cassation 2009) (Belgium).
[76] *Brzak v UN*, 597 F.3d 107 (112) (2nd Cir 2010) (U.S.).

The UN is clear: if it fails to provide an alternative remedy, a Member State can lobby the General Assembly to employ Art. 30 CPIUN or intervene in the competent organs of the UN to protect its citizens.[77] Other ways of redress are prohibited by the CPIUN.[78] The UN seems to argue that the CPIUN is unaffected by general international law and international human rights law.

This resembles a famous statement by the *ICJ* in the *Tehran Hostages* case that diplomatic law forms a "self-contained régime"[79]. The *ICJ* used the term to describe a set of rules where possible violations may only be remedied by the means specified in that set of rules.[80]

The CPIUN cannot be compared to diplomatic law, which has elaborated rules to remedy breaches. Consequently, remedial provisions under general international law apply.

1. Is there a Connection Between Art. 2 and Art. 29 CPIUN?

To lift UN immunity in cases where no alternative remedy exists, there must be a connection between Arts 2 and 29 CPIUN. Indeed, the Belgian Court of Appeals argued that there was no link between the immunity under Art. 2 CPIUN and the UN's compliance with other provisions of the CPIUN, such as Art. 29 CPIUN. Consequently, disrespect for Art. 29 CPIUN could not affect the interpretation of Art. 2 CPIUN.[81]

This interpretation is outdated. The denial of immunity, even if *prima facie* unlawful, could be justified by three rules. First, it could be justified as a countermeasure. Second, the clean hands doctrine could prevent the UN from claiming against the State who breached Art. 2 CPIUN. Third, under Art. 60 VCLTIO, a State could suspend the operation of the CPIUN in relation to the UN because it is a consequence of a material breach of Art. 29 CPIUN. All three rules incorporate the principle that a party cannot demand fulfillment of a contractual relationship when it itself fails to comply with its obligations and upsets the reciprocity of performance and return.[82]

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[77] United Nations (note), 233.
[78] *Ibid.*
[79] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ICJ Reports 1980, 3 (40).
[80] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ICJ Reports 1980, 3 (40).
[81] *M v United Nations and Belgium (Minister for Foreign Affairs)*, ILR 69, 139 (142) (Court of Appeals 1969) (Belgium).
[82] *Cf. Giegerich*, Article 60, in: Dörr & Schmalenbach (eds), Vienna Convention on the Law of Treaties. A Commentary, 2012, para. 1.

As a matter of practicality, this paper proceeds on the basis of the clean hands doctrine. Because the VCLTIO is not yet in force, and countermeasures have been developed in the context of State responsibility and the analogous rules regarding international organizations constitute progressive development,[83] I proceed on the basis of the clean hands doctrine because it is a general principle of international law. Since general international law applies to international organizations,[84] the clean hands doctrine as a principle of general international law applies to international organizations.

If the UN were to complain in a judicial forum against the State who denied immunity in the *Haiti Cholera* case, the State could claim that the UN had unclean hands, thus preventing the UN from claiming against the State.

Fitzmaurice summarized the clean hands doctrine as follows:

> He who comes to equity for relief must come with 'clean hands'. Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it.[85]

The investor-State Tribunal in *Niko Resources (Bangladesh) Ltd. v People's Republic of Bangladesh* extracted three criteria for the clean hands doctrine to apply,[86] relying on the most recent discussion of the clean hands doctrine in *Guyana v Suriname*.[87] First, there must be a continuing breach of an obligation; second, the remedy sought must be against continuance of that breach in the future; and third, there must be a relationship of reciprocity between the obligations concerned.[88]

The denial of immunity by a domestic court could reasonably amount to a continuing breach of Art. 2 CPIUN. If the UN were to seek a remedy in a judicial forum, it would ask against that denial of immunity in the future. The crux lies in the last criterion: there must be a relationship of reciprocity between the

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[83] *International Law Commission*, Report, 66th Sess, UN Doc A/66/10 (2011), p. 69-70, para. 5.
[84] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, 73 (89-90).
[85] *Fitzmaurice*, The General Principles of International Law, RdC 92 (1957), 1 (119).
86 *Niko Resources (Bangladesh) Limited v People's Republic of Bangladesh*, ICSID Case Nos ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19.8.2013, para. 481.
[87] *Guyana v Suriname*, ILR 139, 566 (687-688) (PCA 2007).
[88] *Niko Resources (Bangladesh) Limited v People's Republic of Bangladesh*, ICSID Case Nos ARB/10/11, ARB/10/18, Decision on Jurisdiction, 19.8.2013, para. 481.

State's breach of Art. 2 CPIUN and the UN's failure to implement its obligation under Art. 29 lit. a CPIUN.

First, there is an issue whether the CPIUN creates obligations between the UN and the State parties. Formally, the UN is not a CPIUN party as Art. 31 CPIUN restricts the accession to the CPIUN to members of the UN. The UN is not a member of the UN as only States can be a member of the UN (Art. 4 para. 1 UN Charter). However, Art. 35 CPIUN provides that the CPIUN shall continue in force as between the UN and every Member which has deposited an instrument of accession. This language indicates a relationship of rights and duties between the Member States and the UN under the CPIUN.[89] Accordingly, the CPIUN creates obligations between States parties and the UN.

These obligations must be reciprocal. The UN seemed to accept such a reciprocal relationship between immunity and its obligation to provide an alternative remedy by arguing that Art. 29 lit. a CPIUN is a safeguard to prevent the UN from using its immunity from judicial process as a shield from liability.[90] Scholarly literature conceives Art. 2 and Art. 29 CPIUN as complementary, holding that Art. 29 CPIUN counter-balances the wide-ranging immunity of Art. 2 CPIUN.[91] In the context of the analogous rules of the Specialized Agencies Convention, the High Court for Eastern Denmark also acknowledged the inherent relationship between the two provisions, as it ruled that UNICEF was vested with immunity against the background of the immunity granted under the headquarters agreement and Art. 29 Specialized Agencies Convention.[92] But the most persuasive authority for the notion that Art. 2 and Art. 29 CPIUN are supposed to work together comes from the *ICJ*. Stressing that the question of UN immunity differs from the issue of compensation for any damages, the *ICJ* held that Art. 29 CPIUN implicitly bars national courts from settling claims against the UN.[93]

Both rules are supposed to work together. If one of the obligations is not followed, the conceptual framework of the CPIUN that aims to secure both the independence of the UN and to provide legal protection for individuals is disturbed. The relationship between the obligation imposed on States under Art. 2 CPIUN and the obligation imposed on the UN under Art. 29 CPIUN is recip-

[89] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174 (179).
[90] United Nations (note), 233.
[91] *Miller* (note), 37.
[92] *Investment & Finance Company of 11 January 1984 Limited v UNICEF*, ILDC 64, para. 14 (High Court for Eastern Denmark 1999).
[93] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* ICJ Reports 1999, 62 (88-89).

rocal. The UN could not complain against a breach of Art. 2 CPIUN by a domestic court in a judicial forum as it came with unclean hands by failing to provide an alternative remedy.

2. What is the Result of Balancing Independence and Access to Justice?

In the end, the limits of UN immunity presuppose a balancing between the independence of the UN and the right to access justice. The CPIUN values the independent functioning of the UN. Art. 14 para. 1 ICCPR value the right to access justice. Art. 31 para. 3 lit. c VCLT mandates this balancing.

The law of State immunity provides a valuable analogy. In the beginning, State immunity was absolute.[94] After World War II, State immunity became more and more restricted. Indeed, the commercial activities exception in the law of State immunity is based on those commercial acts not being necessary for the performance of the State's sovereign functions.[95] Similarly, the Austrian Supreme Court in *Dralle v Republic of Czechoslovakia* justified the development of the restrictive theory of State immunity with the expansion of State activity in the 20th century.[96] In a historic perspective, the absolute immunity was justified as a State's commercial activity was presumed to be connected with its political activities; with the State increasingly engaging in commercial competition this presumption no longer held true.[97] Because absolute immunity had lost its foundation, it could no longer be recognized as a rule of international law.[98]

This rationale is instructive for UN immunity. The UN has grown from an organization with very limited activities to a truly universal organization engaging in numerous activities around the globe. Absolute immunity was initially justified in a time when the UN had little legal relationships with individuals and when international human rights law was underdeveloped. However, with its peacekeeping missions growing and its operations becoming more complex, the virtually absolute immunity of the UN may result in a gross denial of justice, especially in tort relationships. This holds especially true in the *Haiti Cholera* case.

A court that denies immunity in circumstances like the *Haiti Cholera* case would surely be blamed for imperiling the independent functioning of the UN from outside interference. However, the purpose of *Waite and Kennedy* is not to dis-

[94] *The Schooner Exchange v M'Faddon,* 11 U.S. 116 (1812).
[95] *Ryngaert*, The Immunity of International Organizations Before Domestic Courts: Recent Trends, International Organizations Law Review 7 (2010), 121 (127).
[96] *Dralle v Republic of Czechoslovakia*, ILR 17, 155 (163) (Supreme Court 1950) (Austria).
[97] *Dralle v Republic of Czechoslovakia*, ILR 17, 155 (163) (Supreme Court 1950) (Austria).
[98] *Dralle v Republic of Czechoslovakia*, ILR 17, 155 (163) (Supreme Court 1950) (Austria).

rupt the UN's independence, but to compel the UN to fulfill its obligation to provide an alternative remedy to individuals. If the UN implements claims commissions that are foreseen in the SOFA Agreement, the issue of lifting the UN's immunity would not arise.

One could argue that the plain words of Art. 2 CPIUN have settled this question. However, the General Convention is not an isolated self-contained régime, but forms part of general international law. This body of law also recognizes a right to access justice. Granting immunity to the UN in the absence of an alternative remedy creates an imbalance between the CPIUN and international human rights law. International law is a unified system of law, not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others.[99] It is exactly the *Waite and Kennedy* test that prevents both the CPIUN and international human rights law from mutual isolation.

Moreover, judicial practice is inconsistent. While some courts uphold the immunity without having regard to equivalent legal protection provided for by the UN, a number of courts have employed the *Waite and Kennedy* test and some have lifted the immunity of international organizations. This is not to say that a court upholding the UN's immunity in the *Haiti Cholera* case would act in violation of international law. Contemporary international law may defy a strictly binary legal code of permission and prohibition, containing different degrees of non-prohibition that range from tolerated to permissible to desirable.[100] A tolerated act may not necessarily mean that it is "legal", but rather that it is "not illegal".[101]

Defying the traditional binary standard of permission and prohibition and employing the modern state of law with different degrees of legality, the denial of UN immunity in the absence of a reasonable alternative may not be legal according to international law. It is rather not illegal and may be tolerated under contemporary international law. The denial of international organizations' immunity by some European courts can be situated exactly under that paradigm. There were no large-scale protests by the concerned Member States to the outcome of these court proceedings. As such, the denial of immunity in the ab-

[99] *Ahmadou Sadio Diallo (Republic of Guniea v Democratic Republic of the Congo), Compensation*, ICJ Reports 2012, 324 (394) (Declaration of Judge Greenwood).
[100] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 403 (478-480) (Declaration of Judge Simma).
[101] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 403 (480-481) (Declaration of Judge Simma).

sence of alternative dispute settlement modes is tolerated under international law.

The last argument against lifting the UN's immunity might be the special status it occupies in the international legal order. It is a virtually universal organization carrying out functions across the globe to maintain international peace and security. It may be different from smaller organizations such as the ACP group or the ADB whose immunities have been denied by European courts. This argument could be based on Art. 103 of the Charter, which specifies that obligations under the UN Charter shall prevail over obligations under other international agreements.[102]

However, both the *ECJ* in its *Kadi* jurisprudence,[103] and a recent judgment of the *ECtHR*[104] ruled that the *Solange* doctrine applies to the UN regardless of Art. 103 UN Charter in cases where the UN itself fails to secure human rights protection as is made clear by Art. 1 para. 3 UN Charter. This is a consequence of the postmodern and pluralist nature of contemporary international law in which overlapping legal orders can no longer be applied on a strictly hierarchical basis.[105] Rather, those overlapping legal orders must respect each other and one order may only intervene if the other fails to provide equal legal protection to its affected subjects.[106]

VII. Conclusion

The immunity of the UN in cases where it has provided an alternative remedy is firmly established. The duty to provide for an alternative remedy is an integral part of the immunity under Art. 105 UN Charter, Art. 2 CPIUN and customary international law as evidenced by Art. 29 CPIUN and a similar obligation under customary international law. If the UN fails to honor this obligation, the *quid pro quo* of the immunity regime is imperiled. This gives a State the authority to induce the UN to comply with its obligation by denying immunity in its domestic courts.

That solution is in accordance with international law. Other rules such as countermeasures, Art. 60 VCLTIO and the clean hands doctrine are, in principle, applicable as the CPIUN is not a self-contained régime. It is justified since the

[102] *Stichting Mothers of Srebrenica and ors v Netherlands and United Nations*, ILDC 1760, para. 4.3.6 (Supreme Court 2012) (Netherlands).
[103] *European Commission and United Kingdom of Great Britain and Northern Ireland v Yassin Abdullah Kadi*, 18.7.2013, Case C-584/10 P, C-593/10 P and C-595/10 P.
[104] *Al-Dulimi and Montana Management Inc. v Switzerland*, 26.11.2013, No. 5809/08.
[105] *Steinbeis*, EMRK kann zum Völkerrechtsbruch zwingen, online: <http://www.verfassungsblog.de>.
[106] *Ibid.*

UN has grown considerably during the last decades. It follows from contemporary international law that defies a traditional binary code and knows numerous value judgments concerning conduct as is shown by a nucleus of State practice that has lifted the immunity of other international organizations. Art. 103 UN Charter may not preclude this holding as both the *ECJ* and *ECtHR* apply the *Solange* doctrine to the Charter. The *Waite and Kennedy* test is the only test that balances the independent functioning of the UN and the right to access an impartial tribunal. A systematic integration of the law of UN immunity and international human rights law mandates this balancing. A domestic court, in the exceptional and rather unusual circumstances of the *Haiti Cholera* case, could therefore deny immunity to the UN without violating international law.