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Who Pays for the United Nations' Torts: Immunity, Attribution, and Appropriate Modes of Settlement

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Who Pays for the United Nations’ Torts?: Immunity, Attribution, and “Appropriate Modes of Settlement”

Patrick J. Lewis†

I. Immunity of the United Nations ................................................ 259
II. Recourse from the United Nations via “Appropriate Modes of Settlement” ................................................. 266
III. Recourse against United Nations Officials in Domestic Courts ................................................................. 274
IV. Recourse against Troop-Contributing Countries in Domestic Courts ............................................................ 283
V. Limiting Immunity Based on the Right of Access to Court ................................................................................ 300
VI. Limiting Immunity Based on the Lack of Functional Necessity .................................................................. 312
VII. Towards Best Practices ................................................................................................................................. 329

I. Immunity of the United Nations

Following the uprising in Libya and Muammar Gaddafi’s subsequent repression of the civilian population, the U.N. Security Council approved the use of “all necessary measures” to protect civilians in Resolution 1973.1 Subsequently, the (then) Libyan Government asked the U.N. Secretary-General to investigate alleged civilian deaths arising from NATO bombings implementing the resolution.2 If such actions were found to violate the laws of war or exceed the Security Council’s authorization for the use of forces in Resolution 1973, who would be responsible? The United Nations has also been accused of causing a cholera outbreak in Haiti, after deploying Nepalese

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peacekeepers without testing all individuals in the unit for cholera. In November 2011, a claim for compensation was brought against the United Nations on behalf of victims. In response, the Secretary-General informed the claimants’ representatives that the claims are not receivable, pursuant to United Nations’ internal dispute settlement procedures. These incidents highlight the relevance of understanding when and how the United Nations is responsible for tortious conduct.

The jurisdictional immunity of foreign states has a long and storied history, with cases dating back to the early nineteenth century. The transition from an absolute to a functional and restrictive approach has been oft discussed. In contrast, the immunity of international organizations and their personnel has followed a “far darker and mysterious path.”

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6 See, e.g., ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 81 (1994) (“There has been a prodigious amount of well-informed writing on all aspects of the topic of [foreign sovereign] immunity.”).


8 See HIGGINS, supra note 6, at 79; see also Robert P. Lewis, Note, Sovereign Immunity and International Organizations: Broadbent v. OAS, 13 J. INT’L L. & ECON. 675, 688 (1979) (stating that, prior to World War II, “the policy of granting foreign sovereigns absolute immunity in national courts was almost universal”).


Nations was founded, a functional concept was adopted with regard to the question of the privileges and immunities that the Organization should enjoy. Article 105, paragraph 1, of the Charter of the United Nations ("Charter"), provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."  

However, this abstract language required more detailed explanation to become workable and to assist U.N. officials, as well as national judges, in determining whether the United Nations should be considered immune from a particular lawsuit. Similarly, it was unclear as to what extent U.N. officials should enjoy privileges and immunities. In Article 105, paragraph 2, the drafters of the Charter again opted for a functional concept by providing: "[r]epresentatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."  

There were few legal instruments that could serve as a model for the immunities envisaged at the time the Charter of the United Nations was adopted.  

of literature on foreign sovereign immunity, leading writers frequently refer to a serious gap in our understanding of international immunities. See Robert Y. Jennings, Foreword to Peter BeKKer, The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities vii (1994) (stating that "the gap in our juridical understanding of international organization is a serious weakness of modern international law"); see also Atkinson v. Inter-American Dev. Bank, 156 F.3d 1335, 1336 (D.C. Cir. 1998) (describing the immunity of international organizations from judicial process as a "little-known" immunity); Higgins, supra note 6, at 94 (concluding that "[m]ore attention should be paid to the immunities of international organizations").

12 U.N Charter art. 105, para. 2.
13 Some earlier international organizations having a political character were granted diplomatic privileges and immunities including the International Commission for the Cape Spartal Light, which was created in 1865 and placed a lighthouse near the Straits of Gibraltar under international administration; the Danube, Congo, and Central Rhine River Commissions conferred diplomatic immunities in 1878, 1885, and 1922 respectively; and international judicial bodies. See David J. Bederman, The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartal, 36
merely provided for "diplomatic immunities" for League officials "engaged on the business of the League" and stated that League property was "inviolable." Only a subsequent agreement with the League's host state, the so-called modus vivendi, stipulated that the League could not "in principle, according to the rules of international law, be sued before the Swiss Courts without its consent." Consequently, the privileges and immunities of international organizations were largely uncharted territory.

It was against this background that the Convention on the Privileges and Immunities of the United Nations ("Convention") was negotiated and adopted, immediately following the establishment of the United Nations. With regard to immunity

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14 League of Nations Covenant art. 7, para. 4. Despite the phrase "when engaged on the business of the League," writers uniformly concluded that the Covenant granted League officials the full range of diplomatic immunities but limited their application to the period of an official's appointment. See Martin Hill, Immunities and Privileges of International Officials 11 (1947); King, supra note 13, at 78; Yuen-Li Liang, The Legal Status of the United Nations in the United States, 2 Int'l L.Q. 577, 584 (1948-49); Tarassenko & Zacklin, Independence of International Civil Servants, in International Administration III 1, 2 (Chris de Cooker ed., 1990) (recounting the French government's decision in 1922 to confer diplomatic immunities on representatives and agents of the Central Rhine Commission); King, supra, at 237 (identifying the Hague Convention for Peaceful Settlement of Disputes of 1899 and 1907 as the first example in which diplomatic privileges and immunities were extended to judges of international tribunals).

15 League of Nations Covenant art. 7, para. 5.


17 Article 105(3) gave the General Assembly the authority to make recommendations or to propose conventions to define the scope of international immunities. This, in effect, gave the member states the opportunity to make collective decisions without "risking litigation to determine whether each measure was "necessary"
from jurisdiction, the Convention states that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case it has expressly waived its immunity." The International Court of Justice ("ICJ") has confirmed that these provisions grant the United Nations full immunity from legal process in national courts for any acts attributable to the organization. The status of officials has been more complicated. The Secretary-General and Assistant Secretaries-General enjoy diplomatic privileges and immunities. Other civilian staff members receive "functional" immunity from legal process limited to "words spoken or written and all acts performed by them in their official capacity." Where peacekeeping forces are working within a "blue-helmet" operation under the command and control of the United Nations, they presumably would be entitled to the immunity protections afforded other U.N. staff. As a practical matter, the Status of Forces Agreement for Peacekeeping Operations ("SOFAs") usually includes absolute immunity protection. These agreements give contributing countries exclusive jurisdiction to try members of their own forces. To remove any


20 Convention, supra note 18, art. 5, § 17.

21 Id. art. 8, § 18.

22 The execution of each of these operations is delegated by the establishing organ, normally the Security Council but sometimes the General Assembly to the Secretary-General. The force itself is made up of military personnel voluntarily provided by member states to the United Nations. This name derives from the blue headgear that is added to the uniforms of members of national contingents when these become parts of a U.N. military force. See Paul Szasz, UN Forces and International Humanitarian Law, 75 Int'l L. Stud. Ser. US Naval War Col. 507, 508-9 (2000).


24 See id.
ambiguity about the status of personnel of the United Nations-authorized NATO Kosovo Force ("KFOR"), the U.N. Interim Mission in Kosovo ("UNMIK"), Regulation 2000/47 explicitly granted the forces absolute immunity.\textsuperscript{25}

The de facto absolute immunity of the United Nations is mitigated by Article VIII, Section 29, of the Convention, which provides that:

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.\textsuperscript{26}

It is clear that the intention of the drafters was for the United Nations to be immune from national jurisdiction, only "in order to avoid litigation in a national court of some other inappropriate forum; but if [it] cannot resolve a dispute, for example with a tort claimant, [it] must offer some other suitable means of settling the matter."\textsuperscript{27} Private law contracts entered into by the United Nations regularly contain arbitration clauses.\textsuperscript{28} Staff disputes within the United Nations are settled by an internal mechanism in the form of the United Nations Dispute Tribunal and United Nations Appeals Tribunal.\textsuperscript{29}

This Article focuses on the thornier situation of tort claims, where \textit{ex ante} the parties cannot agree to arbitrate the dispute, and \textit{ex post} there is often no competent tribunal.\textsuperscript{30} Section II addresses


\textsuperscript{26} Convention, supra note 18, art. 8, § 29.


\textsuperscript{30} It should be noted that in many tort cases the U.N. has provided for arbitration
various methods employed by the United Nations to satisfy its obligation to provide "appropriate modes of settlement." In practice, the systems of reparations currently used have significant drawbacks. This Article then discusses the different avenues by which plaintiffs have sought recovery when they have been unsatisfied by the relief provided (or not provided) by the United Nations.

Section III addresses instances in which plaintiffs have sought recourse against U.N. officials in domestic courts. In this context, the courts have generally upheld immunity, based on either the Convention or domestic implementing legislation. Section IV investigates situations in which plaintiffs have sought recourse against nations whose personnel allegedly committed the tortious conduct while they were members of a U.N. peacekeeping operation. Problematically, various courts have promulgated different interpretations of the "effective control" standard for determining whether an action can be attributed to the troop-contributing country, the United Nations, or both.

Despite the clear language of the Charter and Convention, plaintiffs have argued that domestic courts should set aside the immunity of the United Nations on the basis of the plaintiffs' right to access a court, as exemplified by the U.S. Constitution, the European Convention on Human Rights, or the International Covenant on Civil and Political Rights. Section V considers the worrisome trend of accepting that contention by some European courts. There are also broader attempts to reformulate U.N. immunity so that it parallels restricted state immunity. Even though absolute immunity has been described as an "anachronism," immunity serves a useful and essential purpose, which is often too easily ignored. Section VI outlines how immunity protects the functioning and independence of the United Nations, the lack of familiarity of domestic courts with that


concept, and the failure of domestic courts meaningfully to engage in comparative international law. Section VII concludes that the focus should be on the establishment of effective "appropriate modes of settlement," instead of attempting to formulate inconsistent exceptions to the United Nations' immunity.

II. Recourse from the United Nations via "Appropriate Modes of Settlement"

The Convention requires the United Nations to establish a dispute settlement procedure for tort claims involving the United Nations or U.N. officials (if immunity has not been waived). However, as early as 1966, a Belgium court noted that, although the United Nations had adopted the Universal Declaration of Human Rights, which provides for an individual's right of due process, non-compliance with this obligation does not dilute or repeal the immunity of the United Nations. Additionally, if any dispute should arise over the "appropriate modes of settlement" provided by the United Nations, the only recourse available to an aggrieved party under the Convention is for the U.N. General Assembly or Security Council to request an advisory opinion from the ICJ. This circumstance led the Venice Commission to note bluntly in its Opinion on Human Rights in Kosovo, "[t]here is no international mechanism of review with respect to acts of UNMIK and KFOR."

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32 Anthea Roberts has termed the seeking to identify and interpret international law by engaging in comparative analysis of various domestic court decisions as "comparative international law." See Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, 60 INT'L & COMP. L.Q. 57 (2011).

33 Convention, supra note 18, art. 8, § 29.

34 Tribunale de Première Instance [Civ.] [Tribunal of First Instance] Brussels, May 11, 1966, 45 ILR 1972, 446 (Belg.).

35 Convention, supra note 18, art. 8, § 30. Though the Convention does not specify which legal person may make the request, Mahnoush Arsanjani explains, "[S]tates which may have claims against the U.N. have no direct access to the I.C.J. They must have the General Assembly or the Security Council request an advisory opinion." Mahnoush Arsanjani, Claims Against International Organizations: Quis Custodiet Ipsos Custodies, 7 YALE J. WORLD PUB. ORD. 131, 172 (1981). Even this non-binding system of recourse was challenged by Judge Korma in his dissent from the above-cited ICJ opinion. Cumaraswamy, supra note 19.

36 European Commission for Democracy Through Law (Venice Commission),
General Assembly 1998 Resolution 52/247 sets out temporal and financial limitations applicable to third-party claims against the Organization for personal injury, illness, or death. It also provides limitations for property loss or damage resulting from, or attributable to, the activities of members of peacekeeping operations in the performance of their official duties.\(^{37}\) The temporal limitation for the submission of claims against the United Nations was established as six months from the time of the damage, injury, or loss or from the time it was known by the claimant.\(^{38}\) In any case, the Resolution required that claims be brought no later than one year after the termination of the mandate of the operation.\(^{39}\) Compensation for personal injury, illness, or death was limited to economic loss, measured by local standards, not to exceed $50,000.\(^{40}\) Compensation for property loss or damage was also limited.\(^{41}\)

In the same resolution, the Assembly endorsed the view of the U.N. Secretary-General that liability does not attach to third-party claims resulting from, or attributable to, the activities of members of peacekeeping operations arising from "operational necessity."\(^{42}\) It also endorsed the view of the Secretary-General that the United Nations cannot limit its responsibility when members of a peacekeeping operation, while performing their duties, commit a wrongful act wilfully, or with a criminal intent, or because of gross negligence, as the Organization is justified in seeking recovery from the individual or from the troop-contributing state concerned precisely because of that element of gross fault or wilful or criminal intent.\(^{43}\) SOFAs that came into force following

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\(^{38}\) Id. ¶ 8.

\(^{39}\) Id. ¶ 9.

\(^{40}\) Noneconomic loss such as pain and suffering was excluded. Id.

\(^{41}\) Id. ¶ 10.


\(^{43}\) Id. ¶ 7; see also U.N. Secretary-General, Administrative and Budgetary Aspects
the adoption of Resolution 52/247 include a reference to the resolution and its provisions.44

Pursuant to its obligations under Section 29 of the Convention, the United Nations provides in Article 51 of its 1990 Model Status of Forces Agreement for Peacekeeping Operations ("Model SOFA") that:

[A]ny dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction . . . 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 . . . [A]ll decisions shall require the 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 . . . .45

As the template for individual agreements between the United Nations and the state(s) in which peacekeepers are to be deployed, the Model SOFA outlines the core rights and obligations of peacekeeping forces. However, despite recognizing the Article 51 standing-claims commissions as the only independent avenue for recourse against the United Nations,46 the Secretary-General has repeatedly acknowledged that no such commission has ever been established.47


45 Model SOFA, supra note 23, ¶ 51.


An instructive example is the claims brought on behalf of over 5,000 plaintiffs, filed under the SOFA between the United Nations and Haiti, alleging that the United Nations negligently introduced a cholera epidemic in Haiti. The United Nations rejected the demand, arguing that:

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

Their position appears to be that the dispute is of a public, rather than private law character. Therefore, they are not required to “make provisions for appropriate modes of settlement” under Section 29 of the Convention. However, one of the problems of the distinction between public and private claims is that, due to the “internal, confidential and unilateral” character of the review boards’ procedure, the United Nations has never provided a clear definition of public or private.

The Secretary-General has clarified that claims of a private nature primarily include “claims for compensation submitted by

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50 Convention, supra note 18, art. 8, § 29. The U.N. guide to practice also rejects claims of a public law character, noting that:

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.

Dispute Settlement Report, supra note 28, ¶ 23.

51 Frédéric Mégret, La Responsabilité Des Nations Unies Aux Temps Du Cholera (forthcoming).
third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by members of a United Nations peace-keeping operation within the 'mission area' concerned." In the Haiti cholera claims, many elements of a "dispute of a private law character" would appear to be present. The claim itself was essentially one of tort, the claimants were private individuals, and the remedy sought was monetary compensation. The Human Rights Advisory Panel, established to review human rights violations committed by UNMIK, determined that complaints of human rights violations involving personal injury, illness or death nonetheless constituted dispute of a private law character.\footnote{52}

However, the United Nations' denial appears to be consistent with their previous response to mass tort claims. Claims brought on behalf of some 864 members of the Roma, Ashkali, and Egyptian community in Kosovo, who alleged that they suffered lead poisoning as a result of lead contamination in the Internally Displaced Persons camps in north Mitrovica, were rebuffed. In similar fashion to the Haiti cholera claims, they were informed that compensation was provided 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."\footnote{54} In both instances, the United Nations' determination cannot be appealed and the claimants have no United Nations' claims process to pursue their case.

In the absence of a standing claims commission, those seeking to bring claims against the United Nations for torts associated with peacekeeping operations have been left with highly problematic and inadequate alternative modes of settlement.\footnote{55}

\footnote{52} Dispute Settlement Report, supra note 28, ¶ 15.
\footnote{53} Case No. 26/08 N.M. and Others against UNMIK, Decision of the Human Rights Advisory Panel (Mar. 31, 2010).
\footnote{55} Tom Dannenbaum, Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troops Contingents Serving as United Nations
The first and most common alternative is the internal United Nations "local claims review board," which the Secretary-General has described as leaving "the investigation, processing and final adjudication of the claims entirely in the hands of the Organization." Claims under this procedure are brought to panels of three or more U.N. staff members for disposition. Therefore, the remedy tends to be much more internal and institutionalized than the original claim commission model anticipated.

There are three major flaws with internal claims review boards. First, the power held by the United Nations as adjudicator of the claim is incompatible with a fair process, given its status as one of the parties to the dispute. This led the Venice Commission to demand "a system of independent review of UNMIK and KFOR acts for conformity with international human rights standards to be established as a matter of urgency." The fact that the boards’ rulings are not made public augments this issue. Second, while review boards are designed to be established on the commencement of a peacekeeping operation, in practice they are "set up [by the United Nations] when [it determines that] the need arises." This creates the risk that claimants may be denied a forum when they initially try to bring a claim, with the claimant further reliant on the stronger party from


Shraga, supra note 47 (noting that review boards have been established for almost every peacekeeping operation).

Secretary-General’s 1996 Peacekeeping Budget Report, supra note 42, ¶ 22.


See id. at 263; Arsanjani, supra note 35, at 145.

Venice Commission, supra note 36, ¶ 96.

Mégret, supra note 59, at 262. This lack of transparency has provoked scathing criticism from Kosovo’s Ombudsperson. Ombudsperson Institution in Kosovo, Third Annual Report, addressed to Mr. Michael Steiner, Special Representative of the Secretary-General of the United Nations, 2, UNMIK 17.1 (July 10, 2003).

Secretary-General’s 1996 Peacekeeping Budget Report, supra note 42, ¶ 25.
whom it is seeking reparations. For example, two years after the Security Council authorized UNMIK and KFOR, there were no functioning claims procedures for either body. Third, as the number of claims made against the United Nations has grown over the years, the review boards have, in the words of the Secretary-General, experienced “growing backlogs and longer delays in the settlement of claims,” resulting in “a significant number of claims remaining unresolved at the end of the [review boards’] liquidation period” after the termination of the U.N. mission.

The second alternative to the Article 51 claims commission is a process whereby the United Nations settles the claims en masse through negotiation with the host government, which then distributes the agreed lump sum to individual claimants however it deems equitable. Advantages of the en masse negotiation alternative include efficiency and expediency of settlement, as well as limitation of financial liability. However, there are also serious deficiencies in this approach.

First, an effective remedy depends largely on a host government that has the capacity and nous to pursue a successful negotiation with the United Nations. As the Secretary-General has acknowledged, “[t]he choice of a lump-sum settlement as a mode of handling third-party claims is largely dependent on the State’s willingness to espouse the claims of its nationals.” States hosting peacekeepers may not have institutions ready to launch such a relatively complicated process or simply may have little regard for

64 Dannenbaum, supra note 55, at 127.
65 Ombudsperson Institution in Kosovo, First Annual Report, addressed to Mr. Hans Haekkerup, Special Representative of the Secretary-General of the United Nations, 11, UNMIK 17.1 (July 18, 2001).
67 See id. ¶ 28.
68 See id. ¶ 34.
69 See id.; U.N. Secretary-General, Letter dated Feb. 20, 1965 from the Secretary-General of the United Nations to the Minister for Foreign Affairs for Belgium, Concerning the Settlement of Claims Lodged Against ONUC by Belgian Nationals, Annex 1, at 1, U.N. Doc. S/6597 (Feb. 20, 1965) (stipulating that “[t]he distribution to be made of the sum referred to in the preceding paragraph shall be the responsibility of the Belgian Government”).
70 Secretary-General’s 1996 Peacekeeping Budget Report, supra note 42, ¶ 35.
71 See id. ¶ 37.
the interests of their citizens. Thus, the leading examples of successful en masse claims negotiations are those that were conducted not by host governments but by Belgium, Switzerland, Greece, Luxembourg, and Italy following harms inflicted on their citizens by the United Nations Operation in the Congo ("ONUC") in the 1960s. More typically, Somalia in the 1990s failed in its "responsibility . . . to seek redress [from the United Nations] for the harms suffered by its own citizens . . . [m]ost likely as a result of the lack of an organized government in Mogadishu . . . ."

Second, even when a payment is made, the process is dependent on the government's willingness and capacity to distribute fairly the agreed sums among the individual claimants. This is particularly problematic in post-conflict scenarios where the populace might be divided or unstable.

Partly in response to growing concerns about abuses by U.N. staff and the lack of transparency of U.N. field missions generally, Ombudsperson offices have been the main vehicle established at the mission level to resolve claims of abuse. In recent years, both the Secretary-General and DPKO's Lessons Learned Unit

72 Mégret, supra note 59, at 264.


75 Dannenbaum, supra note 55, at 128.

76 Id.

77 The Lessons Learned Unit in its evaluation of United Nations Operations in Somalia found that the lack of transparency and non-existence of a complaints mechanism led to the perception among the local population that mission personnel were above the law. See Department of Peacekeeping Operations, Comprehensive Report on Lessons Learned from United Nations Operations in Somalia (UNOSOM), April 1992—March 1995, ¶ 57.

78 In a 1999 report, the Secretary-General recommended that the Security Council "[s]upport a public 'ombudsman' within all peacekeeping operations to deal with complaints from the general public." U.N. Secretary-General, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflicts, Recommendation 31, U.N. Doc. S/1999/957 (Sept. 8, 1999).
have consistently recommended the establishment of an Ombudsperson office as an essential part of current and future missions. However, a lack of enforcement power and material support at the mission level has rendered the Ombudsperson an ineffective institution. For example, Kosovo’s Ombudsperson’s powers were essentially limited to making recommendations, including that disciplinary or criminal proceedings be instituted against a person. If these recommendations were ignored without good reason, the office’s only recourse was to “draw the Special Representative of the Secretary-General’s attention to the matter” or make a public statement. The Ombudsperson in East Timor was even more limited in scope and was generally seen as unsuccessful. Given their inability to award compensation for private law claims against the United Nations, the Ombudspersons in Kosovo and East Timor cannot be seen as satisfying the Section 29 obligation for “appropriate modes of settlement.”

III. Recourse against United Nations Officials in Domestic Courts

Whether a U.N. civilian staff member is protected by immunity is likely to hinge on the interpretation of Charter Article 105’s “necessary for the independent exercise of their functions.”
and Convention Section 18’s “in their official capacity.” A broad interpretation would make any activity in the field de facto “official” and offer the most rigorous protection, while a narrow interpretation would provide protection only for those actions that could reasonably be considered “official” or “necessary.”

It is almost certain that the drafters intended the Convention to provide broad protection. The Sixth Committee considered and rejected interpretations of Charter Article 105 that would narrow protections to those actions “indispensable to achieving the organization’s purpose.” The U.N. Office of Legal Affairs (“OLA”) has also rejected an interpretation of the Convention that would deny immunity where staff violated the Standard of Conduct of International Civil Servants by participating in political activity. There is also reason to believe that the ICJ would interpret the Convention’s provisions to provide maximum protection. For example, the Court in Mazilu noted that Article

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85 Convention, supra note 18, art. 5, § 18(a)
86 Rawski, supra note 80, at 111.
87 The most notable being the interpretation of the judge in Donnelly v. Ranollo, a case in the City Court of New Rochelle, New York, predating the Convention. The chauffer of then Secretary-General Trygve Lie was stopped for a speeding violation. Immunity was claimed based on Article 105 of the Charter. The court interpreted the Charter language narrowly and held that immunity should only be granted to personnel “whose activities are such as to be necessary to the actual execution of the purposes and deliberations of the United Nations,” a reading which did not include chauffeurs and household servants at all. Westchester County v. Ranollo, 67 N.Y.S.2d 31, 35 (New Rochelle City Ct. 1946). Notably, the court also cited the fact that while diplomats who claim immunity are subject to trial and punishment in their home country, the United Nations does not have a tribunal to punish its own personnel who are protected by immunity. See id. at 34. The Sixth Committee took the case into account when making recommendations on the draft of the Convention.
89 Applicability of Article VI, Section 22 of Convention on Privileges and
105 of the Charter and Section 22 of the Convention protected all persons “to whom a mission has been entrusted by the Organization” and broadly interpreted the “whole period of such mission[ ]” so that privileges and immunities would apply regardless of “whether or not they travel.” This is consistent with the Court’s conservative approach to diplomatic immunity generally.

While it is clear that the Secretary-General has the sole authority to waive immunity, it is not as clear whether the Secretary-General alone can make the determination of whether immunity initially applies. This was the issue in Cumaraswamy, where defamation suits were brought against the Commission on Human Rights’ Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note confirming that “the words which constitute the basis of plaintiffs’ complaint in this case were spoken by the Special Rapporteur in the course of his mission” and that therefore, with respect to those words, the Special Rapporteur was “immune from legal process.” However, a judge of the Malaysian High Court for Kuala Lumpur concluded that she was “unable to hold that the Defendant is absolutely protected by the immunity he claims,” in part because she considered that the Secretary-General’s note was merely “an opinion” with scant probative value and no binding force upon the court. The Convention states that “all differences arising out of


90 Id., ¶ 52


92 See Cumaraswamy, supra note 19, ¶ 60 (noting that it is up to the Secretary-General “to assess whether its agents acted within the scope of their functions” and then “inform the Government of a member State of his finding” so that the State can act accordingly when such agent’s acts have given rise to court proceedings).

93 Id. ¶ 5.

94 Id. ¶ 6.

the interpretation or application of the present convention shall be referred to the International Court of Justice." Therefore, when further discussions did not produce agreement, the Economic and Social Council, at the request of the Secretary-General, sought an advisory opinion on the matter.

In *Cumaraswamy*, the ICJ stated that the Secretary-General has the right and duty to protect U.N. personnel and the missions they undertake. Thus, the Secretary-General plays a "pivotal role" in any immunity determination. However, the court rejected the position consistently advanced by the United Nations that, subject to review by the ICJ, the Secretary-General’s characterization of an act enjoys conclusive effect in domestic courts. The Court concluded that the Secretary-General’s determination with respect to immunity creates a presumption, to which domestic courts must accord "the greatest weight" and which they may set aside only "for the most compelling reasons." However, it is important to note that this comment in *obiter* leaves open the possibility that a national court could set aside the Secretary-General’s findings.

Vice-President Weeramantry elaborated in a separate opinion, contrasting the institutional competencies of domestic courts and of the Secretary-General in making determinations regarding immunity. In particular, he suggested that domestic courts

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96 Convention, supra note 18, art. 8, § 30.
98 *Cumaraswamy*, *supra* note 19, ¶¶ 50-51.
99 *Id.* ¶ 50.
101 *Cumaraswamy*, *supra* note 19, ¶ 61.
102 See, e.g., *id.* ¶¶ 61-62 (showing that Secretary-General’s findings were not applied on the issue of immunity in Malaysia’s courts, but only because the Government of Malaysia failed to transmit the Secretary-General’s finding to the "competent courts" and thus failed to comply with its obligation under the Charter and General Convention).
103 *Id.* at 92 (separate opinion of Vice-President Weeramantry).
should not exercise primary decision-making authority because they might allow “[l]ocally sensitive issues [to] crowd out perspectives regarding the global norms applicable to such situations.”

Cases such as Cumaraswamy demonstrate that, contrary to the suggestion of some academics, the fear of prejudice is neither “unrealistic” nor “exaggerated.” In contrast, “[t]he Secretary-General is better informed than” domestic authorities regarding “the limits of a given agent’s functions . . . and the needs of the United Nations in relation to any particular inquiry.” Additionally, the Secretary-General has a unique perspective on “the entire scheme of United Nations operations” and “more than any other authority, can assess a given agent’s functions within the overall context of the rationale, traditions and operational framework of the United Nations activities as a whole.”

Despite the clear wording of the Convention and the deference given to the Secretary-General’s determination in Cumaraswamy, plaintiffs have sought to limit the immunity of the United Nations and its officials. However, “in the near-totality of cases national courts scrupulously stick to the U.N.’s immunity.” Many domestic legal systems contain express legislation that grants immunity from suit to international organizations either in general or to specific organizations. Among the most well-known are the U.S.’s International Organizations Immunities Act of 1945

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104 Id. at 95 (separate opinion of Vice-President Weeramantry).


106 Cumaraswamy, supra note 19, at 96 (separate opinion of Vice-President Weeramantry).

107 Id. at 97 (separate opinion of Vice-President Weeramantry).


110 International Organizations Immunities Act, 22 U.S.C. § 288a(b) (2013) (providing that “International organizations, their property and assets, wherever located,
and the U.K.'s International Organisations Act 1968.\(^{111}\) Frequently, courts expressly rely on the relevant domestic legislation even in cases where international sources may be directly applicable in the domestic legal order.\(^{112}\) In dualist systems, with a clear separation between international and domestic law, courts are bound to rely on domestic implementing legislation.\(^{113}\)

A recent exemplar of this approach is *Brzak v. United Nations*, where the U.S. Court of Appeals for the Second Circuit affirmed dismissal of a sex discrimination suit by two U.N. employees against the United Nations and three of its former senior officials: Secretary-General, Kofi Annan; U.N. High Commissioner for Refugees, Rund Lubbers; and Lubbers's deputy, Wendy Chamberlain.\(^{114}\) The U.S. district court found that the United

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\(^{111}\) International Organisations Act, 1968, c. 48, § 1, sch. 2 (U.K.), http://www.legislation.gov.uk/ukpga/1968/48/pdfs/ukpga_19680048_en.pdf (providing that “Her Majesty may Order in Council . . . provide that the organisation shall, to such extent as may be specified in the Order, have the privileges and immunities set out in Part I of Schedule 1 of this Act”). Part I of Schedule 1 to the International Organisations Act 1968 lists among others, “Immunity from suit and legal process.” *Id.* at 11.

\(^{112}\) According to the *Restatement (Third) of the Foreign Relations Law of the United States* § 467 cmt. f (1987), the immunities provisions in the Convention are “probably self-executing” and consequently “to be given effect even without legislative implementation.” See also Curran v. City of New York, 77 N.Y.S.2d 206, 212 (S. Ct. 1947) (holding that since the U.S. was a party to the U.N. Charter, the provision of Article 105 “in a Treaty made under the authority of the United States, [is] the law of the land” and that immunity from taxation was included in the “immunities necessary for the fulfilment of [the U.N.’s] purposes”); United States v. Coplon, 84 F.Supp. 472, 474 (S.D.N.Y. 1949) (denying defendant’s claim of diplomatic immunity when espionage was found not to fall within the category of acts performed in the official capacity of U.N. officials and employees).

\(^{113}\) For instance, the two Indian cases were decided on the basis of the Indian immunity legislation, the United Nations (Privileges and Immunities) Act 1947. Matthew v. International Crops Research Institute for the Semi-Arid Tropics (ICRISAT) and the Government of India, 1982 A.I.R. (AP) (an employment dispute dismissed by an Indian court); Sharma v. UNDP Regional Manager, South Asia, Office of the Labour Commissioner, Delhi Administration, Oct. 10, 1983 (administrative labor proceedings dismissed by the Indian Labour Department).

\(^{114}\) *Brzak v. United Nations*, 597 F.3d 107, 107 (2d Cir. 2010).
Nations was absolutely immune from suit and that individual defendants had functional immunity.\textsuperscript{115} The plaintiffs appealed, contending that the Convention is not self-executing.\textsuperscript{116} The court of appeals affirmed the lower court, finding that the Convention is self-executing, bars all suits against the United Nations, and bars suits against former high officials for acts “performed in the exercise of their United Nations functions.”\textsuperscript{117}

The plaintiffs were Brzak, a U.S. citizen, and Ishak, a French-Egyptian dual-national, employed by the Office of the United Nations High Commissioner for Refugees (“UNHCR”) in Geneva, Switzerland.\textsuperscript{118} Brzak alleged that during a meeting of UNHCR staff members in Geneva in 2003, “she was grabbed in a sexual manner by Lubbers.”\textsuperscript{119} On advice of Ishak, Brzak filed a complaint with the United Nations Office of Internal Oversight Services, which then issued a report that confirmed these allegations against Lubbers.\textsuperscript{120} Brzak, however, alleged that Secretary-General Annan ultimately disregarded the report’s findings and eventually exonerated Lubbers.\textsuperscript{121} The plaintiffs alleged that, as a consequence of Brzak’s complaint and Ishak’s assistance in pursuing it, U.N. officials retaliated against them by manipulating Brzak’s work assignments and denying Ishak merited promotions.\textsuperscript{122} The plaintiffs sued, alleging sex discrimination and retaliation contrary to Title VII of the Civil Rights Act of 1964,\textsuperscript{123} violations of the Racketeer Influenced and Corrupt Organizations Act,\textsuperscript{124} and state common law torts.\textsuperscript{125}

Upon considering the United Nations’ contention of absolute
immunity, the court referred first to Article II, section 2 of the Convention, which provides that the United Nations enjoys immunity from "every form of legal process" unless it is "expressly waived." The plaintiffs argued that, as a matter of domestic law, the Convention cannot be enforced by U.S. courts absent additional legislation, because it is not self-executing, citing the Supreme Court case, Medellin v. Texas. The court, having examined the text of the Convention, recalled its ratification history, and accorded "great weight" to the views of the executive branch; it concluded that the Convention is self-executing and applies in U.S. courts without implementing legislation. This was an "important finding for the future implementation and application of the General Convention in U.S. courts."

The Second Circuit found additional support for the United Nations’ immunity in the International Organizations Immunities Act ("IOIA"), which provides that "international organizations designated by the President receive the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." The plaintiffs contended that the Foreign Sovereign Immunities Act ("FSIA"), which strips foreign states of their immunity in certain circumstances, narrowed the United Nations’ immunity under the IOIA. The court was not persuaded, inter alia, because the plaintiffs failed to show, in district court or on appeal, how their complaint fell under any of

126 Brzak v. United Nations, 597 F.3d 107, 111 (2d Cir. 2010).
127 Id.
128 Medellin v. Texas, 552 U.S. 491 (2008) (holding that pertinent international agreements were not self-executing and did not provide for direct enforcement of ICJ judgments in a state court, thereby emphasizing the power of Congress to give such treaties a domestic effect).
129 Brzak, 597 F.3d at 111-12.
130 Johnson, supra note 44, at 1012.
132 Brzak, 597 F.3d at 112 (quoting 22 U.S.C. § 288a(b)). The United Nations was designated such protection under the International Organizations Immunities Act in 1946. Id. at 112.
134 Brzak, 597 F.3d at 112.
the exceptions to immunity in the FSIA.\textsuperscript{135}

Moving to the claim against three former U.N. senior officials, the court noted that Article V, section 19 of the Convention entitled U.N. officials of senior rank to the same privileges and immunities as diplomatic envoys.\textsuperscript{136} Therefore, when the three alleged individuals worked for the United Nations, they were entitled to absolute immunity from civil and criminal process under Article 31 of the Vienna Convention on Diplomatic Relations.\textsuperscript{137} After their employment ended, Article 39(2) of the Vienna Convention on Diplomatic Relations entitled them to immunity only “with respect to acts performed by such a person in the exercise of his functions” as a diplomat.\textsuperscript{138} The key issue was whether the plaintiffs’ allegations involved “acts that the defendants performed in the exercise of their [U.N.] functions.”\textsuperscript{139} The court declared “when a court attempts to determine whether a defendant is seeking immunity ‘with respect to acts performed by such a person in the exercise of his functions,’ the court must do so without judging whether the underlying conduct actually occurred, or whether it was wrongful.”\textsuperscript{140} However, the court did not discuss the relevance of the Secretary-General’s determination, which Cumaraswamy held should be accorded “the greatest weight.”\textsuperscript{141}

Of the seven claims, the court concluded that all but one regarded “acts that the defendants performed in exercise of their official functions, namely, their management of the office in

\textsuperscript{135} Id. (rejecting also plaintiffs’ claim because whatever the limits on sovereign immunity by FSIA on international organizations, the CPIUN “unequivocally grants the United Nations absolute immunity without exception”); see also Atkinson v. InterAmerican Dev. Bank, 156 F.3d 1335, 1340-42 (D.C. Cir. 1998) (rejecting the argument for a narrower definition of state immunity under the IOIAA to international organizations by noting that the State Department followed a restrictive theory and made suggestions of immunity in appropriate cases).

\textsuperscript{136} Brzak, 597 F.3d at 113.


\textsuperscript{138} Id. art. 39(2).

\textsuperscript{139} Brzak, 597 F.3d at 113.

\textsuperscript{140} Id.

\textsuperscript{141} See Cumaraswamy, supra note 19, ¶ 61.
which the plaintiffs worked.”\textsuperscript{142} Thus, immunity was upheld for those six allegations.\textsuperscript{143} This follows a long line of U.S. domestic court precedents holding that functional immunity applies to employment-related suits against officials of international organizations.\textsuperscript{144} As for the remaining claim concerning the improper touching or grabbing in a sexual manner, the court stated that, as Brzak’s federal claims had been dismissed on jurisdictional grounds, there was “no colorable basis for the district court to exercise supplemental jurisdiction over [Brzak’s] state law claim.”\textsuperscript{145} The court concluded that “Brzak is free to re-file her battery claim in the state courts” but that, “if she did so, the state court would need to adjudicate in the first instance the defendant’s claim of immunity.”\textsuperscript{146}

IV. Recourse against Troop-Contributing Countries in Domestic Courts

Given the difficulty immunity presents in maintaining a cause of action against the United Nations or U.N. officials, plaintiffs have sought to obtain compensation from the troop-contributing countries of peacekeeping operations. However, the European Court of Human Rights (“ECtHR”) took a highly restrictive approach in the joined cases of \textit{Behrami v. France} and \textit{Saramati v. France}, regarding the attribution of the conduct of military personnel involved in operations under United Nations auspices.\textsuperscript{147} \textit{Behrami} was almost universally criticized by legal commentators

\textsuperscript{142} \textit{Brzak}, 597 F.3d at 113.
\textsuperscript{143} \textit{Id.}
\textsuperscript{145} \textit{Brzak}, 597 F.3d at 114.
\textsuperscript{146} \textit{Id. See also}, e.g., Swarna v. Al-Awadi, 2011 U.S. Dist. LEXIS 51908 (S.D.N.Y. 2011) (granting plaintiff’s motion for default judgment with respect to her claims against a former diplomat and his wife, thereby rejecting defendant’s claim of immunity); Baoanan v. Baja, 627 F. Supp. 2d. 155, 155 (S.D.N.Y. 2009) (denying defendant’s motion to dismiss plaintiff’s claim, thereby rejecting the immunity of a former U.N. diplomat, his wife, and his adult daughter).

The \textit{Behrami} case, filed against France, concerned the death of a young boy and a serious injury inflicted on his brother in Kosovo in March 2000, resulting from the detonation of a cluster bomb dropped by North Atlantic Treaty Organization ("NATO") forces in 1999.\footnote{\textit{Behrami, supra note 147, \textsection 5.}} The applicants argued that the incident occurred because of the failure of French KFOR troops to mark or defuse undetonated bombs which those troops knew to be present on the site in question.\footnote{\textit{Id. \textsection 61.}} The complaint was based on European Convention on the Protection of Human Rights and Fundamental Freedoms ("ECHR") Article 2 ("Right to Life").\footnote{Pierre Bodeau-Livinec, Gionata P. Buzzini & Santiago Villalpando, \textit{Behrami \& Behrami \textit{v. France; Saramati \textit{v. France, Germany \& Norway: ECHR Judgment on Applicability of European Convention on Human Rights to Acts Undertaken Pursuant to UN Chapter VII Operation in Kosovo},} 102 AM. J. INT'L L. \textbf{323}, 323 (2008).} The \textit{Saramati} case, against Norway and France, concerned the arrest of the applicant by UNMIK police in April 2001 and his extra-judicial detention by KFOR from July of that year through to the following
January.154 The applicant claimed that he had been arrested and detained by order of the KFOR commander.155 With regard to his detention, the applicant sued under Article 5 ("Right to Liberty and Security") of the ECHR, alone and in conjunction with Article 13 ("Right to an Effective Remedy"), and, with regard to his lack of court access, on Article 6 ("Right to a Fair Trial").156

The first matters determined by the court was that issuing detention orders fell within the mandate of KFOR and that the supervision of de-mining fell within UNMIK’s mandate.157 The court then examined whether the impugned action of KFOR (detention in Saramati) and inaction of UNMIK (failure to de-mine in Behrami) could be attributable to the United Nations.158 In this context, the court preliminarily explained that it intended to use the term “attribution” in the same way as Article 3 (now Article 4) of the Draft Articles on the Responsibility of International Organisations ("Draft Articles"),159 as adopted by the International Law Commission ("ILC") on second reading in 2011.160

With regard to the detention in the Saramati case, the applicants argued that KFOR soldiers’ conduct was not attributable to the United Nations or NATO, as “KFOR was not established as a [U.N.] force or organ, in contrast with other

154 Behrami, supra note 147, ¶ 8.
155 Id. ¶¶ 9, 15 (explaining KFOR commander was a Norwegian officer at the time of the arrest and was replaced by a French general in early October 2001).
156 Bodeau-Livinec, Buzzini & Villalpando, supra note 153, at 323.
157 Id. ¶ 127.
158 Id. ¶¶ 132–43.
159 Behrami, supra note 147, ¶ 121.

Elements of an internationally wrongful act of an international organization
There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
(a) is attributable to that organization under international law; and
(b) constitutes a breach of an international obligation of that organization.
peacekeeping forces and [with] UNMIK. To establish individual state responsibility, the applicants noted that KFOR troops, including the commanders, answered directly to their national commanders; that the rules of engagement were national; and that the troops were disciplined by national command. However, the court held that the Security Council, under Resolution 1244, had “delegated” to willing organizations and member states the power to establish KFOR. Despite the remote relationship between KFOR troops and United Nations decision-makers, the United Nations retained “ultimate authority and control” over the security of the mission, only delegating operational command. It was sufficient that the United Nations had the authority to delegate such control, that it delegated it within specific limits, and that it was kept abreast of events on the ground by regular reports. Thus, no direct United Nations influence over the impugned conduct was required to attribute responsibility to the United Nations. In such circumstances, the court concluded, as the word was used in the Draft Articles, “KFOR was exercising lawfully delegated Chapter VII powers of the [Security Council] so that the impugned action was, in principle, ‘attributable’ to the [United Nations].”

However, this arguably reflects a debatable interpretation of the Draft Articles. According to Draft Article 6, the conduct of

161 Behrami, supra note 147, ¶ 77.
162 Id.
163 Id. ¶ 135.
164 Id. ¶ 140.
165 Id. ¶ 134.
166 Id. ¶ 136. The ECtHR’s delegation-attribution rationale derives from the work of Professor Sarooshi, who argued that “the question of who exercizes operational command and control over the force is immaterial to the question of responsibility. The more important enquiry is who exercizes overall authority and control over the forces.” See DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY 163 (1999) (original emphasis). He continues by stating that “acts of force authorized by the Council are attributable to the [United Nations], since the forces are acting under [U.N.] authority,” and that the only two exceptions to this principle are cases where the Council is “prevented from exercizing overall authority and control over the force”, or when the forces act “ultra vires.” Id. at 165.
167 Behrami, supra note 147, ¶ 141.
168 Bodeau-Livinec, Buzzini & Villalpando, supra note 153, at 326.
an organ or agent of an international organization in the performance of functions of that organ or agent is attributable to the organization. In the ILC's view, "the general rule set out in article [6]" also covers the situation in which a state organ is "fully seconded to" an international organization. In contrast, Draft Article 7 "deals with the situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization." Therefore, Draft Article 7 would appear to be the basis for assessing whether any act or omission by KFOR could be attributable to the United Nations.

The criterion for attribution that has been raised in Draft Article 7 is the "effective control" exercised by the international organization over the conduct concerned. The effective control test itself, a test for the attribution of conduct, has been affirmed by a number of tribunals, including the ICJ in cases such as *Nicaragua* and *Bosnian Genocide*. The commentary to the

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169 DARIO 2011, supra note 160, art. 6. The text of Article 6 in DARIO 2011, supra note 160 reads:

Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.


171 Id. at 110. The text of Article 7 reads:

Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization.

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

DARIO 2011, supra note 160, art. 7.

172 2004 ILC Report, supra note 170, at 113.

Draft Articles indicates that this criterion should be understood as "the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal." In other words, "the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question." Although the court relied on the meaning of "effective control" in its decision, it did so with respect to the broader issue of control exercised by international security and civil presence over the territory of Kosovo and "not in order to characterize the control that would have been exercised by the United Nations over the specific impugned conduct."

On the issue of Saramati’s detention, the court concluded that the detention was attributable to the United Nations, given that the "Security Council, ‘in delegating its security powers,’ exercised the ‘ultimate authority and control’ over the conduct of KFOR." It is noteworthy that "the issue of ‘effective control’ over detention matters appears only once in the Court’s reasoning and not in relation to the United Nations." Indeed, the "Court referred to the ‘effectiveness (including the unity) of NATO’s operational command’—which, in its opinion, had been preserved since there was no ‘suggestion or evidence of any actual [troop-contributing nations’] orders concerning, or interference in, the present operational (detention) matter.’"

 Regardless of whether the Security Council exercised "ultimate authority and control" over KFOR operations, "such authority and control would certainly not be the same as ‘effective control’ over the conduct itself—that is, the detention of Saramati." In this respect, the court itself drew the distinction

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175 2004 ILC Report, supra note 170, at 111.
176 Id. at 113.
177 Behrami, supra note 147, ¶ 70.
178 Bodeau-Livinec, Buzzini & Villalpando, supra note 153, at 327.
179 Behrami, supra note 147, ¶ 133.
180 Bodeau-Livinec, Buzzini & Villalpando, supra note 153, at 327.
181 Id.
182 Id. at 328.
between the “ultimate authority and control” that, in its opinion, had been retained by the Security Council, and the “effective command of the relevant operations” that had been retained by NATO. This interpretation was rejected by the ILC, which states in its revised commentary that the “European Court did not apply the criterion of effective control in the way that had been envisaged by the Commission.” In his Seventh Report, Special Rapporteur Gaja concludes forcefully “had the Court applied the criterion of effective control set out by the Commission, it would have reached the different conclusion that the conduct of national contingents allocated to KFOR had to be attributed either to the sending State or to NATO.”

It should be noted that consistent United Nations and state practice over the last sixty years firmly distinguished between United Nations-run operations (such as peacekeeping) and authorizations to use force granted by the Security Council to member states (such as KFOR). For example, in N.K. v. Austria, the superior provincial court of Vienna decided that Austria was not responsible for damage to the property of a member of the Austrian contingent of the U.N. peacekeeping force in the Golan Heights in 1975-76. The plaintiff alleged that his property had been damaged due to the negligence of another Austrian soldier, and he claimed compensation from Austria.

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183 Id. at 325.
187 N.K. v. Austria, 77 I.L.R. 470 (Superior Provincial Court (Oberlandesgericht) of Vienna 1979).
188 Id.
Decided prior to the formulation of the Draft Articles, the action was dismissed because the court considered that the soldier was acting as an "organ" of the United Nations and not of Austria.  

With regard to the alleged failure to de-mine in the Behrami case, the court noted that "UNMIK was a subsidiary organ of the [United Nations] created under Chapter VII of the Charter so that the impugned inaction was, in principle, 'attributable' to the [United Nations] in the same sense." This result would seem uncontroversial, as Draft Article 6 assigns and the United Nations itself assumes responsibility for the conduct of its organs during operations. However, it is problematic that the court attributed to UNMIK a failure to de-mine on the mere ground that "the supervision of de-mining fell with UNMIK's mandate," without examining the nature, content, and extent of the obligation to de-mine or the conditions and modalities for its implementation. Such an examination should have been conducted to assess whether the alleged failure to de-mine was attributable to the United Nations; to the respondent states in their capacity as troop-contributing nations to KFOR; or to NATO, as the holder of the operative command of KFOR.

Having attributed the actions of KFOR and UNMIK to the United Nations, the court noted that the United Nations had a legal personality separate from that of member states and that the organization is not a party to the ECHR. In light of the court's
previous case law, the question remained, however, whether the court was competent *ratione personae* to review the act of the respondent states carried out on behalf of the United Nations. In this regard, the court considered that:

the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by [Security Council] Resolutions and occur prior to or in the course of [operations under Chapter VII of the Charter], to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the [United Nations'] key mission in this field including... with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a [Security Council] Resolution which were not provided for in the text of the Resolution itself.196

The court further noted that “the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities.”197 In doing so, the court did not address the possibility that an action or omission may be attributable to two or more entities (in this instant case, to the United Nations and also to the respondent state[s] or NATO). Again, it is uncertain whether the court’s approach on this issue is consistent with the Draft Articles.198 In its introductory commentary to the set of draft articles dealing with the attribution of conduct to an international organization, the ILC states:

Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization.199

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197 *Id.* ¶ 149.
198 *Id.* ¶ 151.
Notwithstanding the potential drawbacks of such a judicial approach, the court’s reasoning in the Behrami and Saramati cases was adopted in a number of other judicial decisions. In Kasumaj v. Greece and Gajic v. Germany, dealing with issues of property occupied or used by contingents of KFOR in Kosovo, the ECtHR declared the applications inadmissible on the mere grounds that “KFOR actions were in principle attributable to the [United Nations].”\textsuperscript{200} In Berić v. Bosnia and Herzegovinia, the ECtHR extended this reasoning “to the acceptance of an international civil administration in its territory by a respondent State” and considered that the impugned action by the High Representative for Bosnia and Herzegovina “was, in principle, ‘attributable’ to the [United Nations].”\textsuperscript{201}

The ECtHR revisited these issues in Al-Jedda v. United Kingdom,\textsuperscript{202} an appeal from the U.K. House of Lords.\textsuperscript{203} The applicant in Al-Jedda was an Iraqi/British national\textsuperscript{204} detained by the British military in a British-run detention center in Basra, Iraq, between October 2004 and December 2007.\textsuperscript{205} He was believed to have been involved in recruiting and working with terrorists, although no criminal charges were filed against Al-Jedda during his detention or thereafter.\textsuperscript{206} Al-Jedda, however, filed a petition

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\textsuperscript{201} Berić v. Bosnia & and Herzegovina, App. No. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, Eur. Ct. H.R., ¶ 21, 30 (2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83109.


\textsuperscript{204} Al-Jedda was later stripped of his British citizenship. Al-Jedda, App. No. 27021/08 ¶ 9.

\textsuperscript{205} Al-Jedda, App. No. 27021/08 ¶ 10-11.

\textsuperscript{206} A Special Immigration Appeals Commission held in a closed judgment that the Secretary of State had proved “on the balance of probabilities” that Al-Jedda had terrorist connections. Al-Jedda, App. No. 27021/08 ¶ 15. Al-Jedda did not appeal this
in the United Kingdom in 2005 challenging his detention under the Human Rights Act, the domestic legislation implementing the ECHR. In contrast, the U.K. argued that, pursuant to Article 103 of the Charter, Article 5 of the ECHR was preempted by United Nations Security Council Resolution 1546, which established the interim government in Iraq and conferred the multinational force with the “authority to ‘take all necessary measures’ to contribute to the maintenance of security and stability in Iraq.” In short, because British forces had detained Al-Jedda while acting as part of the Coalition Provisional Authority, the United Kingdom’s position was that his detention was attributable to the United Nations under Resolution 1546.

On the issue of attribution, the court distinguished Al-Jedda’s application from the decisions in Behrami and Saramati, noting the role of the United Nations in relation to the security in Iraq in 2004 was vastly different to the role it had played in Kosovo in 1999. The court emphasized that the international security presence in Kosovo was established by Security Council Resolution 1244, whereas the United Kingdom had entered Iraq with coalition forces without such a resolution. The adoption of Security Council Resolutions 1511 and 1546 had not altered the unified command structure of the Multi-National Force, which had remained substantially the same since the invasion in March 2003, nor did the Court “consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or—

judgment. *Id.*

207 In response, the Secretary of State for Defence acknowledged that Al-Jedda was within U.K. jurisdiction during his detention, which implicated his rights under the ECHR. *Id.* ¶ 16.

208 See U.N. Charter art. 103, which reads:

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


211 *Id.* ¶ 83.

212 *Id.*
more importantly, for the purposes of this case—ceased to be attributable to the troop-contributing nations.\textsuperscript{213}

This is an important development, as the court essentially admitted the possibility of dual or multiple attribution of the same conduct to the United Nations and to a state, a possibility that it did not entertain in \textit{Behrami}.\textsuperscript{214} The court then continued:

It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was common ground between the parties before the House of Lords that the test to be applied in order to establish attribution was that set out by the International Law Commission, in Article [7] of its draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct (see paragraphs 18 and 56 above). For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations.\textsuperscript{215}

Here, the court does not acknowledge in any way the overwhelming criticism that \textit{Behrami} has received, but is content to declare that the situation in Iraq satisfies neither the ILC’s test nor its own, without clarifying which applies and why.\textsuperscript{216} While it was fairly predictable that the court would distinguish \textit{Behrami} rather than apply it or overrule it, the court’s evasiveness is still quite troubling.\textsuperscript{217}

On the merits, regarding the apparent conflict between the Article 5 of the ECHR and Resolution 1546 and the role of Article 103 of the Charter, the court noted:

\textsuperscript{213} \textit{Id.} ¶ 80.
\textsuperscript{215} \textit{Al-Jedda}, App. No. 27021/08, ¶ 84.
\textsuperscript{216} Milanović, supra note 214, at 137.
\textsuperscript{217} \textit{Id.}
In interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligations on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of the Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.\(^\text{218}\)

Sir Nigel Rodley similarly argued for a strong interpretative presumption in his separate opinion in the \textit{Sayadi} case before the Human Rights Committee.\(^\text{219}\) Despite the fact that a letter by the U.S. Secretary of State annexed to the resolution expressly referred to security internment,\(^\text{220}\) the court still did not find that the presumption was rebutted.\(^\text{221}\) This is because the resolution seemed to leave internment as just one of a number of options that the states concerned could use, since it also expressly referred to

\(^{218}\) \textit{Al-Jedda}, App. No. 27021/08 ¶ 102.


\(^{220}\) Acting under Chapter VII of the Charter, the Security Council decided “that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism.” Press Release, Security Council, Security Council Endorses Formation of Sovereign Interim Government in Iraq; Welcomes End of Occupation by 30 June, Democratic Elections by January 2005, U.N. Press Release SC/8117 (Aug. 6, 2004). The letters referred to were sent to the Council by the then-U.S. Secretary of State, Colin Powell, and the interim prime minister of Iraq, Ayad Allawi. \textit{Id.} Colin Powell’s letter outlined the duties of the MNF forces, stating that these “will include combat operations against members of [insurgent] groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq’s security.” \textit{Id.}

\(^{221}\) \textit{Al-Jedda}, App. No. 27021/08 ¶¶ 105-06.
the need to comply with international human rights law, and since the U.N. Secretary-General and his special representative in Iraq frequently objected to the use of internment.\textsuperscript{222} “By the Court’s standard, it would seem that unless the Security Council itself explicitly worded a resolution to authorize practices prohibited by the ECHR, the Court would not recognize an Article 103 conflict and could find liability for breach of ECHR obligations.”\textsuperscript{223}

The Dutch Court of Appeal took a different approach in a decision rendered two days before the decision in the \textit{Al-Jedda} case.\textsuperscript{224} In \textit{Nuhanović v. The Netherlands} and \textit{Mustafić-Mucić et al v. The Netherlands}, the court held the State of the Netherlands had acted unlawfully and was liable under Dutch law for evicting four Bosniaks from the Dutchbat-controlled compound (a Dutch battalion under the command of the U.N. peacekeeping force, UNPROFOR) in Srebrenica.\textsuperscript{225} Although Bosnian Serbs subsequently killed Ibro Nuhanović, Muhamed Nuhanović, Nasiha Nuhanović, and Rizo Mustafić, the court only ruled on the actual removal of them from the compound, not on any failure of the Netherlands to subsequently protect them.\textsuperscript{226} The claim that the Netherlands (and the United Nations) had failed to offer protection to Bosniak men has been made in a parallel, but otherwise unrelated, case brought on behalf of the Mothers of Srebrenica discussed later in this Article.\textsuperscript{227}

\begin{flushright}
\textsuperscript{222} \textit{Id.}
\textsuperscript{225} The Dutch government has indicated that it will appeal the decisions to the Dutch Supreme Court, although prospect of reversal is limited because the Supreme Court cannot review findings of fact or interpretations of foreign law. \textit{See, e.g., Nuhanovic and Mustafić v. The Netherlands}, ASSER INSTITUTE, http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39985 (last visited Sept. 13, 2013). Moreover, the \textit{Al-Jedda} decision makes reversal on the international law issue of attribution significantly less likely than might have been the case when \textit{Behrami and Saramati} was the principal international precedent.
\textsuperscript{226} \textit{Nuhanović}, 200.020.174/01, ¶ 3.1
\textsuperscript{227} \textit{See infra Sec. V.}\
\end{flushright}
Regarding attribution, the Dutch Court of Appeal determined that the proper standard of attribution is "effective control." In doing so, it rejected the standard of attribution of conduct that was used by the district court ("operational overall control"), the standard used by the ECtHR in Behrami and Saramati ("ultimate authority and control"), and the position taken by the United Nations that peacekeeping troops are to be considered a subsidiary organ of the United Nations. Unlike the ECtHR in Al-Jedda, the Dutch Court of Appeal categorically aligned itself with the criterion formulated by Article 7 of the Draft Articles on the Responsibility of International Organizations. Under this test, the Netherlands would not owe the men a tort law duty if it did not exercise effective control over its troops. This would be the case if, for example, it had lost the legal authority and factual ability to instruct and supervise its troops, because this authority and ability was entirely with the United Nations.

The Dutch Court of Appeal also anticipated Al-Jedda in accepting the possibility of dual attribution. Specifically:

[T]he Court adopts as a starting point that the possibility that more than one party has "effective control" is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party. For this reason the Court will only examine if the State exercised "effective control" over the alleged conduct and will not answer the question whether the [United Nations] also had "effective control."

For effective control by the State to exist, the court found it relevant that the State kept control over the personal affairs of the troops and possessed formal power to take disciplinary measures. The court also considered that the fall of Srebrenica brought the peacekeeping operation to an end and that from July 2014.

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228 Nuhanović, 200.020.174/01, ¶ 5.7.
231 Id. ¶ 5.9.
232 Id.
233 Id. ¶ 5.10.
11, 1995, onwards the Dutchbat’s only aim was to evacuate the refugees in a way that ensured their safety.234 Thus, the court distinguished this situation from a normal peacekeeping operation.235 Moreover, the court noted that during the transition period, the Dutch government was actively involved in the Dutchbat operation.236 The control over the Dutchbat was not only theoretical, it was exercised in practice—the Dutch government, represented by its two highest-ranking officers, had taken the decision to evacuate the Dutchbat and the refugees, and the Minister of Defense had ordered the Dutchbat not to cooperate in the separation of male Muslim refugees in Srebrenica.237

The court concluded that the Dutchbat’s conduct was directly linked to the decisions and instructions of the Dutch government.238 The Dutchbat’s refusal to put the men on the list of local personnel and telling them to leave the compound was directly linked to the way the Dutchbat’s evacuation was to be executed, namely by following the instructions as to who was going to be included in the evacuation operation.239 According to the court, this implied that the alleged wrongful conduct was within the State’s effective control and could therefore be attributed to the Netherlands.240 In a sense, then, the Dutch Court of Appeal in Nuhanović and Mustafić-Mujić and the ECtHR in Al-Jedda approached Behrami from different sides: in Nuhanović and Mustafić-Mujić the U.N. mission was already over, which meant that the effective control of the sending State was revived; in Al-Jedda, the mission had begun before the involvement of the United Nations, which meant that the United Nations had not acquired effective control.241

234 Id. ¶ 5.11.
235 The Court of Appeal distinguished Behrami and it should be noted that the Court of Appeal did not consider the question of whether dual attribution is possible in normal peacekeeping situations. Id. ¶ 5.11.
236 Nuhanović, 200.020.174/01 ¶¶ 5.12-17.
237 Id. ¶ 5.18.
238 Id. ¶ 5.19.
239 Id. ¶ 5.17.
240 Id. ¶¶ 5.19-5.20.
More broadly, the court took the position that, in order to
determine whether the state had effective control over an act, it is
not only relevant whether that act was an implementation of a
specific instruction by either the United Nations or the State but
also whether, "if there was no such specific instruction, the
[United Nations] or the State had the power to prevent the conduct
concerned." Thus, the removal of the Bosniaks from the
compound could be attributable to the Netherlands, if the
Netherlands was able to prevent that removal. The approach taken
by the Dutch Court of Appeal is quite close to a position defended
by Tom Dannenbaum in a recent piece on attribution in
peacekeeping operations. Dannenbaum argues, "[E]ffective
control... is held by the entity that is best positioned to act
effectively and within the law to prevent the abuse in question." His
interpretation aims at "ensuring that the actor held responsible
is the actor most capable of preventing the human rights abuse."

However, it seems overly broad to declare that a state
exercises effective control in regard to a particular act if it is able
to prevent that act. There is always the possibility for troop-
contributing states to send orders or instructions to its nationals
who serve in a U.N. operation, allowing it to exercise control in a
way that prevents the impugned conduct from occurring. Therefore, if one accepts "power to prevent" as the relevant
standard, the conduct of peacekeeping forces, by definition, can

and-sr.

242 Nuhanović, 200.020.174/01, ¶ 5.9.
243 Dannenbaum, supra note 55, at 126. This piece was relied on by the counsel for
the plaintiffs and is cited by the Court (though on another point). Nuhanović,
200.020.174/01, ¶ 5.8.
244 Dannenbaum, supra note 55, at 157.
245 Id. at 158.
246 André Nollkaemper, Dual Attribution: Liability of the Netherlands for Conduct
247 Indeed, it is on this basis some scholars have taken the position that the conduct
of peacekeeping troops can always be attributed to both the sending state and the U.N.
See Luigi Condorelli, Le statut des forces de l’ONU et le droit international humanitaire,
78 RIVISTA DI Diritto Internazionale 881 (1995) (It.); Luigi Condorelli, Le statut des
forces des Nations Unies et le droit international humanitaire, in LES CASQUES BLEUS:
POLICERS OU COMBATTANTS? 87 (Claude Emmanuelli ed., 1997) (It.).
always be attributed to the state (whether or not in parallel to the United Nations). There is little practice to support this broad construction, and the comments by States and international organizations to the Draft Articles do not offer much support for this interpretation. As member states have not implemented a standing U.N. army, U.N. peace operations are reliant on ad hoc coalitions of troop-contributing countries. Such an all-encompassing definition of “effective control” may have the unintended consequence of chilling the willingness of states to participate in U.N. operations.

V. Limiting Immunity Based on the Right of Access to Court

In the alternative, when the tortious behavior cannot be attributed to troop-contributing countries, plaintiffs have sought to have the United Nations’ immunity overridden. In Mothers of Srebrenica v. the Netherlands and United Nations, the Association of Citizens Mothers of Srebrenica (the “Association”) argued that the United Nations and the Netherlands, by failing to protect thousands of male civilians trapped in the Srebrenica enclave, were liable for the 1995 genocide. Specifically, the Association alleged that each had failed to prevent the genocide, thus acting contrary to promises and other legal obligations previously made, “and therefore [each were] negligent.” The judgment was made in connection with interlocutory claims brought by the Netherlands arguing that the court had no jurisdiction with regard to the United Nations and that the Netherlands be allowed to intervene or join the case against the United Nations. Without going into any detail on the procedural discussions taken up by the court, the Appeal Court in The Hague allowed the Netherlands to join the United Nations as a party in

248 Nollkaemper, supra note 246, at 1148.
249 See, e.g., Larsen, supra note 148, at 520.
251 Id. ¶ 1.1.
252 Id. ¶ 5.10.
253 Id. ¶ 2.3, 2.4.
the action and upheld the district court’s ruling. This allowed the state to discharge its duty vis-à-vis the ICJ’s decision in *Cumarawamy* “to inform its courts of the position taken by the Security-General” concerning the immunity of the United Nations.

The court recognized that absolute immunity provided to the United Nations under the Convention as well as under Article 105 of the Charter. However, the Association argued that this immunity should be “surpassed” on the basis of their right to access a court of law, as embodied in Article 6 of the ECHR and Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”). The Dutch Court of Appeal held that the United Nations’ immunity *could* be set aside as conflicting with the prohibition on the denial of justice, although it was not justified in this case. In contrast, the Dutch Supreme Court took the position that neither the right of access to courts under Article 6 of the ECHR and Article 14 of the ICCPR nor *jus cogens* prohibition against genocide under the Genocide Convention overrode immunity.

According to the Dutch Court of Appeal, the duty of the Netherlands to provide access to a court was not displaced by

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254 *Id.* ¶ 6.


256 *Mothers of Srebrenica*, 200.20.151/01 ¶ 4.2.

257 *Id.* ¶ 5.1.


Article 103 of the Charter, which provides that, in the event of a conflict between the obligations of the members of the United Nations under the Charter and their obligations under another international agreement, their Charter obligations prevail. Instead, the court concluded that Article 103 of the Charter was not intended to allow the Charter to "just set aside" fundamental rights recognized by customary international law or international conventions. Referring to the provisions in the Charter concerning the promotion and encouragement of human and fundamental rights, the court found it "implausible" that Article 103 was intended to impair the enforcement of such rights.

Thus, the court held that it was not precluded from testing United Nations' immunity against ECHR and ICCPR provisions. Simply asserting away the conflict rule brings to mind Koskenniemi's critique of the European Union's approach to international law as "[s]olipsistic in the sense of capable of seeing nothing else than one's own legal system . . . [and] imperialistic because everything taking place in the world is judged from its perspective. Or, I should like to say, everything as long as this is convenient." While Article 103 was not drafted for the purpose of freezing human rights at 1945 levels, it was intended to preempt the displacement of the terms of the Charter by subsequent treaties, even human rights treaties. This would seem to be exactly the circumstances before the Dutch Court of Appeal in *Mothers of Srebrenica*. The absence of direct and meaningful engagement with this issue seriously undermines the court's reasoning.

261 Mothers of Srebrenica, 200.20.151/01, ¶ 5.5.
262 Id.
263 Id.
264 Id.
266 See Brockman-Hawe, *supra* note 255, at 739.
267 Id.
It should be noted, the Dutch court never made an affirmative finding that the ECHR applied, but instead merely assumed that the case fell within the *ratione materiae* of the ECHR.\footnote{See id. at 740; see also Mothers of Srebrenica, 200.20.151/01, ¶¶ 5.2-5.5.} As the ECHR obliges States to extend protections to individuals “within their jurisdiction,” U.N. immunity arguably renders the ECHR inapplicable by removing U.N. action from the scope of national jurisdiction. The English courts have followed the “no-conflict” approach of denying the relevance of Article 6 to international immunities. In *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, Lord Bingham of the House of Lords questioned the applicability of Article 6 of the ECHR to claims brought against a foreign state for torture and expressed confusion with respect to the notion that “a state can be said to deny access to its court if it has no access to give.”\footnote{Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia), [2006] UKHL 26, [2007] 1 AC 270, ¶ 14 (appeal taken from Eng.).} Justice Tomlinson followed this reasoning with respect to the immunity of international organizations, denying the necessity of considering the relationship between UNESCO’s immunity and Article 6 because the U.K. “possessed no jurisdiction over UNESCO unless UNESCO chose to waive its immunity.”\footnote{Entico Corporation Limited v. Secretary of State for Foreign and Commonwealth Affairs and UNESCO, [2008] EWHC 531 (Comm), [2008] 2 All ER (Comm) 97 [23] (Eng.), reprinted in 2008 U.N. Jurid. Y.B. 477, U.N. DOC. ST/LEG/SER.C/46.} It is unfortunate that the Dutch court did not engage in a meaningful, judicial dialogue and address this jurisdictional concern.\footnote{MATTHIAS KLOTH, IMMUNITIES AND THE RIGHT OF ACCESS TO COURT UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 28-30 (2010) (suggesting that the approach of the English Courts is flawed because national courts have jurisdiction until it is affirmatively removed by the grant of immunity).}

The Dutch Court of Appeal noted that the European Court of Human Rights has ruled that the immunity of international organizations must be “set aside” under certain circumstances in deference to the right of access to a court of law recognized by the ECHR.\footnote{See Mothers of Srebrenica, 200.20.151/01, ¶ 5.2.} However, the ECtHR also stressed that the right of
access to a court of law was not absolute and may be subject to restrictions, provided that those restrictions do not violate the "essence" of that right. The Dutch Court of Appeal applied the criteria developed by Beer and Reagan v. Germany and Waite and Kennedy, according to which a restriction to access is permissible if it serves a legitimate goal, if it is proportionate, and if an interested party has access to reasonable alternative means to protect its rights under the ECHR. The legitimacy requirement was disposed of quickly by concluding that immunity had been granted for the purposes of promoting the effective operation of the United Nations. The proportionality of the grant was assessed in light of the "special position" of the United Nations as the only international organization authorized to use force to preserve international peace. According to the court:

[i]n connection with these extensive powers, which may involve the [United Nations] 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 [United Nations] did not enjoy, or only partially enjoyed immunity from prosecution, the [United Nations] 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 conflict in which the [United Nations] may be involved this might include situations in which the [United Nations] 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 [United Nations] is summoned in countries where the judiciary is not up to the requirements set by the ECHR. The immunity from prosecution granted to the [United Nations] therefore is closely connected to the public interest pertaining to keeping the peace and safety in the world.

273 Id.


275 See id. ¶ 5.2.

276 Id. ¶ 5.7; see also Brower, supra note 10, at 92 (writing that "national prejudices still threaten the work of international organizations. These prejudices justify the
Neither the plaintiffs’ allegations that the United Nations had failed to do enough to prevent the Srebrenica genocide nor the fact that the United Nations had failed to establish an alternative forum where the claimants could have their case against the United Nations heard, were sufficiently “compelling” to justify a finding that the grant of immunity was disproportionate to its objectives. With respect to the first of these claims, the Dutch Court of Appeal observed that the United Nations had neither committed nor assisted in the commission of the Srebrenica genocide. Moreover, although the accusation that the United Nations had failed to prevent the genocide was “serious,” setting aside immunity on the grounds suggested by the applicants might “be latched onto too easily [by other courts], which could lead to misuse.”

Finally, with regard to the plaintiffs’ claim that there was no procedure that sufficiently safeguarded access to a court of law, the court expressed “regret” that the United Nations had not instigated alternative proceedings in conformity with its obligations under the Convention. In particular, the court stressed that Section 29(a) of the Convention requires the United Nations to provide appropriate dispute settlement procedures in private law claims against the United Nations. This particular part of the decision is problematic for a number of reasons. First, the court assumed that the claim was one of a private law character when it is not clear whether the claim is based on a domestic “tort” obligation/violation, on a public international law obligation to prevent genocide, or on a combination of both.

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277 See Mothers of Srebrenica, 200.20.151/01, ¶ 5.7; see also Kumaraswamy, supra note 19, ¶ 61 (showing the ICJ indicated that States could disagree for the “most compelling reasons with the Secretary-General’s determination to not waive immunity”).

278 See Mothers of Srebrenica, 200.20.151/01, ¶ 5.10.

279 Id.

280 See id. ¶ 5.13.

281 See id. ¶¶ 5.8, 5.11, 5.13.

282 The plaintiffs alleged the U.N. acted contrary to Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide. See id. ¶ 1.11.

283 Johnson, supra note 44, at 1014.
Second, the court "did not seem to have been informed (nor did it apparently inquire) [about] how the [United Nations had] applied and interpreted that provision since 1946."\(^{284}\) The court briefly referred to the SOFA between the United Nations and the host country concerning the U.N. protection force ("UNPROFOR"), having noted simply that the state "has insufficiently refuted" the argument of the Association that that agreement did not offer a realistic opportunity to sue the United Nations.\(^{285}\) However, there is no discussion of what the agreement actually provided or why it did not offer a realistic opportunity for pursuing a case against the United Nations. Oddly, the court did not discuss the SOFA’s authorization of the creation of a claim commission, any relevant reports of the Secretary-General, or common practice.\(^{286}\) Nonetheless, the court concluded that the purported failure of the United Nations to comply with the Convention did not decisively impair the right of access to a court because alternative forums existed where the appellants could hold responsible "two categories of parties liable for the damages incurred by the mothers of Srebrenica, namely the perpetrators of the genocide and the State."\(^{287}\) The conclusion with respect to claims against the Netherlands seems to ignore the holdings in Behrami and Saramati, which stated that only the United Nations and not the troop-contributing nations are liable for peacekeeping missions.\(^{288}\) This would appear to have been equally applicable in this case, as the Dutch Court of Appeal decided Mothers of Srebrenica before Nuhanović.

Analogous arguments have been made in the United States, that granting immunity to the United Nations would result in multiple violations of the U.S. Constitution, including violations

\(^{284}\) \textit{Id.}\n
\(^{285}\) \textit{See} Mothers of Srebrenica, 200.20.151/01, ¶ 5.11.\n
\(^{286}\) \textit{See supra} Section II.\n
\(^{287}\) \textit{See} Mothers of Srebrenica, 200.20.151/01, ¶ 5.13; \textit{see also} Dekker & Schechinger, \textit{supra} note 255, at 7-8 ("[W]ith respect to the responsible political and military leaders of the Bosnian-Serb army, which the Court of Appeal apparently has in mind, ... [t]his argument seems a bit far-fetched, because ... a civil claim against an individual soldier of the Bosnian-Serb Army ... would (in principle) be passed on to the State of Bosnia-Herzegovina.").\n
\(^{288}\) \textit{See supra} notes 147-161 and accompanying text.
of procedural and substantive due process rights, as well as one’s rights under the First and Seventh Amendments. In Urban v. United Nations the U.S. Court of Appeals of the District of Columbia Circuit held that a “court must take great care not to ‘unduly impair[] [a litigant’s] constitutional right of access to courts.” However, in that particular case, the court did not need to assess the issue of immunity from suit, since it found the case was launched by a “frivolous litigant flooding the court with meritless, fanciful claims.” The plaintiffs in Brzak made similar contentions, but, in contrast to Dutch Court of Appeal in Mothers of Srebrenica, the U.S. court conclusively rejected these constitutional challenges to the existence of immunities, declaring that:

[L]egislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law. If appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist. Suffice it to say, they offer no principled arguments as to why the continuing existence of immunities violates the Constitution.

Mothers of Srebrenica was appealed to the Dutch Supreme Court, which held that the Dutch Court of Appeal erred in relying on the criteria in Waite and Kennedy in order to evaluate whether U.N. immunity should be set aside for the right to a fair trial. In Waite and Kennedy, the ECtHR did not consider the relation between Article 6 of the ECHR and Article 103 of the U.N. Charter. Therefore, the Supreme Court held that there was no reason to assume that the ECtHR meant to include the United Nations when it found that the availability of “reasonable

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291 Id.


293 See Mothers of Srebrenica, 200.20.151/01, ¶ 4.3.5.

294 See id.
alternative means to protect effectively their rights under the Convention" was "a material factor" in determining whether the grant of immunity to an international organization was permissible under the ECHR, at least not as far as the acts of the United Nations under Chapter VII of the U.N. Charter were concerned. Instead, the court, relying on Behrami and Saramati, determined that under Article 103, U.N. immunity took precedence over conflicting obligations under other international agreements.

In order to sidestep the Article 103 issue, the plaintiffs argued that this rule does not extend to cases where a violation of *jus cogens*, a peremptory norm of general international law, is alleged. Unlike ordinary customary law, which has traditionally required consent and allows the alteration of its obligations between states through treaties, *jus cogens* cannot be violated by any state "through international treaties or local or special customs or even general customary rules not endowed with the same normative force." To refute the plaintiff's proposition, the Dutch Supreme Court cited the ECtHR case of *Al-Adsani v. UK* and the recent ICJ ruling in *Germany v. Italy* (Jurisdictional Immunities of the State). Both courts found that there was currently no rule of customary international law that prevented states from claiming immunity in cases dealing with violations of *jus cogens*. The ECtHR in *Al-Adsani v. UK* held that:

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295 See *id.* ¶ 4.3.2.
296 See *id.* ¶¶ 4.3.4-6.
297 See *id.* ¶ 4.3.7.
299 See *Mothers of Srebrenica*, 200.20.151/01, ¶¶ 4.3.7-.3.8.
300 See *id.* ¶¶ 4.3.10-.3.13.
301 In addition, this argument about the effect of *jus cogens* displacing the law of state immunity has been rejected by the following national courts: United Kingdom (Jones v. Saudi Arabia, [2006] UKHL 26; [2007] 1 AC 270, (H.L) (appeal taken from Eng.)); Canada (Bouzari v. Islamic Republic of Iran (2004), 71 O.R. (3d) 675,143, D.L.R.4th 243 (Can. Ont. C.A.)); Poland (Natoniewski v. Germany, Polish Yearbook of International Law 2010, 299); Slovenia (Case No. Up-13/99, Constitutional Court of Slovenia); New Zealand (Fang v. Jiang, [2007] NZAR 420 (H.C.)); 141 I.L.R.702 (H.C. 2006)); and Greece (Margellos and Others v. Federal Republic of Germany, 129 I.L.R.525 (Special Sup. Ct. 2002)); see also Jurisdictional Immunities of the State (Ger. v. It., Greece intervening), Judgment, ¶ 96 (Sept. 11, 2013, 11PM), http://www.icj-
While noting the growing recognition of the overriding importance of the prohibition of torture, [the court] does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.\(^\text{302}\)

In *Germany v. Italy*, the ICJ also rejected the claim by Italy and Greece that state immunity could not be invoked in cases where rules endowed with a peremptory character had been breached.\(^\text{303}\) The two States had argued that *jus cogens* automatically displaced any hierarchically lower rule of customary or treaty law, such as state immunity, that would hinder the enforcement of the *jus cogens* rule.\(^\text{304}\) The ICJ ruled that the gravity of the alleged crimes or their qualification as violations of *jus cogens* norms were no ground for an exception to, or an overriding of, state immunity.\(^\text{305}\) The court distinguished between procedural and substantive rules and found that there was no conflict between substantive *jus cogens* prohibitions on enslavement, for instance, and procedural state immunity.\(^\text{306}\) The court noted that this was consistent with the ICJ’s rulings in *Armed Activities in the Congo* and *Arrest Warrant of 11 April 2000*, in which *jus cogens* did not confer jurisdiction or abrogate

cij.org/docket/index.php?p1=3&p2=2&case=143&p3=0 ("The Court does not consider the judgment of the French Cour de Cassation of Mar. 9, 2011 in La Réunion aérienne v. Libyan Arab Jamahiriya (No. 09-14743, Mar. 9, 2011, Bull. civ., March 2011, No. 49, 49) as supporting a different conclusion. The Cour de Cassation in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on state immunity, such a restriction could not be justified on the facts of that case.").


\(^\text{303}\) Jurisdictional Immunities of the State (Ger. v. It., Greece intervening), judgment, ¶ 61 (Sept. 11, 2013, 11PM), http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=143&p3=0; see also id. ¶ 101 (holding that, in the context of state immunity, it could “find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress”).

\(^\text{304}\) Id. ¶ 93.

\(^\text{305}\) Id. ¶¶ 105-06.

\(^\text{306}\) Id. ¶¶ 93-94.
immunities of officials.\textsuperscript{307}

The Dutch Supreme Court similarly rejected the argument that the immunity of the United Nations did not apply because of the gravity of the allegations of the claimants.\textsuperscript{308} Should this principle govern a case against the United Nations? The Supreme Court offered nothing more than \textit{ipse dixit}.\textsuperscript{309} However, there are reasons to query this extension. The rationale behind state immunity is quite different from that of the United Nations’ immunity. Besides reasons of international courtesy,\textsuperscript{310} state immunity is predominantly derived from the principle of sovereign equality of states, as generally expressed by the maxim \textit{par in parem non habet imperium}.\textsuperscript{311} Other principles often invoked as justifications for state immunity are the principle of non-intervention in the internal affairs of other states\textsuperscript{312} and the inability of a national court to enforce its judgments against a foreign state.\textsuperscript{313}

In contrast, writing in 1944, the League of Nations’ former legal adviser McKinnon Wood gave three justifications for the immunity of international organizations.\textsuperscript{314} First, international organizations must have effective protection against biased domestic courts.\textsuperscript{315} Second, they need effective protection against “baseless actions brought from improper motives or by the numerous cranks, fanatics or cantankerous persons who may conceive that they have a duty to compel the organization to take

\begin{footnotesize}
\item[307] \textit{Id.}, ¶ 95.
\item[309] See id. ¶¶ 4.3.13-3.14.
\item[311] See \textsc{Ian Brownlie}, \textsc{Principles of Public International Law} 321 (6th ed. 2003).
\item[312] \textsc{Pingel-Lenuzza}, \textit{supra} note 310.
\item[313] \textsc{Hazel Fox}, \textsc{The Law of State Immunity} 56-57 (2008).
\item[314] Hugh McKinnon Wood, \textit{Legal Relations Between Individuals and a World Organization of States}, 30 \textsc{Grotius Soc’y Transactions for the Year} 1944 141, 143-44 (1944).
\item[315] See id.
\end{footnotesize}
some particular step or that they have suffered wrong at its hands.\footnote{Id. at 144.} Third, international organizations require effective protection against the possibility that member states will interpret the legal effect of their acts in different, and possibly inconsistent, ways.\footnote{Id.}

Furthermore, in the cases cited above, Kuwait and Germany invoked a rule of customary international law, specifically state immunity, to avoid liability for an alleged violation of \textit{jus cogens}. In contrast, in \textit{Mothers of Srebrenica}, the United Nations was invoking a provision of a treaty, specifically Article 105 of the Charter. Relevantly, Article 53 of the Vienna Convention on the Law of Treaties provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.\footnote{Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 53. The Vienna Convention also envisages the emergence of new peremptory norms of general international law. \textit{Id.} art. 64.}

While this provision does not apply to the U.N. Charter, because the Vienna Convention is not retroactive,\footnote{Id. art. 4.} it strongly suggests that there is a difference between applying a rule of \textit{jus cogens} to a treaty and applying it to any other kind of legal dispute. If the sequence were reversed, that is, if the Vienna Convention were older than the U.N. Charter, an infinite loop would seemingly result, with Article 53 of the Vienna Convention and Article 103 of the U.N. Charter each invalidating the other. While hardly an uncontroversial position,\footnote{See Slobodan Milošević v. State of the Netherlands, 41 I.L.M. 86, ¶ 3.5 (2001) (holding that, on the basis of Article 103, the rules of the U.N. Charter and therefore those of the U.N. Security Council prevail over "any other" set of rules).} Judge Elihu Lauterpacht stated in the \textit{Bosnian Genocide} case:
[T]he relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*.\(^{321}\)

Of course, none of that ultimately would have saved the plaintiffs’ case. After all, they were not claiming that the United Nations committed genocide or torture. The Dutch Court of Appeal, applying the *Beer and Reagan v. Germany* and *Waite and Kennedy* criteria, insinuated that it might have withdrawn the U.N.’s immunity had the organization been accused of the “more serious” crimes of committing or assisting in the commission of genocide, as opposed to the “lesser” wrong of failing to prevent the Srebrenica massacre.\(^{322}\) Although the Court of Appeal did not explain its reason for drawing this distinction, it has been suggested that the disparity can perhaps be justified on the basis of the *jus cogens* nature of the prohibitions of genocide, versus the treaty-norm status of the latter affirmative duties.\(^{323}\) Similarly, regarding any *jus cogens* exception to Article 105, there is a massive distinction between actually committing genocide and the plaintiff’s claim that the United Nations was negligent in preventing the genocide.

**VI. Limiting Immunity Based on the Lack of Functional Necessity**

If the competence of domestic courts to test U.N. immunity


\(^{322}\) See Dekker & Schechinger, *supra* note 255, at 6-7. They have also identified a confusing aspect of this ruling. They point out that “the general interest connected with [U.N.] immunity . . . and the risk of abuse of domestic court proceedings would not change [even if the United Nations had been accused of the ‘more serious’ offenses], making it unlikely that the test of proportionality would result in a different outcome.” *Id.* at 6.

against other legislation or treaties is rejected, does this mean that the United Nations has immunity for any action? Here, there appears to be a tension between Article 105 of the Charter, which provides the United Nations with "functional" immunity, and the Convention, which provides the United Nations with "absolute" immunity. The apparent functionally-limited grant of immunity provided for in the Charter has historically been regarded as embodying a standard of absolute immunity, insofar as "international organizations can only act within the scope of their functional personality there is no room left for non-functional acts for which immunity would be denied." However, in recent years many scholars have come to regard this approach as overbroad, and instead encourage courts to adopt a "strict-functionality" test that would limit the application of the U.N.'s immunity to activities that are necessary for the exercise of its functions or fulfilment of its purposes.

The plaintiffs in Mothers of Srebrenica argued that the United Nations could only possess a strict-functional immunity, on the basis that "the Convention cannot extend further than the superior ranked [U.N.] Charter." The Dutch Court of Appeal rejected this approach, deciding that Article II, section 2 of the Convention and Article 105(3) of the Charter granted the United Nations "the most far-reaching immunity, in the sense that the [United Nations]"

324 August Reinisch & Ulf Andreas Weber, In the Shadow of Waite and Kennedy, 1 INT'L ORG. L. REV. 59, 63 (2004). Reinisch also noted that "the idea of functional immunity is rather imprecise in so far as it could refer both to the rationale for granting immunity at all . . . as well as to a certain content of immunity to be accorded." AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 331 (2000). Furthermore, "many scholars and judges consider . . . 'functional' and 'absolute' [to be] synonymous qualifications." Id. at 332-33.


cannot be brought before any national court of law in the countries that are a party to the Convention." The Dutch Court of Appeal is one of a few judicial institutions to have evaluated the scope of the U.N.'s immunity on the basis of the international law obligations embodied in the Convention and Charter, as opposed to domestic laws that have incorporated those international law obligations. Interestingly, the Dutch Court of Appeal decision deviated from the precedent set by the Belgian Civil Tribunal in a decision from several decades earlier. In Manderlier, the Belgian Tribunal concluded that the Charter embodied only the immunities that "necessity strictly demands for the fulfilment of the [U.N.'s] purposes" but that these immunities had been expanded by Section II of the Convention. The Dutch Court of Appeal turned this analysis on its head, concluding that the Convention had not gone "beyond the scope allowed by Article 105 of the Charter" in the course of "implementing" the Charter protections.

While the Charter does not restrict the U.N.'s immunity, it does not extend indefinitely. For example, the OLA has contended time and again that the immunity granted by the Charter and Convention does not extend to commercial enterprises, a

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327 Mothers of Srebrenica, 200.20.151/01, ¶ 4.2.
330 Mothers of Srebrenica, 200.20.151/01, ¶ 4.4.
331 See Office of Legal Affairs, Advisability of the United Nations Entering Into a Profit-making Joint Venture with a Private Publishing Firm – Purpose of the Current Commercially Oriented Activities of the United Nations—Participation in a Profit-Oriented Commercial Joint Venture Could put the Status and Character of the Organization in Question, 1990 U.N. Jurid. Y.B. 257, 258, U.N. Sales No. E.93.V.1 (acknowledging that if "the Organization were to participate in a commercial joint venture, it would . . . have to waive its privileges and immunities, the granting of which would no longer be justified"); see also Anthony Miller, The Privileges and Immunities of the United Nations, 6 INT’L ORG. L. REV. 7, 21 n.45 (2009) (describing other incidents in which the OLA of the U.N. has recommended against undertaking activity, on the grounds that it would exceed the functional mandate of the U.N. and expose it to
view that was recently affirmed by the High Court of Kenya.\textsuperscript{332} This acknowledgment comports with the U.N. General Assembly’s view that immunities have an “outer limit” beyond which “no privileges and immunities which are not really necessary should be asked for.”\textsuperscript{333} The OLA has gone further and acknowledged that the manner in which the United Nations executes its mandate may impact the scope of the U.N.’s immunity.\textsuperscript{334} The OLA acknowledged that participation in a competitive bidding process by U.N. subsidiary organs, even when the bidding was done in order to assist States, might strip the U.N. subsidiary organ of its immunity before domestic courts.\textsuperscript{335} The restrictive nature of the United Nations’ immunity is strengthened by the opinion of the ICJ in the Certain Expenses of the United Nations case, which determined that the purposes of the United Nation “are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited.”\textsuperscript{336}

Nonetheless, scholars have asserted that international

\textsuperscript{332} Tanad Transporters Ltd. v United Nations Children’s Fund (2009) eK.L.R., 1, 3 (C.C.K.) (Kenya), reprinted in 2009 U.N. Jurid. Y.B. 487, U.N. DOC. ST/LEG/SER.C/47 (holding that “for the applicant to succeed in its claim that this court has jurisdiction to hear the dispute, it must establish that the commercial activity exercised by the respondent is outside its official function. In the present application, it is clear that the transport agreement between the applicant and the respondent related to the official function of the respondent.”).


\textsuperscript{334} See Office of Legal Affairs, supra note 331, at 258.

\textsuperscript{335} General Legal Division of the Office of Legal Affairs, Participation of Organizations of the United Nations system in Competitive Bidding Exercises Conducted by Governments, 1999 U.N. Jurid. Y.B. 418, 423, U.N. DOC. ST/LEG/SER.C/37 (“If the practice of United Nations system organizations competing with private companies for business were to be pursued, it cannot be a priori excluded that the immunity of such organizations might be challenged in court. Whether this would occur and the possible results are difficult to predict. Even if the United Nations system organizations were to prevail in such legal actions, the institution of such actions conceivably could have other implications.”).

immunities have expanded\(^{337}\) to the point where their implementing treaties resemble the doctrine of absolute state immunity\(^{338}\) because complete jurisdictional immunity may seem "excessive" in light of the minimum immunities necessary for the United Nations to perform its functions.\(^{339}\) Scholars frequently have questioned whether the United Nations requires immunity from every suit brought by victims of traffic accidents.\(^{340}\) Proposals for reform generally draw analogies to restricted state immunity. The shift toward a restrictive approach to state immunity originated with a decision of the Supreme Court of Austria in 1950,\(^{341}\) as well as the Tate letter of the United States

\(^{337}\) See Singer, supra note 105, at 56 (arguing "as jurisdictional immunity has waned for states, it has waxed for international organizations"); see also Hammerschlag, supra note 105, at 282 (describing "a long line of rulings that have expanded immunity for international organizations").

\(^{338}\) See, e.g., Boimah v. United Nations Gen. Assembly, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (describing the Convention as creating "absolute" immunity); Felice Morgenstern, Legal Problems of International Organizations 6 (1986) (referring to the "absolute" immunity of international organizations); Walter Gary Sharp, Sr., Protecting the Avatars of International Peace and Security, 7 Duke J. Comp. & Int’l L. 93, 128 (1996) (stating that the Convention "creates a system of absolute immunity for the property, funds, and assets of the United Nations"); Farrugia, supra note 8, at 513 (stating that "international organizations still have absolute immunity, although foreign government immunity is now restricted"); Henderson, supra note 10, at 487 n.6 (asserting that the United Nations Charter grants the United Nations "complete immunity" from all legal process); Lewis, supra note 8, at 686 (noting that most international organizations "define their immunities from legal process as absolute," and stating that the language of the Charter "was intended . . . to confer absolute immunity").


\(^{340}\) See Singer, supra note 105, at 128, 141 (emphasizing that functional necessity secures only the minimum immunities necessary for international organizations and does not guarantee them immunity from all routine transactions, much less a "quiet" or "charmed" existence); see also Note, Jurisdictional Immunities of Intergovernmental Organizations, 91 Yale L.J. 1167, 1190 (1982) ("Merely allowing a suit in tort against an intergovernmental organization seems unlikely to constitute an overly intrusive interference with its core activities."); see also Westchester Cnty. v. Ranollo, 187 Misc. 777, 780, 67 N.Y.S.2d 31, 34 (City Ct. 1946) (refusing to believe that every employee of an international organization requires immunity for official acts without regard to the importance of his or her functions).

State Department in 1952, which observed the increased activity of States in commercial activities. As the U.K. Privy Council observed in \textit{Philippine Admiral}, the restrictive theory is more consonant with justice:

In this country—and no doubt in most countries in the western world—the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued there in respect of such transactions.

Over the following years, the courts in many civil and common law states adopted a distinction between absolute immunity for acts \textit{jure imperii} and restrictive immunity for acts \textit{jure gestionis}. In the context of U.N. immunity, a number of scholars have suggested that the doctrine of restricted state immunity should either be applied en bloc or provide a model


345 See \textit{DEREK BOWETT}, \textit{THE LAW OF INTERNATIONAL INSTITUTIONS} 362 (1982) (predicting that, as international organizations expanded, there would be greater justification for applying the doctrine of restricted state immunity to their activities); Letter Roberts B. Owen, Legal Adviser to the Department of State, to Leroy D. Clark, General Counsel to the EEOC (June 24, 1980), \textit{reprinted in} Marian L. Nash, \textit{Contemporary Practice of the United States Relating to International Law}, 74 \textit{AM. J. INT’L L.} 917, 917 (1980) (concluding that international organizations enjoy the same restricted immunity as foreign states); Thomas O’Ttoole, \textit{Sovereign Immunity Redivus}:}
for the immunity of international organizations and their personnel. In particular, it has been suggested that, if foreign states can function with restricted immunity, domestic courts should require international organizations to do the same.

However, despite suggestions from scholarship and a relatively small number of decisions of domestic courts, the division between acts *jure imperii* and acts *jure gestionis* is neither relevant nor transportable to international organizations. The legal foundation of the United Nations' immunity and state immunity are fundamentally different. As rightly pointed out by Higgins, the question of whether the immunity is necessary for the fulfillment of the organization's purpose cannot be answered by reference to the division between acts *jure imperii* and acts *jure gestionis*. Additionally, domestic courts have generally been

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346 See Singer, supra note 105, at 65 (proposing to draw on foreign state immunity concepts in defining the scope of international immunities); see also Note, *Jurisdictional Immunities of Intergovernmental Organizations*, supra note 340, at 1191-92 (proposing limited restrictions that would harmonize international immunities in conformity with trends in state immunity law); see also BEKKER, supra note 10, at 163 (proposing to draw a modest analogy to foreign state immunity by distinguishing between the nature of activities performed by international organizations).

347 Singer, supra note 105, at 135.


350 See Fox, supra note 313, at 727. In the literature it has also been asserted that there is no distinction between acts *jure imperii* and acts *jure gestionis* in international organization law. See CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF INTERNATIONAL INSTITUTIONAL LAW 328 (2003).

351 HIGGINS, supra note 6, at 93; see also Christian Dominicé, *L’immunité de juridiction et d’exécution des organisations internationales*, 187 Recueil Des Cours 145, 179-80 (1984 IV) (criticizing the Italian courts’ application of the allegedly implicit restrictive immunity standard to international organizations, pursuant to the distinction
unwilling to recognize exceptions to the immunity of international organizations under customary international law for acts *jure gestionis*. An Austrian court, hearing a case against the Organization of Petroleum Exporting Countries Fund for International Development, the immunity of which was laid down in a headquarters agreement with Austria, put the issue unequivocally as:

Comparing the nature of the immunity of international organizations to that of states while foreign states, according to domestic law and prevailing international law, solely enjoy immunity for sovereign acts and not in their capacity as subjects of private rights and duties, the immunity of international organizations is—within the scope of their functional restrictions—in principle to be regarded as absolute.\(^{352}\)

In a similar vein, a Swiss court pointed out that the immunity of international organizations bore no similarity to the immunity of States, the latter being limited, but the former ordinarily being absolute in accordance with the relevant headquarters agreement.\(^{353}\) A Danish court also ruled that UNICEF should be considered immune from jurisdiction relating to a dispute of a civil law nature, excluding an exception for acts *jure gestionis*.\(^{354}\)

Under the restrictive approach to state immunity, domestic courts determine whether they have jurisdiction over the subject matter or if the State enjoys immunity. In contrast, under so-called absolute immunity, the United Nations determines whether

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domestic courts have jurisdiction by waiving immunity\cite{355} or whether it is obliged to provide "appropriate modes of settlement." In this context, immunity does not equate to impunity but is better regarded as a forum selection rule. Unlike diplomatic immunity, where waiver remains a right of the sending state,\cite{356} the Convention creates an obligation for the Secretary-General to waive the immunities of U.N. personnel whenever the assertion of immunity would "impede the course of justice" and waiver may be accomplished without prejudice to the United Nations.\cite{357}

With respect to tort actions brought by non-employees, automobile accidents provide the most common source of dispute and the one area in which the United Nations consistently waives its immunity.\cite{358} To the extent that it carries third-party insurance,

\begin{itemize}
  \item \textbf{Section 20}

  Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General 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 of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

  \item \textbf{Section 23}

  Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

355 Sections 20 and 23 of the Convention on the Privileges and Immunities of the United Nations contain two waiver provisions. They read:

Section 20

Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General 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 of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

Section 23

Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

356 LINDA S. FREY & MARSHA L FREY, THE HISTORY OF DIPLOMATIC IMMUNITY 561 (1999) (stating, in the context of diplomatic immunity, that waiver "is more a moral than a legal obligation").

357 HILL, supra note 14, at 109-11 (describing the Convention's mandatory waiver as an innovation).

the United Nations has also waived its immunity for other tort claims.\textsuperscript{359} Immunity has also been denied in both Kosovo and East Timor after evidence of involvement of serious crimes has come to light. For example, members of the U.N. civilian police accused of rape in Mitrovica and murder in Pristina have had immunity protections waived.\textsuperscript{360}

When two Jordanian U.N. civilian police were arrested for allegedly raping an East Timorese woman employed as a cleaner in a hotel in Dili, the Special Representative of the Secretary-General announced that the officers would not enjoy immunity from legal process and would be tried in East Timorese courts.\textsuperscript{361} After an investigation by a U.N.-convened Board of Inquiry, the Special Representative of the Secretary-General decided that rape could not be construed as an “official” or “necessary” act and that consequently, a waiver from the Secretary-General was unnecessary because immunity did not attach.\textsuperscript{362} The East Timor Prosecutor General subsequently indicted the officers.\textsuperscript{363}

Waiver is only required after the Secretary-General determines

\begin{footnotes}
\footnotetext{359}{See, e.g., Fourth Report on Relations Between States and International Organizations, supra note 339, at 162; Reply dated Feb. 26, 1976 by the UN Office of Legal Affairs to a Questionnaire from the Institut de Droit International, 1976 U.N. Jurid. Y.B. 163, U.N. Doc ST/LEG/SER.C/14; Bekker, supra note 10, at 204; Singer, supra note 105, at 85.}

\footnotetext{360}{Rawski, supra note 80, at 119.}

\footnotetext{361}{A spokesman for the Secretary-General in New York subsequently explained that the Secretary-General would waive the immunity of the U.N. civilian police and that, because they were not peacekeepers, he could do so without the approval of the Jordanian government. \textit{See U.N. Policeman Charged with Rape in East Timor, \\textit{AGENCE FRANCE-PRESSE} (Aug. 26, 2001), available at http://www.lexisnexis.com/hottopics/lnacademic/}.}

\footnotetext{362}{Rawski, supra note 80, at 120. This decision came only after an internal debate within the mission, in which sections argued that the U.N. civilian police were covered by the Convention’s immunity provisions during their entire time on mission, that immunity protection is not contingent on the nature of the particular act in question, and that the arrests were therefore unlawful.}

\end{footnotes}
that immunity would impede the course of justice and that waiver would not prejudice the interests of the Organization "in his opinion." However, the United Nations Legal Counsel has recognized that the Secretary-General’s waiver decisions are reviewable by the ICJ. As a result, waiver becomes a frequent duty of the United Nations and a serious structural limitation of its immunity. It hangs "like a permanent threat over the heads of officials who might otherwise [be] inclined to abuse their position" and can provide a remedy for victims of abuse. In line with the concept of functional necessity, the United Nations seems unwilling to waive immunity when claimants accuse its personnel of committing intentional torts in their official capacity.

Many writers claim that the Convention requires the United Nations to waive the immunities of its personnel but not its own immunity. While this view enjoys popular support, it has been

364 Convention, supra note 18, art. 5-6, §§ 20, 23. While there has been no comprehensive statement from the Secretary-General’s office about when waiver is obligatory, there are indications that, in cases of “serious breaches” of international law, refusal to waive immunity would violate Sections 20 and 23. See Working Paper submitted by Japan, U.N. GAOR, 3d Sess., Sec II 2(2) at 4, U.N. Doc. BWC/AD HOC GROUP/WP.52 (Dec. 8, 1995).

365 See Oral Statement of the United Nations, supra note 30, ¶¶ 59-61; see also Written Statement of Federal Republic of Germany, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29) (assuming that the ICJ has the authority to review the Secretary-General’s decisions on waiver).

366 See Bowett, supra note 345, at 377 (explaining that “waiver is often a duty imposed on the organisation”).

367 See Egon Ranshofen-Wertheimer, The International Secretariat 266 (1945) (describing the effect of potential waivers of diplomatic immunities on League of Nations officials); see also Jacques Secretan, The Independence Granted to Agents of the International Community in Their Relations with National Public Authorities, 16 Brit. Y.B. Int’l L. 56, 72 (1935) (arguing that “[t]he right to waive immunities, vested in the authority which appoints the agent in question, is a sufficient guarantee that cases of denial of justice will not occur”).

368 See Reply dated Feb. 26, 1976 by the U.N. Office of Legal Affairs to a Questionnaire from the Institut de Droit International, supra note 359, at 172, 176 (explaining that the United Nations does not generally waive immunity except in cases of third-party liability that is covered by insurance).

369 See Bekker, supra note 10, at 192 (stating that international organizations have no legal duty to waive their own immunities and that the decision to waive immunity is usually left to the discretion of the organization); see also Wilfred Jenks,
argued that it reflects an incomplete understanding of the Convention. When the United Nations waives the immunity of its personnel for official acts, it waives a manifestation of its own immunity, assumes responsibility for the underlying conduct, and undertakes to indemnify its agents against any damage awards. In this sense, the express duty of waiver indirectly applies to the United Nations' "own" immunity, at least in cases where the claimants join U.N. personnel as defendants.

Therefore, as with U.N. officials, the key question is who

INTERNATIONAL IMMUNITIES 45 (1961) (stating that there is "no corresponding 'right and duty' . . . of the organization" to waive its immunity).

370 Brower, supra note 10, at 31-32 (arguing that the "immunity of [U.N.] personnel for official acts and the immunity of the Organization are inseparable because the former constitute a manifestation of the latter").

371 A few writers have suggested that the waiver of immunity of agents for official acts has no logical place in the framework of U.N. immunity. U.N. personnel possess immunity for official acts because they constitute the acts of the U.N. itself. Therefore, as a technical matter, the officials' immunity should not be waived; the immunity of the U.N. should be waived. See Marjorie Whiteman, 13 Digest of International Law 155 (1968).

372 Oral Statement of the United Nations, supra note 30, ¶ 14 ("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.").

373 Written Statement Submitted on Behalf of the Secretary-General of the United Nations, supra note 100, ¶ 64 (recognizing that an expert on mission was "entitled to be reimbursed by the United Nations for any . . . costs, expenses or damages" resulting from a defamation suit arising out of his official activities); Oral Statement of the United Nations, supra note 30, ¶ 46 (reaching the same conclusion).

should make the determination of whether immunity initially applies. By introducing a duty to waive unnecessary immunities, the Convention preserves the conceptual framework of functional necessity but vests the Secretary-General with the primary authority for its application. The principal rationale for granting absolute immunity from legal process to the United Nations lies in securing its independence and guaranteeing its functioning. It is relatively uncontroversial that "[t]he privileges and immunities of international organizations are designed mainly to protect the independence of organizations from undue outside influence and otherwise to ensure that they are able to carry out their mission."

Many court decisions involving the immunity from suit of international organizations incorporate the independent functioning argument. For example, courts note the grant of immunity "in order to facilitate the working of an international body," to "ensure its functioning," and "to avoid... hindrances to the independent functioning." Immunity from suit may also be necessary to protect international organizations against a potentially hostile environment, against "unilateral and sometimes irresponsible interference by individual governments," and against a general danger of prejudice against

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375 See Brower, supra note 10, at 30; see also Peter Bekker, International Decision: Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 93 Am. J. Int'l L. 913, 921 (1999) (stating that "[t]he object and purpose of [the mandatory waiver provisions] is to assign a central role to the Secretary-General in the case of immunity questions arising under the Convention").

376 REINISCH, supra note 324, at 233.

377 COVEY OLIVER, EDWIN FIRMAGE, CHRISTOPHER BLAKESLEY, RICHARD SCOTT & SHARON WILLIAMS, THE INTERNATIONAL LEGAL SYSTEM 613 (1995); see also Glenn, supra note 9, at 276 (speaking of the "indispensability of jurisdictional immunity to the effective functioning of international organizations").


379 REINISCH, supra note 324, 191 (discussing the reasoning of the court in X v. International Centre for Superior Mediterranean Agricultural Studies, Court of Appeals of Crete (1991)).


381 Jean-Flavien Lalive, L'immunité de juridiction des états et des organisations internationales, 84 RECUEIL DES COURS 205, 298-303 (1953 III).

382 Paul Szasz, International Organizations, Privileges and Immunities, in 2
international organizations among judges. While these prejudices may be imperceptible in the stable environment of major western capitals, it is unhelpful to judge U.N. immunities by reference to the situations where they are needed least.

Additionally, it is sometimes argued that domestic judges may not be trained well enough in international matters in order to decided issues concerning the United Nations. However, it has been suggested that the failure to waive immunity for intentional torts is unwarranted because the United Nations never requires immunity “in cases alleging that they have intentionally caused death, personal injury, or damage to . . . property within the forum state.” This argument is appealing, given that, when domestic law governs a tort claim, international organizations are less justified in citing the limited perspective of municipal courts or the possibility of conflicting judgments to justify the assertion of immunity. Actually, in these tort cases, domestic courts may be in the best position to apply the governing law.

Still, a blanket rule against immunity fails to consider the nature of situations in which the United Nations and its officials are likely to commit international torts. The cases discussed in

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384 For example, during the inter-war period, critics asserted that the League of Nations did not require immunities because its seat was located in a “civilized country.” Frey & Frey, *supra* note 356, at 552, 593; *see also* Wood, *supra* note 314, at 143-44 (recognizing that international organizations have little reason to fear the possibility of bad faith or prejudice in the domestic courts of countries like Switzerland).

385 *See* Beker, *supra* note 10, at 207 (quoting Jenks, *supra* note 369, at xxxvi, for the proposition that “the need for [international] immunities must be gauged not by the extent to which they are necessary or useful in everyday life in a well-ordered capital but by their potential importance in emergencies”).

386 *Reinisch, supra* note 324, at 234.


388 *Id.* at 130.


390 Brower, *supra* note 10, at 64.
this Article generally involve purposeful activities that the United Nations has determined to be part of its official work. When the tort claims involve circumstances in which the United Nations concludes that it has a right under international law to perform acts that would otherwise be actionable under domestic law, it is not clear that domestic courts should adjudicate the rights and liabilities of the Organization and its personnel. For example, when the Security Council controls military enforcement actions in accordance with Chapter VII of the Charter, members of the participating force should not be exposed to domestic court jurisdiction for claims of personal injury and property damage that might otherwise lie under domestic law. When member states require the United Nations to issue reports on particular topics, their authors should not face domestic court jurisdiction for defamation claims that might arise under domestic laws.

International officials are unlikely to commit intentional violations of domestic tort law in the absence of a colorable claim that they have a right to do so under international law. While such claims may not always be justified, it is not unreasonable to be even more suspicious of attempts by domestic courts to resolve conflicts between international law and domestic tort law. Instead, the influence of member states on the activities of the United Nations should be channelled through its “internal law.” These are laid down in its founding treaties, its organizational practice, and the rules emanating from organs of the organization. The United Nations should be protected from the adjudicative power of national courts to ensure both clearly defined decision-making processes and budgetary procedures that lay down the options available to States to exercise influence within the United Nations are not circumvented by external “commands” addressed to the United Nations through any state organs, and in particular, through courts.

391 Id.
392 Id. at 65.
393 Id.
394 See generally Rudolf Bernhardt, Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen, 12 BERICHTE DER DEUTSCHEN GESELLSCHAFT FUR VOLKERRECHT 7 (1973).
395 Szasz, supra note 382, at 1326.
This consideration was one of the main arguments raised in the United Nations amicus curiae brief in the *Broadbent v. OAS* case.\(^ {396} \) To justify a scope of immunity for international organizations different from that of states, the United Nations reasoned:

Intergovernmental organizations may be considered as collective enterprises of their member States. Their constituent treaties define precisely the influence each member is to have on the operations of the organizations, and how that influence is to be exercised—generally through collective organs. If individual members could then exert additional influence on those organizations, largely through the fortuitous circumstances of where their headquarters, or other offices or officials or assets, happen to be located this could drastically change the constitutionally agreed sharing of power within the organizations. Thus the immunity granted by States to an intergovernmental organization is really their reciprocal pledge that none will attempt to garner unilaterally an undue share of influence over its affairs.\(^ {397} \)

Under these circumstances, the assertion of immunity represents a legitimate effort by the United Nations to transfer the adjudication of liability to international “appropriate modes of settlement” and, thus, to ensure the primacy of international law.\(^ {398} \)

Finally, though frequently considered as an aspect of the attempt to secure the organization’s independence,\(^ {399} \) the negative effect of inconsistent judgments by various domestic courts and the lack of any harmonization mechanism also support the grant of immunity from domestic lawsuits.\(^ {400} \) It has been argued that an

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399 See Bekker, *supra* note 10, at 102-03.

organization created for the common interest of its member states "must therefore speak with one voice and can only regulate its legal relations through one uniform body of law."\footnote{401} The most effective way to achieve a "modicum of uniformity" in interpretation is for "all States concerned [...] to pay serious heed to one another's case law."\footnote{402} As Judge Simma of the ICJ has argued, the growing importance of domestic jurisprudence for international law's development brings with it an "increasing responsibility on the part of these courts to maintain the law's coherence and integrity."\footnote{403} In this context, it is problematic how infrequently domestic courts look to other foreign decisions regarding the immunity of the United Nations.\footnote{404}

The Vienna Convention on the Law of Treaties does not require consistent interpretation; instead it calls for treaties to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."\footnote{405} However, subsequent practice of treaty parties (including decisions of their national courts) may

\footnote{401}{Bekker, supra note 10, at 103.}
\footnote{402}{Roderick Mundy, The Uniform Interpretation of International Conventions, 27 INT'L & COMP. L.Q. 450, 458-59 (1978); see also Konrad Zweigert & Hein Kotz, An Introduction to Comparative Law 27-28 (1998).}
\footnote{403}{Bruno Simma, Universality of International Law from the Perspective of a Practitioner, 20 EUR. J. INT'L L. 265, 290 (2009).}
\footnote{404}{In April 2011 the University of Vienna hosted a conference which is expected to lead to an edited volume August Reinisch, Transnational Judicial Dialogue of Domestic Courts on International Organizations (forthcoming 2013). Contributors noted:
Regarding the Netherlands, Rosanne van Alebeeck and André Nollkaemper had "found only two cases in which a Dutch court expressly referred to another national court when deciding a question related to [international organization] immunity; the proverbial exceptions that prove the rule." Regarding the United Kingdom, Dan Sarooshi and Antonios Tzanakopulos concluded that "[o]n the issues of personality and immunity the UK courts have been relatively conservative in their approach by relying almost exclusively on the construction of the [International Organizations] Act [1968] and implementing Orders in Council (secondary legislation)." Regarding Italy, Riccardo Pavoni endorsed the "characterization of Italian case law on [international organizations] as isolationist, although not by reference to the substantive correctness of the court findings in the various cases, but precisely for its disregard of foreign and international court decisions."
\footnote{405}{Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.}
provide evidence of an agreement on interpretation.\textsuperscript{406} Even some of the most vocal opponents of the citation of foreign decisions in other contexts recognize the importance of engaging in comparative analysis of various domestic court decisions when interpreting treaties. Despite his vociferous objections to the use of foreign decisions in constitutional interpretation, Justice Scalia states that “[w]hen federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories,” because “[o]therwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated.\textsuperscript{407}

VII. Towards Best Practices

The Convention, as a matter of international policy, vested the United Nations with an obligation to waive immunity or to make available an alternative means of settlement.\textsuperscript{408} With respect to torts claims, the ICJ in \textit{Cumaraswamy} confirmed that:

[A]ny 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.\textsuperscript{409}

Instead, when plaintiffs are unsatisfied by the “appropriate

\textsuperscript{406} Id. art. 31(3)(b). The threshold for establishing such an agreement is meant to be high, requiring “concordant, common and consistent” practice that “is sufficient to establish a discernible pattern implying the agreement of the parties regarding interpretation.” See Appellate Body Report, Japan-Taxes on Alcoholic Beverages 12-13, WT/D/S/8/AB/R, WT/D/S/10/AB/R, WT/D/S/11/AB/R (adopted Nov. 1, 1996) (quoting IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 137 (1984)). However, not all treaty parties are required to have engaged in such practice; it may be sufficient for some to have done so and others to have assented to or acquiesced in the practice. See RICHARD GARDINER, TREATY INTERPRETATION 227, 235-39 (2008); see also MARK VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 431 (2009).


\textsuperscript{408} Miller, supra note 331, at 97.

\textsuperscript{409} Cumaraswamy, supra note 19, ¶ 66.
modes of settlement” offered by the United Nations, they often attempt to seek recourse against troop-contributing countries. It seems settled that the “effective control” test of Draft Articles is the relevant standard for determining whether the conduct is attributable to the United Nations, the troop-contributing country, or both. Various courts have construed this as narrowly as “ultimate authority and control” in *Behrami* and as broadly as “power to prevent” in *Nuhanović*. There are three scenarios in which the “effective control” test might be applied: a general authorization by the Security Council for member states to take action, such as in Libya; a specifically authorized force, not operationally controlled by the United Nations, such as KFOR; and the classic U.N. peacekeeper blue-helmets. How will courts rule on attribution in these cases going forward?

It is clear from *Al-Jedda* and ILC commentary that wrongs committed by forces that were merely authorized by the Security Council cannot be attributable to the United Nations. Regarding the second scenario, given the response to the *Behrami* decision by academics, the ILC, and the United Nations and that the ECtHR found means to distinguish *Al-Jedda* from it, future rulings will likely not find attribution to the United Nations. Consequently, it is likely that most future applications will be found in the third scenario, which is most similar to *Nuhanović*. Given that attribution was factually based on the active involvement of the Netherlands in the evacuation process and the mission had ended de facto, great caution should be exercised in using the judgment as a possible basis for other claims. However, when both the United Nations and the troop-contributing country have normative control and are involved factually, dual attribution may be the appropriate disposition.

If the actions are attributable to the United Nations, plaintiffs have sought to limit its immunity by invoking the right of access to court. The ECtHR in *Behrami* and *Saramati* did not unequivocally state that Article 103 took precedence over the

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410 See supra Part IV.
411 See *Behrami*, supra note 147, ¶ 133; *Nuhanović*, 200.020.174/01, ¶ 5.9.
412 Nollkaemper, supra note 246, at 1157.
413 See supra Part V.
ECHR, despite the Dutch Supreme Court in *Mothers of Srebrenica* explicitly relying on it for that point.\(^{414}\) When the question was squarely before the Court, in *Al-Jedda*, the ECtHR skillfully avoided taking position on this prickly issue.\(^{415}\) However, a plain language interpretation of Article 103 suggests that the obligation to grant immunity to the United Nations prevails over any other international agreement, even human rights treaties.

While the Dutch Court of Appeal in *Mothers of Srebrenica* ultimately upheld the immunity of the United Nations, its line of reasoning is an example of a worrisome trend. The court’s finding that it is legally permissible for a party to the Convention to deny “absolute” immunity to the United Nations, as provided under that Convention, has the potential for significant complications. Should a party to the Convention, whether through legislative, executive, or judicial action, refuse to accord the U.N. immunity provided thereunder and allow jurisdiction to be exercised over it, a potential dispute between the United Nations and that State could arise. If the Secretary-General simply flouts the plain words of Section 29, the state of the claimant, or any state party for that matter, would have a justified cause of complaint to the ICJ under Section 30, on the basis that the United Nations had breached an obligation under the Convention. However, being unconvinced that the procedures at the United Nations level offers the appropriate guarantees does not justify domestic courts forcing a State to violate its international responsibilities.

Broader proposals to limit the United Nations’ immunity, based on a lack of functional necessity, are also unjustified. The Charter and Convention do not resemble the doctrine of absolute sovereign immunity. Instead, they adhere to the concept of functional necessity, but give international officials the primary authority for making immunity decisions. The limited perspectives of domestic courts are likely to produce rulings that consistently underestimate the legitimate scope of the U.N.’s activity and its need for immunity.\(^{416}\) Consequently, they are

\(^{414}\) See *Mothers of Srebrenica v. Netherlands & United Nations*, 200.20.151/01, ¶¶ 4.3.4-.3.6.

\(^{415}\) See *Al-Jedda*, App. No. 27021/08 ¶ 102.

\(^{416}\) *JENKS*, *supra* note 369, at 41.
likely to make decisions that impair the capacity of the United Nations to achieve its objectives, particularly in controversial areas such as peace, security, and human rights. Inconsistent decisions may, in effect, change the actual content of the United Nations's legitimate function in different countries. When immunity has been granted to the United Nations and its officials on the basis of functional necessity, member states should leave immunity determinations to the international officials and judges who best understand the needs and functions of the United Nations.

While legally impermissible, as a practical matter, domestic courts may well assume jurisdiction if faced with a private law claim of a prima facie valid nature, if the United Nations does not provide "appropriate modes of settlement." To head off this challenge, the United Nations should set up Article 51 standing claims commissions at the commencement of every mission. Of course, practical problems are presented by standing claims commissions in certain cases. As the Secretary-General put it, "in any event, [such commissions] would be problematic in the context of Chapter VII operations where no 'host Government' would be available to participate." However, in such instances an independent panel of international jurists would still be far superior to the current internal and ad hoc procedures. If the United Nations wishes to avoid unwarranted encroachment by domestic courts, it needs to ensure that it provides an independent, efficient, and transparent alternative process to deal with tort claims.

417 Written Statement Submitted on Behalf of the Secretary-General of the United Nations, supra note 100, ¶¶ 43-44 (citing several General Assembly Resolutions for the proposition that "disregard for the privileges and immunities of officials has always constituted one of the main obstacles to the implementation of the missions and programmes assigned to the organizations of the United Nations system by Member States").

418 Brower, supra note 10, at 57.

419 Dispute Settlement Report, supra note 28, ¶ 17.