

**The non-justiciability of third-party claims before
UN internal dispute settlement mechanisms.
The ‘politicization’ of (financially) burdensome questions**

*Martina Buscemi**

1. *The political question doctrine and the United Nations*

The use of the political question doctrine (PQD), as a form of judicial abdication, has long been asserted by domestic courts seeking to impose a bar on the merit of claims that challenge the validity, the legality, or the expediency of governmental acts involving highly political matters. Common issues considered immune from judicial inquiry and deferred for political consideration include military affairs and the conduct of foreign relations.¹ Building on the assumption that political debate, rather than judicial scrutiny, is more suitable for the review of sensitive governmental acts, the judiciary in several municipal law systems adopts a prudent position of respect for substantive decisions taken by the executive branch, thus avoiding any interference with the latter. The PQD, albeit not uniformly applied, is in fact rooted in the (constitutional) principle of the separation of powers, and therefore it is, essentially, a *State*-related concept predominantly applied by *domestic* courts.²

* Research Fellow of International Law, University of Milan.

¹ For a thorough review of the doctrine and practice of the use of the PQD in foreign policy-related matters see D Amoroso, ‘Judicial Abdication in Foreign Affairs and the Effectiveness of International Law’ (2015) 14 Chinese J Intl L 99; D Amoroso, ‘A Fresh Look at the Issue of Non-justiciability of Defence and Foreign Affairs’ (2010) 23 Leiden J Intl L 933.

² With its several formulations, the PQD can be identified ‘as essentially a function of the separation of powers’ (L Henkin, ‘Is There a Political Question Doctrine’ (1976) 85 Yale L J 597, 603, citing a passage from the landmark United States Supreme Court case in *Baker v Carr*, 269 US 186, 217 (1962)).



Yet, over the last few decades, both national and international courts have put forward arguments akin to the PQD in order to dismiss claims that challenged, directly or indirectly, acts attributable to the United Nations (UN). Variants of the PQD have been evoked by courts in order to justify refraining from reviewing Security Council resolutions and the conduct of member States covered by them, on the basis that a judicial review would impinge on the Organization's independence.³ For instance, judicial restraint has been embraced by (national and international) courts facing questions related to the implementation of Security Council resolutions imposing targeted sanctions.⁴ A similar deferential approach can be found in the well-known strand of decisions rendered by the European Court of Human Rights (ECtHR),⁵ and by domestic courts,⁶ dealing with acts of States committed within the framework of military missions established by, or authorized by, the Security Council.

Admittedly, the non-justiciability of claims against acts covered by Security Council resolutions has not always been explicitly grounded on the PQD. Rather different legal grounds have been relied upon, such as the lack of competence *ratione personae* of the international court, the jurisdictional immunity afforded to the UN, or the supremacy clause enshrined in Article 103. However, some jurisprudential lines may reveal the use of traditional arguments belonging to the PQD strain. Meaningful, in this regard, is the concern expressed by the ECtHR that judicial intervention in matters of international peace and security might affect, and interfere with, the 'imperative mandate' of the Security

³ C Ferstman, *International Organizations and the Fight for Accountability. The Remedies and the Reparations Gaps* (OUP 2017) 135.

⁴ See the well-known judgments before the Swiss Federal Court in *Nada* (14 November 2007) and *Al-Dulimi* (23 January 2008). The first episode of the so called 'Kadi saga' before the European Union courts is also a case in point (European Court of First Instance, *Yusuf and Al Barakaat International Foundation v Council and Commission*, case T-306/01, 21 September 2005), where the Council, the Commission, and the United Kingdom, expressly relied on the PQD to convince the Court to dismiss the claims. The argument, however, has not been followed by the General Advocate, nor by the ECJ which in 2008 reversed the first ruling.

⁵ See eg *Behrami and Behrami v France, Saramati v France, Germany and Norway* App no 71412/01 and 78166/01 (2 May 2007); *Beric and Others v Bosnia and Herzegovina* App no 36357/04 (16 October 2007).

⁶ See eg UK House of Lords, *Al-Jedda v Secretary of State for Defence* (12 December 2007).



Council under which the respondent State acted. In *Behrami/Saramati* and *Beric and Others*, for instance, the ECtHR, while dismissing the complaints for lack of competence *ratione personae*, affirmed the unwillingness to interfere, through its judicial review, with the fulfilment of the UN's key mission to secure international peace and security, and therefore to scrutinize any act or omission of Member States covered by it.⁷ This contention has also been evoked, by the same token, in *Mothers of Srebrenica*.⁸ Whether the approach endorsed by the ECtHR can be viewed as embracing a 'restyle' of the traditional PQD, it is not in doubt that the solution chosen underlies a judicial deference towards the supreme mandate of the political and 'executive' organ of the UN.⁹ From that perspective, the imperative nature of the mandate of the Security Council to ensure international peace and security is perceived, especially when involving military matters, as a political constraint on courts, even on international tribunals tasked with monitoring the respect of human rights.

Intriguingly, the argument of the 'non-justiciability' of disputes that touch upon political and policy matters of the UN's mandate has recently resurfaced in a novel way. The 'political argument' has been raised to dismiss claims of compensation filed, before UN internal dispute settlement mechanisms, by individuals whose rights have been affected in the course of peacekeeping operations and territorial administration. Strikingly, the decision to consider the claims 'not receivable' due to having a 'political nature' has not been assumed by impartial courts or quasi-judicial bodies, but by...the UN Secretariat itself. The assessment unilaterally conducted by the UN Secretariat, leading to the 'non-justiciability' of claims due to political reasons, raises a number of issues.

⁷ In *Behrami/Saramati* and *Beric and Others* the disputes at stake called in question, indirectly, the resolutions of the Security Council concerning, respectively, the transitional administration of Kosovo and the administration of Bosnia (*Behrami* (n 5) para 149; *Beric* (n 5), para 29).

⁸ ECtHR, *Stichting Mothers of Srebrenica and others v the Netherlands* App no 65542/12 (11 June 2013) para 154.

⁹ According to some authors, the 'deferential approach' endorsed by the Court was instrumental in the granting of primacy to the substantive values of ensuring collective security (P De Sena, C Vitucci, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values' (2009) 20 *Eur J Intl L* 193, 206).



The aim of this article is to evaluate the abdicative approach undertaken by the UN and to frame it in the broader strategy of ‘politicization’ of legal questions as a way of escaping responsibility and its financial implications. Firstly, the ‘political or policy-related’ disputes recently declared immune from UN internal review will be briefly outlined (para 2). The legal arguments in support of the ‘non-admissibility’ of such claims will be then critically discussed (para 3), in light of the 1946 Convention on Privileges and Immunities of the United Nations (para 3.1), and of the traditional formulation of the PQD (para 3.2). The article takes a critical look at the wrong turn taken by the UN regarding the compensation of third-party claims, by attempting to disentangle the genuine reasons lying behind the new approach (para 4). Lastly, some final remarks will be made with regard to the quest for justice for (mass) tort claims against the UN (para 5).

2. *The non-justiciability of ‘political claims’ in the recent practice of the UN third-party disputes*

Whilst the deployment of pioneering technologies in UN peacekeeping operations has already taken off, the mode of settlement of disputes arising with third parties is still outdated and is arguably even moving backwards. Nothing meaningful has changed in the procedures for settlement of third-party claims since the entry into force of the 1946 Convention on Privileges and Immunities of the United Nations (CPIUN), requiring the UN, under the Section 29, to settle through ‘appropriate modes [...] disputes arising out of contracts or other disputes of a *private law* character to which the Organization is a party’.¹⁰ At the time of the establishment of the first peacekeeping mission (UNEF), a provision was included in the Status of Forces Agreement (SOFA) signed in 1957 between the UN and the Egyptian Government to establish an arbitral body (the Claims Commission) mandated to review and provide compensation in response to claims for damages occurred during the course of the mission. The Model SOFA promulgated by the Secretary-General in 1990 contained a similar clause, which has been consistently reproduced in each of the SOFAs signed between

¹⁰ CPIUN, Section 29; emphasis added.



the UN and the Host State following the mandate of a peacekeeping operations.¹¹ With one member appointed by the Secretary-General, one by the host Government and a chairman appointed jointly, the Claims Commissions were supposed to work within a minimum set of judicial guarantees and to render final and binding awards.

However, to date, Claims Commissions have never come into existence, and the provisions requiring their establishment remains a dead letter. Conversely, the practice of the UN has shifted towards the establishment of *in situ* administrative offices (the local claims review boards, hereinafter local boards), composed exclusively of UN staff and accountable to the UN Secretary-General. Local boards do not have adjudicative powers, but they endeavour to negotiate an amicable settlement with claimants.¹² The rules applied (the 'internal liability law'), and the cases dealt with, are still rather uncertain and remain undisclosed,¹³ except for the crystal-clear financial and temporal limitations of the UN liability introduced by the General Assembly Resolution 52/247 of 26 June 1998.¹⁴ Arguably, the UN system of third-party remedies has taken a step backwards since the original 'arbitral' model designed in 1957, at least from the perspective of the procedural guarantees provided to claimants. It is in fact doubtful whether the local boards, with their inherent deficiencies, lacking independence and transparency, constrained by financial and temporal limitations, do provide an effective remedy for the victims.¹⁵

Recently, a restrictive interpretation adopted by the UN concerning the 'private nature' of claims eligible for scrutiny pursuant to Section 29 became an additional stumbling block for claimants seeking a remedy

¹¹ Section VII para 51 UN Doc A/45/594 (9 October 1990).

¹² K Schmalenbach, 'Dispute settlement' in J Klabbers, Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 251, 265.

¹³ See K Schmalenbach, 'Third Party Liability of International Organizations. A Study on Claim Settlement in the Course of Military Operations and International Administrations' (2006) 10 YB Intl Peace Operations 33.

¹⁴ UN Doc A/RES/52/247 (17 July 1998). These restrictions have already been put forward in several reports of the UN Secretary-General (UN Doc A/51/389 (20 September 1996) para 20 and A/51/903 (21 May 1997) para 10).

¹⁵ On the shortcomings of the local boards and the detrimental effects of the limitations introduced by the UN, which further curbed the possibility for the claimants to obtain full redress from injuries, see C Ferstman (n 3) 105-107.



and reparation for the harms suffered. In doing so, the UN tightened even further the already narrow access to justice for aggrieved individuals, thus setting a dangerous precedent that needs to be carefully scrutinized. Interestingly, but not surprisingly, such a restrictive and abdication approach has been adopted in two cases that spawned *mass* claims in tort. The complaints arose out of the outbreak of cholera in Haiti brought in 2010 by the MINUSTAH troops (hereinafter the cholera case), and of the lead poisoning at UN-run refugees' camps in Kosovo which operated between 1999-2013 (the lead poisoning case). A high number of petitioners sought justice and individual compensation from the UN – respectively, 5000 Haitians affected by cholera and 138 members of the Roma, Ashkali and Egyptian communities located in the Internal Displaced Person's (IDP) camps under the UNMIK management who suffered from lead poisoning. In both cases, while suits for damages before national courts were in principle hindered due to the immunities afforded to the UN, the claims filed before the local boards were dismissed at the outset, being classified as 'not receivable' because of their public or policy law nature. More precisely, in the lead poisoning case, the UN rejected the claims of compensation for health damages filed before UN Third Party Claim Process in 2006, arguing that the disputes 'do not constitute claims of a private law character and, in essence, amount to a review of the *performance* of UNMIK's mandate'.¹⁶ As a consequence, the UN considered that it was not under any legal obligation to draw up a remedy for the victims within the meaning of Section 29 CPIUN. The UN further clarified its position stating that '[t]he claims were considered by the Organization not to be of a private law character since they amounted to a review of the performance of UNMIK's mandate as an interim administration, as UNMIK retained the discretion to determine the modalities for the implementation of its

¹⁶ Letter from Patricia O'Brien (UN Under-Secretary-General for Legal Affairs) to Dianne Post, who represented the complainants (25 July 2011); emphasis added. By considering the claims 'not-receivable', the UN rejected the claims of compensation for health damages filed before UN Third Party Claim Process in 2006. However, ten years later, the Human Rights Advisory Panel (HRAP) acknowledged that the UNMIK had violated the rights to life and health of the claimants recommending that the UN apologize and pay individual compensation. See HRAP, *N M and Others v UNMIK*, case No 26/08 (26 February 2016).



interim administration mandate, including the establishment of IDP camps'.¹⁷

Likewise, in the cholera case a similar argument was made to impede the review of the claims brought by the victims of cholera before the local dispute mechanism in Haiti. The UN Under-Secretary-General for Legal Affairs, in replying to a petition internally filed by victims of cholera, affirmed that '[w]ith 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 CPIUN Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946'.¹⁸ In a subsequent exchange of letters with the Human Rights Council Special Procedures mandate-holders, the UN further explained that '[i]n the practice of the Organization, disputes of a private law character have been understood to be disputes of the type that arise between two private parties', such as those arising out of contractual liability, vehicle accidents and those relating to the use of property. It is contended that 'in contrast to claims arising from circumstances in which the United Nations is acting like a private person, claims attacking the political or policymaking functions of the Organization are not private-law in character. In this context, an assertion that the United Nations has not adopted or implemented certain policies or practices does not generate a dispute of a private law character'.¹⁹

¹⁷ See Letter from Pedro Medrano, Assistant UN Secretary-General, Senior Coordinator for Cholera Response, to Ms Farha et al (25 November 2014) para 93, in reply to the Joint Letter of Allegation from the Special Rapporteur on Adequate Housing, the Independent Expert on Haiti, the Special Rapporteur on Health, and the Special Rapporteur on Water and Sanitation (25 September 2014). Coincidentally, this statement brings to mind similar wording used by the ECtHR in the *Behrami* and *Mothers of Srebrenica* cases (nn 7-8).

¹⁸ Under-Secretary-General for Legal Affairs, Letter to Mr. Brian Concannon, Director, Institute for Justice and Democracy in Haiti (21 February 2013); emphasis added.

¹⁹ See Letter from Pedro Medrano (n 17) para 87-89.



3. *The political argument as a defense to liability*

By declaring ‘non-receivable’ the claims involving a review of *political* and *policy* matters of the UN mandate, the Organization shielded itself from mass claims of litigation and, most importantly, from compensation in the event of a finding of its liability. The result being that the UN enjoys a *double* immunity, before national courts and before its internal dispute settlement mechanisms – or even a *triple* one, given the lack of jurisdiction of international courts to rule on conduct attributable to the UN.

The position maintained by the UN to avoid reviewing claims before its internal dispute settlement procedures is not legally sound nor fully convincing. This approach cannot be grounded on the provisions enshrined in the CPIUN and in the SOFAs, nor on the PQD’s arguments used by domestic courts to prevent interference with executive actions taken in the international sphere.

3.1. *The policy-related grievances and the divide between private/public claims in the CPIUN*

According to the UN Secretariat, claims related to Haiti and Kosovo cases fall outside the scope of the obligation, enshrined in Section 29 of the 1946 CPIUN, to provide for an alternative remedy, since the claims involve policy-related grievances and a review of the performance of the UN mandate. A restrictive interpretation of the scope of the obligation set in Section 29 seems, on the surface, at odds with the rationale of the norm, ie the need to establish an appropriate alternative remedy that counterbalances the jurisdictional immunity afforded to the UN before national courts.²⁰ Moreover, it is difficult to reconcile this approach with ‘the aim of the UN Charter to promote freedom and justice for individuals’, in light of which the ICJ in 1954 argued that the

²⁰ The set-up of an alternative dispute mechanism is viewed as the ‘flipside and the necessary supplement’ to the UN’s immunity, K Schmalenbach, ‘Disputes Settlement (Article VIII Sections 29-30 General Conventions)’ in A Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (OUP 2016) 529.



UN should afford judicial or arbitral remedy for disputes with its own staff.²¹

Yet, the critical issue to be resolved is whether the disputes at stake have a *private law* nature, thus falling inside the scope of the obligation to provide for alternative dispute settlement. Admittedly, the archaic wording of Section 29, introducing the ‘private-law’ character limitation for claims eligible for internal scrutiny, is rather ambiguous. The distinction between private and public law disputes is controversial in domestic legal orders and barely fits in the context of claims against the United Nations.²² The text of the CPIUN, on the other hand, does not contain a definition of ‘private law’ disputes that the UN is obliged to settle with appropriate modes, and its *travaux préparatoires* do not assist in clarifying the issue. Instead, the contextual history-drafting of the Convention on the Privileges and Immunities of the Specialized Agencies (CPISA), contemplating a regulation mirrored to the CPIUN’s one, offers a meaningful element to this debate. In commenting on Section 31 CPISA, which is identical to Section 29 CPIUN, a line was drawn between private law disputes arising out of ‘matters *incidental* to the performance by the Agency of its main functions’, and those related to ‘the actual performance of its *constitutional* functions’.²³

On the basis of this original distinction, one can argue that the mass claims in tort in Haiti and Kosovo cases should have been considered *prima facie* receivable, since they did not challenge the ‘constitutional’ activities of the UN or the performance of the functions of the MINUSTAH and UNMIK, relating instead to some ‘incidental’ aspects.²⁴ In fact, the failure to exercise reasonable care to screen the UN

²¹ ICJ, *Effect of Awards of Compensation made by the U. N. Administrative Tribunal* Advisory Opinion (13 July 1954) 47, 57. Although the ICJ held this argument in relation to the internal justice system for labour quarrels with the UN, there is no reason to apply a different rationale with regards to third-party disputes with the Organization.

²² As noted by scholars, the private/public law divide ‘est historiquement et géographiquement construite et donc contingente, qu’elle revêt souvent un sens spécifique mais incertain au niveau international’ (F Mégret, ‘La responsabilité des Nations Unies aux temps du cholera’ (2013) 46 *Revue Belge de Droit International* 161, 167) and ‘[i]n relation to the United Nations, it is uncertain whether the distinction refers to the body of law, or to the nature of the complainant, conduct, or forum’ (D Hovell, ‘Due Process in the United Nations’ (2016) 110 *AJIL* 1, 34).

²³ See K Schmalenbach (n 20) 551-552.

²⁴ On the ‘incidental criterion’ see also Y Okada, ‘Interpretation of Article VIII, Section 29 of the Convention on the Privileges and Immunities of the UN. Legal Basis



personnel prior to deployment, the failure to operate and maintain the sanitation facilities and waste disposal system in order to prevent the foreseeable transmission of human waste into waterways, and the failure to take adequate measures with regard to the hazardous health-conditions of the areas where the refugee camps were located, call into question *ancillary* or *instrumental* activities rather than the core functions of UN missions' mandate.²⁵

The analysis of the subsequent (institutional) practice of the UN in the application of Section 29 can be read as backing this view. The Report 'Procedures in place for implementation of article VIII, section 29' issued in 1995 by the Secretary-General helps greatly to clarify the problem, by identifying two categories of claims to which Section 29 is applicable: disputes arising out of commercial agreements (contracts and lease agreements), and other disputes of a private law character. Within the latter's cluster of claims, the 1995 Report embraces 'claims for compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by members of a United Nations peace-keeping operation within the "mission area"'.²⁶ Accordingly, since 1998, claims for personal injury, illness or death arising from or directly attributable to the mission have consistently been included under the UN liability provisions contained in every SOFA signed with the UN,²⁷ with the principle of 'operational necessity' working as the only exemption from liability.²⁸ Similarly, the Legal Officer of the UN, while identifying the requirements that must be satisfied to trigger the applicability of Section 29, confirmed that the claim, to be receivable, must involve a legal relationship between the Organization and the claimant, based on contract or tor-

and Limits of a Human Rights-based Approach to the Haiti Cholera Case' (2018) 15 *Intl Organizations L Rev* 39, 67-68.

²⁵ Along this line, and with regard to Haiti claims, see F Mégret (n 22) 173.

²⁶ UN Doc A/C.5/49/65 (24 April 1995) para 15.

²⁷ See eg the SOFA signed between Haiti and the UN para 54.

²⁸ This principle exempts the Organization from providing compensation for damages occurring to private property, when 'damage results from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate' (see UN Doc A/51/389 para 13).



tious liability (*responsabilité aquilienne*), and it must concern damages allegedly suffered during the course of that relationship.²⁹

Conversely, *public* disputes have been associated, in the practice of the UN, with claims challenging the validity and legality of decisions adopted by the General Assembly or Security Council.³⁰ More broadly, claims have been characterized as ‘public’ when brought by States complaining about the defective performance of the UN functions, or invoking diplomatic protection on behalf of its mistreated citizens.³¹ Likewise, disputes arising from the failure of the UN missions to protect civilians from the harmful acts of third parties might be included, under certain circumstances, within the same classification, since they would entail a revision of the truly operational functioning of the UN and its core mandate.³² These claims are considered by the UN to have an exclusively public (international) law nature.

Yet, it is true that when civilians suffer injuries in the context of a peacekeeping mission, the private/public divide of the claim can be blurred. The same harmful act attributable to the UN can be assessed both as a tortious act on the basis of the relevant domestic tort law (amounting to a non-contractual liability of the UN) and as a human rights violation under public international law (triggering the international responsibility of the Organization). In the UN practice, hybrid or mixed claims are considered receivable pursuant to Section 29, inasmuch as they can *also* be assessed through the lens of general principles of tort laws alone, without calling into question the performance of the UN mandate.³³ The ‘private’ character cannot be excluded simply because the damages suffered by an individual are the result of a violation

²⁹ RH Harpignies, ‘Settlement of disputes of a private law character to which the UN is a party – A case in point: the arbitral award of 24 September 1969 in *Re Starways LTD. v. the United Nations*’ (1971) 7 *Revue Belge de Droit International* 451, 454.

³⁰ It is the position of the UN to not enter into litigation with claims that ‘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’ (UN Doc A/C.5/49/65 para 23).

³¹ See Letter from Pedro Medrano (n 17) para 91. For instance, the unilateral refusal to establish a claims commission upon the request of the Host State has been considered a public matter immune from internal scrutiny.

³² Mass claims submitted by relatives of the victims of Rwanda and Srebrenica massacres have been designed so as not to have a ‘private law’ nature inasmuch as they challenge Security Council resolutions and the mission mandate (*ibid* para 91-92).

³³ On this point see K Schmalenbach (n 20) 553.



of his/her rights under domestic law, also framed as a violation under public international law.³⁴ In fact, the long-standing UN compensation practice encompasses the payment of damages for personal injuries arising from violations of international human rights law and humanitarian law.³⁵

Now, in light of the above institutional rules and practice relating to the UN's liability, it can be maintained that claims arising from the cholera and lead poisoning cases are, at least *predominantly*, private in nature, and they are not exclusively of public character. In fact both disputes involve elements of a private law and tortious dispute: claimants were individuals represented by NGOs (and not by their States of nationality), seeking monetary compensation for personal injuries or death, based on allegations of gross-negligence and recklessness, also grounded in domestic civil law.³⁶ Moreover, in light of the purpose of Section 29 above stated, the ultimate test to appraise the 'private' character of a dispute is whether the claim can be theoretically brought before a national court which, only because of the immunity, would dismiss it.³⁷ Should the claim be justiciable before domestic courts, it must be designated as a 'private' law dispute within the meaning of Section

³⁴ See Y Okada (n 24) 71. For an in-depth analysis of the nature of the international responsibility for human rights violation and the private/public divide see F Mégret (n 22) 174-177; B Taxil, 'Les réclamations de particuliers contre les opérations de paix onusiennes: les défallances du système à la lumière de l'affaire du choléra' (2017) 63 *Annuaire Français de Droit International* 234, 244.

³⁵ See UN Doc A/51/389 (20 September 1996) para 6-8, 16.

³⁶ K Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility in Good Samaritan' (2016) 16 *Chicago J Intl L* 341, 361; C Ferstman (n 3) 114. The same view is shared in the Joint Letter of the Allegations (n 17) 4. See also the class action introduced by cholera victims before the US courts, grounded on common law of torts (Class Action Complaint (9 October 2013) para 13), seeking liability under state laws and regulations, which prohibit, *inter alia*, disposal of human waste in waterways and negligence, including the negligent transmission of a contagious disease (para 53). Whilst the private claims in Haiti before the internal dispute settlements can be certainly framed under the tortious law principles, the line between private and public character in relation to the Kosovo case is much more blurred. Suffice to say that the claims were, firstly, classified as 'private law' and dismissed by the HRAP, and therefore fell under the jurisdiction of UNMIK Claims Review Board. Subsequently, after the claims were designated as of 'public law' nature by the UN Secretariat, the HRAP reopened the proceedings. On this point see also B Taxil (n 34); R Pavoni 'Choleric notes on the Haiti Cholera Case' (2015) 19 *QIL-Questions Intl L* 27-28.

³⁷ See F Mégret (n 22) 168.



29, thus triggering the obligation of the UN to provide an alternative settlement. In our view, since the claims did not challenge either the execution of the core mandate, or an action taken by the UN questioning the wisdom of its choices, or reflecting a course of political decision (such as a military decision taken on the ground), but ancillary activities, both claims would be justiciable before national courts, provided that they are filed in accordance with the pertinent rules of private international law, with the UN immunities being the only procedural bar.

Lastly, the (international) ‘public’ function exercised by the UN while interfacing with the claimants cannot be considered a decisive element for designating the claim as ‘public’.³⁸ Otherwise, all the (harmful) interactions between the Organization and individuals occurring during the activities of the UN would be immune from scrutiny, except for those arising out of contractual liability. This would end up in aligning the ‘private/public’ divide of Section 29, which is legally relevant for the purpose of the obligation to settle the dispute under the CPIUN, with the *acta iure privatorum/iure imperii* distinction, applicable in the context of State immunities before domestic courts.³⁹ In this regard, the recent statements of the UN-Secretariat, carving out the scope of application of Section 29 only to ‘claims arising from circumstances in which the United Nations is acting like a private person’, thus removing tortious acts from within the private law domain disputes,⁴⁰ seems to dangerously overlap the distinctions.

3.2. Refashioning the PQD within the UN legal order? The monopoly of the UN-Secretariat over the (re)interpretation of internal liability rules

By asserting that claims involving a review of *political* and *policy* matters of the UN mandate are ‘non-receivable’, the UN adopted a line of reasoning which is hard to reconcile with the ‘private/public’ divide contained in the CPIUN and in the SOFAs, but it does resemble that of

³⁸ K Schmalenbach (n 20) 553.

³⁹ Moreover, the *acta iure privatorum/iure imperii* distinction has proved difficult to apply in practice and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property – albeit not yet in force – departs from this criterion, by providing a list of proceedings in which State immunity cannot be invoked.

⁴⁰ See Letter from Pedro Medrano (n 17) para 87.



the PQD used by domestic courts in relation to foreign acts of the executive. Much as certain acts of State escape judicial scrutiny, certain 'acts of the Organization' are considered to be essentially immune from internal review. This results in a *triple* immunity for the UN before national, international and institutional fora.

The use of the 'political exception', whose scope in domestic orders has been progressively downsized,⁴¹ is not suitable in the context of international organizations, and particularly of the UN. An array of reasons militates against the refashioning of the PQD model within the context of claims filed internally against the UN.

First, both the disputes at stake do not involve truly 'political' questions within the traditional meaning of the PQD. In fact, as already stated, the claimants did not confront the political wisdom of choice made by the UN in performing activities under the mandate of the MINUSTAH and the UNMIK, nor the *substantive* political decisions thoughtfully adopted by UN organs or taken by member States on the ground, and strictly related to the performance of the missions. Neither the essential interests of the UN or its member States were at stake in the conduct under scrutiny. On the contrary, the disputes revolve around acts that are *incidental* to the performance of the functions entrusted to the two missions.⁴²

Second, the PQD has been developed as a State-related theory, strictly linked to the allocation of public powers, the preservation of inter-institutional harmony, and to the constitutional system of checks and balances envisaged in municipal orders. Transferred into the institutional setting of the UN, the PQD would lose its *raison d'être*. The very fact that the legal assessment concerning the non-admissibility of

⁴¹ The downsizing of the PQD is in line with the ongoing erosion of the traditional immunity from judicial control, as has long been contended by many constitutional and international scholars. As far as international Italian scholarship is concerned, the scope of application of the PQD has been challenged and critically discussed either in past works (see L. Condorelli, 'Acts of the Italian Government in International Matters Before Domestic Courts' (1975) 2 *Italian YB Intl L* 178, and in more recent ones, see D. Amoroso (n 1)).

⁴² As above stated, Haitian victims contest the failure to screen the peacekeepers and the gross negligence in managing the raw sewage of the peacekeepers. Lead-poisoning victims charged the UN for not providing them with timely information about the health risks of the IDP's camps or the required medical treatment, as well as for failing to relocate them to a safer location.



‘political’ claims was conducted by the administrative branch of the Organization (the Secretariat), which is not independent of the ‘political’ power, does not square with the rationale of the PQD and its underlying principle of institutional balance.⁴³ The situation would have been different if the legal assessment concerning the ‘admissibility’ of claims were conducted by the Claims Commissions, that is to say by an arbitral dispute mechanism endowed with a minimum set guarantees of independence and transparency.⁴⁴ *Third*, while domestic judges expressly state the reasons for barring the consideration of the merits of a claim based on the PQD (or at the least they are required to do so), the practice of the Secretariat departed from this standard. The scarcity of reasons in support of the declaration of ‘non-receivability’, coupled with the total inaccessibility of the previous cases assessed by the local boards, without a reasonable ground that justifies the confidentiality of the classified documents, makes the present situation different from the context where the PQD is traditionally applied by domestic courts.

From a broader perspective, the way in which the UN raised the ‘political argument’ is hardly consistent with the *rule of law*, a principle upon which the UN expressly claimed to be bound,⁴⁵ as well as with very basic principles of accountability, good-governance, and transparency, which are maintained to be applicable also to international organizations.⁴⁶ In fact, the recent positions adopted by the Secretariat re-

⁴³ As Ferstman puts, it is problematic when ‘the body taking the decision to rule out the category of claims is the would-be respondent’ (C Ferstman (n 3) 115).

⁴⁴ F Mégret (n 22) 166. The UN should firstly be obliged to establish the Claim Commission even if it is only to assess, according to the principle of ‘kompetenz kompetenz’, whether claims are receivable under Section 29. However, the UN practice allows for the Secretariat to make a final assessment of the legal nature of claims, and ‘if no compelling reasons are provided against the ‘public international law’ assessment of the UN Secretary-General, a negative decision on jurisdiction is required’ (see K Schmalenbach (n 20) 555).

⁴⁵ With resolution 67/1, the General Assembly has clearly affirmed that the Organization ‘recognize[s] that the rule of law applies to all States equally, and to international organizations, *including the United Nations* and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord *predictability* and legitimacy to their actions’ (UN Doc A/RES/67/1 (24 September 2012) para 2; emphasis added).

⁴⁶ In the 2004 Report on the Accountability of International Organisations, the International Law Association (ILA) affirmed that ‘the principle of good governance requires IO-s to consider the substance of a complainant with all necessary care and to give a reasoned reply’ (ILA Berlin Conference (2004), ‘Accountability of International



moving (some) tortious acts from within the private law domain disputes,⁴⁷ in stark contrast with the UN's consolidated practice and several pieces of internal UN law, are likely to clash with the principle of *legal certainty*, since it attempts to reshape the applicable rules with regard to pending claims. The adoption of statements by the Secretariat attempting to modify, *ex post* and *in peius*, the position of aggrieved individuals under the internal applicable rules of the Organization comes into tension with the principle of *good faith* and with the doctrine of *legitimate expectations*,⁴⁸ which provide for the predictability of the rules and conditions that a petitioner must comply with in order to file a claim before the internal dispute settlement procedures. This move is highly problematic in the context of the UN liability law, where the rules at stake have not been clearly codified, but have largely developed through internal practice, mostly undisclosed by the Organization.

The recent change of policy raises concerns also from the point of view of the institutional balance of the Organization itself. Serious doubts surrounded the method through which the Secretariat attempted to unilaterally (re)define internal rules concerning the dispute of settlements with third-parties (sharply defined also as 'external administrative rules').⁴⁹ If the UN wishes to review its compensation policy towards third-parties, this should be based, from a procedural point of view, on a study conducted by the Secretary-General, possibly issued in an official and comprehensive Report, eventually endorsed by the General Assembly and enclosed in the SOFAs, which will take effect *pro futuro*, and not with regard to pending claims. From a substantive perspective, the possibility to adopt special rules to regulate the consequences of harmful acts is not boundless. Notwithstanding that the UN held a rather different view on the extent to which 'special rules' can

Organisations' (2004) 1 Intl Organizations L Rev 221, 270; emphasis added). Moreover, the Report clearly stated that 'IO-s should render public the substantive outcome of remedial action against them by private claimants' (ibid 265).

⁴⁷ See n 19.

⁴⁸ See K Boon (n 36) 361, and the ILA Report pointing out that the compliance with the principle of stating the reasons for a decision or a particular course of action 'is in accordance with the requirement that IO-s should behave in a consistent manner, and may contribute to the creation of legitimate expectations' (ILA Report (n 46) 238).

⁴⁹ K Schmalenbach (n 13) 43, borrowing the expression from C Amerasinghe, *Principles of the Institutional Law of International Organizations* (CUP 1996) 194.



depart from the general international law on responsibility,⁵⁰ these cannot frustrate the purpose of Section 29 (to provide for an alternative remedy) and the general principle imposing an obligation to make reparation.⁵¹

Yet, the problem is that the definition and interpretation of internal rules, often grounded on the *lex specialis* principle, cannot be challenged before any fora. In this context, the Secretariat enjoys a full ‘monopoly’ over the (re)interpretation of institutional rules with knock on effects on individuals,⁵² thus contributing to the consolidation of certain legal contentions even when these are likely to collide with previous practice and the general international law on reparation. In other words, the risk is that “fake” law progressively becomes “real”.⁵³ In the end, the fact that the UN Secretariat assumed the function of dispute settlement, in place of arbitral bodies, as well as the power to re-determine *ex post* the admissibility criteria of claims, without clearly giving reasonable grounds, reinforces the perception of the UN as a Leviathan institution unbound by law and even above the law.

4. *Behind the non-receivability of claims: Political questions or just burdensome questions?*

The wrong turn taken by the UN results in politicizing issues that are, in principle, assessable from a legal point of view. Yet, it is not dif-

⁵⁰ While commenting on the Draft Articles on the Responsibility of International Organizations (DARIO), the Organization claimed that ‘the obligation to make reparation, as well as the scope of such reparation, must be subject, in the case of the UN, to the rules of the organization, and more particularly, to the *lex specialis* rule within the meaning of draft article 63’, such as the financial and temporal limitation introduced by the General Assembly in 1998 (UN Doc A/CN.4/637/Add.1 (17 February 2011) 30). However, the ILC clarifies that the special rules adopted by an international organization can contract out general rules concerning responsibility only to a limited extent (Draft articles on the responsibility of international organizations with commentaries (2011) vol II Part Two YB Intl L Commission 46, 54).

⁵¹ On this point see recently C Ferstman, ‘Reparations for Mass Torts Involving the United Nations. Misguided Exceptionalism in Peacekeeping Operations’ (2019) 16 Intl Organizations L Rev 42, 44.

⁵² As argued by C Ferstman (n 3) 126, the UN has a ‘monopoly over the law and its procedures’.

⁵³ C Ferstman (n 51) 46.



difficult to read, underlying the use of the ‘political argument’, the serious concern about the massive financial implications stemming from the admissibility of the (massive) claims. By dismissing the claims, the UN has dodged the merits of disputes which involve costly questions, rather than truly ‘political’ ones. Had the local boards declared ‘receivable’ the claims, the UN would have faced a significant financial burden, due to the large scale of claimants and the kind of damages suffered, thus setting a dangerous precedent for future litigation.⁵⁴ Considering that the estimated compensation for the victims far exceeds the average of the UN total annual budget, and that an ongoing cash shortage is plaguing the Organization,⁵⁵ it is likely that the decision concerning the ‘admissibility’ of the Haiti and Kosovo claims was taken under a great deal of (financial) pressure. At the same time, it comes as no surprise that member States have been reluctant to push for a different position,⁵⁶ since all the costs of UN liability are shouldered through member States contributions. For the same reasons, member States have not proved keen to trigger Section 30 of the CPIUN, which defers any differences with the Organization concerning the interpretation or application of the CPIUN, including the failure of the UN to comply with the obligation enshrined in Section 29, to the ICJ for an decisive-advisory opinion.

Facing this deadlock, the UN was able to pursue a rather abdicative approach, without encountering any significant objections from its

⁵⁴ While the plaintiff class action brought by the victims of cholera sought compensation for US \$ 2.2 billion (see Class Action Complaint (n 36) para 65), the UN are potentially exposed to claims seeking compensation for between \$15 and \$35 billions of dollars (D Hovell (n 22) 42; M Garcin, ‘The Haitian Cholera Victims’ Complaints Against the United Nations’ (2015) 75 *Heidelberg J Intl L* 672, 699). With regard to Kosovo claims, the amount due to the victims is lower, considering the number of claimants (138), but according to the HRAP’s recommendation, adequate compensation encompasses both material and moral damages and the reimbursement of all fees and expenses incurred by the complainants in relation to the proceeding before the Panel (HRAP, *N M and Others v UNMIK* (n 16) para 349).

⁵⁵ In October 2019, the General-Secretary warned that the UN may not have enough funds for staff salaries, due to the delay in the contributions from States (see <<https://news.un.org/en/story/2019/10/1048782>>).

⁵⁶ For the lack of significant reaction by member States in relation to the *affaire cholera* see M Buscemi, ‘La codificazione delle organizzazioni internazionali alla prova dei fatti. Il caso della diffusione del colera a Haiti’ (2017) 100 *Rivista di diritto internazionale* 989, 1001-1010.



members.⁵⁷ In fact, this approach can be viewed as part of a broader ‘avoidance strategy’ developed by the UN when faced with highly onerous tort cases, which is composed of three different but connected actions: (i) declaring the mass claims ‘not-receivable’ before the internal accountability mechanisms, by enjoying a monopoly over the (re)interpretation of institutional liability rules in the own interests of the Organization; (ii) apologizing officially for the role of the UN, often following the finding of internal inquiries, by adopting satisfactory measures that have no financial, but only ‘moral’ costs, if any;⁵⁸ and (iii) eventually establishing *voluntary* Trust Funds for implementing community assistance projects for the victims, which receive donations from States and other donors, instead of inserting designated sums in the ordinary budgets of peacekeeping missions and territorial administrations. While the first two dynamics have also been followed in previous cases (namely, in the aftermath of the Rwanda and Srebrenica events), the establishment of voluntary funds by the Secretariat has occurred only recently with regard to the cholera and lead-poisoning cases, and in support of the victims of sexual exploitation and abuse in peacekeeping operations.⁵⁹ Unsurprisingly, the Trust Funds have so far attracted only marginal voluntary contributions. While the Kosovo Fund has not been replenished yet,⁶⁰ the Cholera Fund has committed the (limited) budget

⁵⁷ But see R Freedman, N Lemay-Hébert ‘The Security Council in Practice: Haiti, Cholera, and the Elected Members of the United Nations Security Council’ (2020) 33 *Leiden J Intl L* 157.

⁵⁸ Statement of apologies expressed by the General Secretary in the Kosovo and Haiti case are available at <www.un.org/sg/en/content/sg/statement/2017-05-26/statement-attributable-spokesman-secretary-general-human-rights> and at <www.un.org/press/en/2016/sgsm18323.doc.htm>. Similar apologies have been offered also for the role of the UN in the Rwanda’s and Srebrenica’s tragic events, following the findings of internal inquiries.

⁵⁹ The UN established in 2016 the UN Haiti Cholera Response Multi-Partner Trust Fund and the Trust Fund in Support of Victims of Sexual Exploitation and Abuse, and in 2017 the Trust Fund in support of the Ashkali, Egyptian and Roma communities.

⁶⁰ Despite the efforts to mobilize resources to the Trust Fund, the financial situation is still critical (see UNMIK, Report of the Secretary-General UN Doc S/2019/797 (4 October 2019) paras 26 and 54). However, the Under-Secretary General for Peacekeeping Operations, in replying to the allegations raised by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, mandated by the Human Rights Council (Letter 24 December 2018), affirmed that the UN will continue to direct available resources to the affected communities through communities-focused projects funded



collected for community assistance projects,⁶¹ thus reinforcing the policy of the UN not to engage with individual compensation, but only with community-focused projects and humanitarian assistance.⁶²

Measures of ‘collective reparation’ and non-monetary remedies are not infrequent in the practice of mass violations committed by States, in relation to which the financial liability is often limited due to practical reasons.⁶³ From this perspective, State practice has not always followed the rigid standard to provide for ‘full reparation’ historically set out in *Factory at Chorzów*⁶⁴ and enshrined in both the ILC works on international responsibility with regard to the reparation owed to States, international organizations or the international community as a whole. When it comes to the reparation of aggrieved individuals, the practice of the UN indicates a much further misalignment between how the obligation to provide reparation is framed in theory and how it is offered

through sums inserted in the 2017-2018 and 2018-2019 budgets of the UNMIK. The resources are allocated for confidence-building projects and programmatic activities involving representatives of the affected communities, but not for individual compensation.

⁶¹ See the webpage of the UN Haiti Cholera Response Multi-Partner Trust Fund (<<http://mptf.undp.org/factsheet/fund/CLH00>>). To date, the resources amount to \$10 million coming, mostly, from donations and the reallocation of the MINUSTAH unencumbered balance towards the Fund. The sum collected has been allocated to recipient UN organizations (UN Funds and Programmes and UN Specialized Agencies), and implementing partners (Government and NGOs) with a view to implementing the new approach of the Secretary-General composed of two tracks – track 1 ‘Prevent and cut transmission’ (3 millions), and track 2 ‘development of a package of material assistance and support for those most affected by cholera’ (6 millions). The latter of which includes the implementation of a symbolic community project in Mirebalais, the commune where cholera started in Haiti, and community assistance projects in 4 cholera priority communes, both carried out in consultation with local affected communities, the UN organizations (namely, UNDP, UNOPS) and local authorities.

⁶² In this regard, C Chinkin, ‘United Nations Accountability for Violations of International Human Rights Law’ (2019) 395 *Recueil des Cours de l’Académie de Droit International* 314 affirmed that ‘in both cases the core principles of human rights that [the United Nations] owed to all individuals appears to have become lost in some diluted concept of assistance to vulnerable communities’.

⁶³ C Tomuschat, ‘Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law’ in M Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution Through International Law*. Liber Amicorum Lucius Caflisch (Brill 2007) 569.

⁶⁴ Permanent Court of International Justice, Merits, PCIJ, 1928, Series A, No. 17, 4, 21.



in practice, based on the availability of the resources of the Organization.

The wretched financial situation of the UN, given its dependence on Members' contributions, and the lack of income streams, significantly impacts on the way the Organization recognizes its responsibility and conceives the rules governing the consequences of its conduct. In fact, it is precisely because of the scarcity of financial resources that the Organization introduced severe limitations, *de iure* and *de facto*, on third-party compensation, often disguised as *lex specialis*.⁶⁵ For the same reason, the Organization is more inclined to offer reparation in the form of community-focused projects rather than individual compensation.⁶⁶ In this regard, the ILC, while recognizing that that '[i]t may be difficult for an international organization to have all the necessary means for making the required reparation', makes firmly clear that 'inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law'.⁶⁷

Whether or not it is possible to reach an equilibrium in the tension between the theoretical principle of reparation and practical considerations when it comes to the (mass) reparation of injured individuals, it remains that the reparation provided by the Organization, if not 'full', should at least take the form of 'second-best measures',⁶⁸ that is to say measures sweeping out of the consequences of the wrongful acts to the greatest possible extent. Depending on the nature of the offences, non-monetary forms of redress or collective forms of reparations (such as housing assistance, income-generating activities, education aid, and psychological support), and means of satisfaction (eg disclosure of the truth, acknowledgement of wrongdoing and apology, memorialization), can effectively redress the prejudice suffered by the victims, without the payment of full individual compensation. In the aftermath of mass human rights violations, the importance of individual compensation in

⁶⁵ See *amplius* C Ferstman (n 51), arguing that the UN (mis)interpreted the extent to which special internal rules can derogate from general law concerning the reparation.

⁶⁶ See nn 58-59. See also the Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, which 'is not intended as a means for compensation' (UN Doc A/RES/62/214 (21 December 2007) Annex para 3).

⁶⁷ Draft articles on the responsibility of international organizations (n 49) 77.

⁶⁸ C Ferstman (n 3) 92.



proportion to the suffered harm has in fact often been downsized and instead ‘the capacity of reparations programs to instill important values such as social solidarity, civic trust, and recognition’⁶⁹ has been emphasized – a principle, that of local trust, which is central for every UN peacekeeping operation and territorial administration.

To identify the feasible restorative measures able to redress – as far as possible – the prejudice suffered by the victims, having regard to the financial capacity of the UN, the Organization needs to enter into consultation and negotiation with the victims, which should be conducted under an independent accountability procedure.⁷⁰ In fact, when victims’ rights are not supported by their State of nationality,⁷¹ the Organization, by its own admission, will still have to face individual claimants.⁷² This necessarily requires the establishment of a tailored independent dispute resolution mechanism, which should exist alongside the local boards competent for everyday tortious acts (eg car accidents, property law disputes) and for claims of relatively low amounts that do not exceed the financial authority delegated to the administrative offices. The options for the establishment of an accountability mechanism have long been discussed by scholars, starting from the fact that the UN is unwilling to move on from internal accountability schemes to judicial third-party adjudication. The procedural alternatives thus far proposed include a Central Claims Commission,⁷³ an Ombudsperson Institution,⁷⁴ a

⁶⁹ D Hovell (n 22) 46.

⁷⁰ With regard to cholera victims, the UN is engaging in consultation with victims only partially and outside the framework of an independent settlement procedure (see n 61).

⁷¹ When faced with past multiple claims that entail multiple reparations, the UN agreed to negotiate a lump-sum agreement with the State of nationality of the victims, due to several practical advantages (see UN Doc A/51/389 para 35).

⁷² *idem* para 37.

⁷³ N Schrijver, ‘Beyond Srebrenica and Haiti. Exploring Alternative Remedies against the United Nations’ (2013) 10 *Intl Organizations L Rev* 588, 596.

⁷⁴ N Schrijver (n 73) 596-597; M Garcin (n 54) 701.



Standing Inspection Panel,⁷⁵ a Reparation Commission,⁷⁶ and similar accountability mechanisms suggested in the 2004 ILA Report.⁷⁷

5. *The quest for accountability for (mass) tort claims: What will motivate the UN to enhance its internal accountability framework?*

The UN internal scheme of remedies available to aggrieved third parties is full of blackholes and inconsistencies. Paradoxically, a visitor who is injured at the UN headquarters,⁷⁸ a person hit by an UN vehicle (...or unarmed drone),⁷⁹ or a party who complains about the breach of a contract by the Organization,⁸⁰ would have more chance of having their claim settled with due process safeguards, as well as more chance to obtain compensation for the damages, than the most aggrieved victims of human rights abuse at the hands of peacekeepers.⁸¹ The UN's failure to set up an independent and effective procedure for regulating

⁷⁵ See F Hoffmann, F Mégret, 'Fostering human rights accountability: an ombudsperson for the United Nations?' (2005) 11 *Global Governance* 43, suggesting the creation of an Ombudsperson already 15 years ago; M Garcin (n 54) 701.

⁷⁶ D Hovell (n 22) 45-46.

⁷⁷ ILA (n 46) 281-284. On the standards applicable to alternative means in the context of UN peacekeeping operations see Y Okada (n 24) 64-66. Taking stocks of its experience, the HRAP spelled out minimum factors that should be taken into account to establish a future Human Rights Panel (The Human Rights Advisory Panel History and Legacy Kosovo, 2007-2016, Final Report (June 2016) 94-95). For further discussion of normative proposals see P Schmitt, *Access to Justice and International Organizations. The Case of Individuals Victims of Human Rights* (Edward Elgar 2017) 201-203.

⁷⁸ Tort disputes are reviewed by an internal Tort Claims Board, within the limits introduced by the General Assembly (UN Doc A/RES/41/210 11 December 1986), and then submitted to arbitration if the dispute is not settled amicably.

⁷⁹ Accidents involving UN operated vehicles are usually covered by commercial insurance policy. For the compensation of damages arising from an (unarmed) drone crash operated by a private contractor see M Buscemi, 'The Use of Unarmed Drones in UN Peacekeeping Operations. Issues of Attribution' in E Carpanelli, N Lazzarini (eds), *Use and Misuse of New Technologies: Contemporary Challenges Under International and European Law* (Springer 2019) 257.

⁸⁰ 'General conditions of contracts for the provision of goods and services' para 17 (available at <www.un.org/Depts/ptd/about-us/conditions-contract>).

⁸¹ While the lead-poisoning victims have been heard before an independent accountability mechanism (the HRAP), although its conclusions recommending compensation have not been implemented yet, victims of cholera, instead, are still waiting to be heard before an independent body.



its authority over individuals is strikingly anachronistic and can be regarded as ‘an historical anomaly’,⁸² if compared with the experience of other national public authorities and international organizations faced with legal challenges from individual grievances.

Against the broad consensus among scholars on the necessity to end UN impunity by strengthening its internal accountability framework, the difficult question is how to ensure that the UN actually does so. In other words, what factors can successfully motivate the UN to comply with the law? From the practice of the UN’s violations and the related extensive scholarly discussion, a few considerations seem to emerge about the *incentives* to comply with the obligation to provide for a remedy and reparation. On the one hand, it is evident that primary rules of general international law relating to the obligation to provide a remedy, as well as the principles of ‘global administrative law’, have not effectively succeeded in taming the UN – or not to the point of compelling the Organization to establish clear, adequate and effective procedures for the settlement of all the disputes with individuals injured by its activities. Likewise, secondary rules of international law, codified in the DARIO, for implementing the responsibility have proved not to be very persuasive. The absence of significant reaction and protest either from member States, primarily concerned with financial repercussions, or from other actors of the international community, have deterred the UN from setting adequate, independent and effective dispute mechanisms and from providing full reparation to aggrieved third parties.

On the other hand, the threats to the independence and autonomy of the UN coming from several lawsuits lodged by individuals against member States and the UN, before national and international courts, have not turned into an overwhelming force leading to a substantial enhancement of the internal accountability framework. The possibility of passing the buck of responsibility to member States, by attributing wrongful acts to them, has exercised pressure on the UN to provide for certain internal accountability mechanisms only on few occasions.⁸³ The same holds true for the challenges of class actions against the Organization in front of national courts, whose judges have not brought into

⁸² D Hovell (n 22) 4.

⁸³ The establishment of the Ombudsperson for Al-Qaida and ISIL Sanctions Committee might be viewed in this light.



question, thus far, the absolute immunity enjoyed by the UN in tort disputes. The combination of these factors produces a 22-catch situation where, in one respect, there is still uncertainty as the human rights standard in terms of remedies applicable to the UN, and in another respect, these standards can hardly be enforced in any case due to three factors: (i) the absence of external monitoring mechanisms established by conventional law, (ii) the lack of a standing independent accountability body set by institutional law, and (iii) the inefficiency of the enforcement tools posed by customary law of international responsibility. The result is that the UN is the sole guardian of its own duties and the applicable standards, being highly influenced by pressing financial constraints.

Against this stalemate, scholars have recently emphasized how *reputation* is increasingly becoming a constraint on abuses by international organizations, capable of forcing them to comply with accountability standards.⁸⁴ This would replicate how it has been for (some) corporations progressively implementing human rights and environmental standards and recognizing their corporate social responsibility. In this regard, reputational sanctions have been viewed as a ‘disciplinarian of international organizations’⁸⁵ and the key element for corrective and remedial actions. Historically, it is indeed true that accountability mechanisms established by international organization have come to light as a result of scandals, outcries and protests stemming from several actors of the international community.⁸⁶ In the UN context, the two independent accountability mechanisms – the Ombudsperson for the Al-Qaida and ISIL Sanctions Committee and HRAP – were both established in the aftermath of criticism and pressure coming from different institutional actors – mostly European – and a group of member

⁸⁴ I Johnstone, ‘Do International Organizations Have Reputations?’ (2010) 7 Intl Organizations L Rev 235; K Daugirdas, ‘Reputation and the Responsibility of International Organizations’ (2015) 25 Eur J Intl L 991.

⁸⁵ K Daugirdas, ‘Reputation as Disciplinarian of International Organizations’ (2019) 113 AJIL 221 and the contributes hosted in the Symposium published in (2019) 113 AJIL Unbound.

⁸⁶ P Klein, ‘Panels, Médiateurs et Mécanismes Informels de Contrôle des Activités des Organisations Internationales: Entre Accountability et Responsibility’ in J Crawford, S Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart 2010) 233.



States.⁸⁷ Likewise, due process and fair trial guarantees have been strengthened in disputes with UN staff as a result of the 2009 reform which, as is known, was adopted in response to the severe criticisms towards the previous administrative jurisdictional system.⁸⁸ Reputation is indeed a motivating factor that may lead the UN to adopt not only a higher level of protection toward third parties affected by its activities, but also a higher duty of care towards its personnel, especially those deployed in hazardous scenarios.⁸⁹ After all, international organizations do have a reputation also as employers.⁹⁰

Today, the good or bad reputation the UN has is grounded even more on the opinion held not only by institutional actors, but also by 'private' actors, including 'civil society'. In the cholera and lead-poisoning cases, the ensemble reaction emanating from journalists, academics, NGOs, and also institutional actors such as the UN independent experts (namely the UN Human Rights Council Special Procedures mandate-holders),⁹¹ and European institutions,⁹² have put pressure on

⁸⁷ As regards the HRAP, see eg Venice Commission, Opinion on human rights in Kosovo: possible establishment of review mechanisms, Opinion n 280/2004 (11 October 2004). The decision to establish an Ombudsman for the Al-Qaida and ISIL Sanction List has been prompted by the critics expressed, among others, by several European actors (see eg Resolution of the Council of Europe, United Nations Security Council and European Union blacklists (23 January 2008) and the European judicial response to the sanctions, with particular regard to the Kadi saga before the ECJ); more recently see Proposal to the United Nations Security Council by the Group of Like-Minded States on targeted sanctions (12 November 2015) and Proposal by the Group of Like-Minded States on Targeted Sanctions for fair and clear procedures for a more effective UN sanctions system (7 December 2018).

⁸⁸ For an overview of the criticisms see P Schmitt (n 77) 165.

⁸⁹ On this issue see the pivotal study conducted by A De Guttry, M Frulli, E Grepipi, C Macchi (eds), *The Duty of Care of International Organizations Towards Their Civilian Personnel. Legal Obligations and Implementation Challenges* (TMC Asser Press 2018), and especially G Armenes et al, 'International Organizations and Alleged Duty of Care Breaches: A Growing Ethical, Reputational and Financial Challenge' *ibid* 3, 13-19.

⁹⁰ M Frulli, 'Preface' *ibid*.

⁹¹ For the role of UN independent experts in the cholera case see P Alston, 'Extracting Accountability: Special Rapporteurs and the United Nations' Responsibility for Cholera in Haiti', NYU School of Law, Public Law Research Paper No 18-10 (20 February 2018). For the role of UN independent experts in the lead-poisoning case see the exchange of letters between Baskut Tuncak, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous sub-

the UN to – at the very least – apologize for its role and to implement community-focused projects in the most affected areas. However, the critical voices did not prompt a significant change to the point of laying down a fair and effective settlement procedure for the claimants, or of awarding the victims with individual compensation. The same holds true with respect to scandals and protests arising from sexual exploitation and abuses committed in peacekeeping operations. One reason might be that the audience for whom the UN must consider its reputation is also composed of member States whose priority might be to reduce as much as possible their financial contributions to the Organization.⁹³

Yet, the member States have a reputation too. To begin with, the way national delegates set policy priorities and mobilize financial resources, and how they exercise their influence within an international organization in order to steer it towards certain goals. Indeed, the audience to which States are called to answer might be closer and more reactive. Therefore, the light must also be necessarily turned on member States, which cannot hide behind the denial of justice faced by aggrieved individuals as a result of institutional structural deficiencies and misleading interpretation of liability rules by the Secretariat. Though damage to the reputation of the UN and its member States takes time, it has the potential to call into action every single actor.

stances and wastes and the UN, available on the website of the UN Human Rights Office of the High Commissioner (<www.ohchr.org>).

⁹² See the resolution of the European Parliament 2018/2149(INI) (29 November 2018) para 43; and the letter signed by fifty-five members of the European Parliament who wrote to UN Secretary General Antonio Guterres on January 31 2019 urging him to ‘take long overdue steps to ensure that the victims of widespread lead poisoning at UN-run camps in Kosovo receive individual compensation, adequate health care and educational support’ (the text is available at <<https://feministinitiative.eu/assets/uploads/2019/01/letter-to-mr-un-secretary-general.pdf>>).

⁹³ On the multiple audience the UN has, see K Daugirdas, ‘Reputation and Accountability Another Look at the United Nations’ Response to the Cholera Epidemic in Haiti’ (2019) 16 Intl Organizations L Rev 11, 22-23. On the contrary, when compensation is not at issue, damage to reputation proved to be effective in prompting for corrective actions (see K Boon, ‘Reputation and the Accountability Gap, Symposium’ AJIL Unbound (n 85) 233).

