Choleric notes on the Haiti Cholera Case

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1. Introductory remarks

The titles in the growing literature relating to the Haiti Cholera Case are often, albeit tacitly, inspired by García Márquez’s celebrated novel ‘Love in the Time of Cholera’. This choice seems to arise from the traditional concern of writers with the identification of a catchy title for their works. We should go beyond that concern and enquire into the manifold ways to establish a connection between the devastating cholera epidemic in Haiti and García Márquez’s masterpiece. The most apt way is to take advantage of the pun deliberately used by the Colombian author: el cólera as the deadly disease and la cólera as rage.

Indeed, one may feel choleric about the posture consistently taken by the United Nations (UN) since evidence began to emerge in late 2010 linking the cholera outbreak in Haiti to negligent organic waste management and disposal at a base being used by the UN Stabilization Mission in Haiti (MINUSTAH), which was hosting troops from Nepal, a country endemically affected by the disease. That posture has been translated into stone-wall tactics, an absence of transparency and inexplicable silences, refusals to acknowledge responsibility for the deaths and infections despite overwhelming evidence, and most important for our purposes, indefensible legal argumentation purportedly ruling out any duty to provide redress to the victims on the part of the UN.

As shown below, it is noteworthy that the UN’s defence does not rely on arguments that exclude the existence of primary obligations on the Organization in the area of international human rights law or that

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2 G García Márquez, El amor en los tiempos del cólera (Oveja Negra, 1985).

QIL, Zoom-in 19 (2015), 19-41
suggest difficulties in establishing that the acts leading up to the Haiti cholera tragedy should be attributed to the UN. Therefore, such well-known problems, which are conversely highlighted by scholars in the context of the *Haiti Cholera Case*, may conveniently be left out from the scope of this contribution. The real bone of contention in the case at hand seems rather to involve the extent of the UN’s third-party liability for acts of a private law nature, as well as the repercussions, if any, of the non-fulfilment of that liability on the jurisdictional immunity of the Organization in domestic courts.

Before addressing these legal issues, a caveat is that, as in García Márquez’s novel, the present contribution evokes a choleric mood driven by extreme passion, not by irresistible furious anger *per se*. It is default intellectual and civic passion for the workings and destiny of the principal universal international organization (IO), one which is certainly ‘worth cherishing… at least if and when [it] serve[s] the global good’. Yet, the ‘Haiti cholera betrayal’ fuels choleric feeling and the perception of an exponentially increasing ‘disconnect between how UN officials have historically seen themselves – as a kind of secular God for the international community – and the more pedestrian way that organization is now seen by outsiders, namely as just another governance institution whose legitimacy rests on its accountability’.3

2. **An unprecedented frontal challenge from within**

Most strikingly, the *Haiti Cholera Case* reveals that the multifaceted UN system may also produce antibodies to protect the Organization against itself. On 25 September 2014, four UN Human Rights Council (HRC) mandate holders addressed a joint letter of allegation to the UN

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4 ibid 82 (‘Organizations may well-nigh be untouchable right here and right now, but at least they carry the promise of the “salvation of mankind” – they promise a better future, a better tomorrow’, ibid).

Secretary-General (SG) communicating submissions they had received, according to which the UN must bear responsibility for the cholera outbreak in Haiti and the resulting violations of human rights, such as the rights to health and to safe drinking water.\(^6\)

The submissions were especially concerned with the UN’s refusal to acknowledge its tortious liability towards the victims and the associated duty to afford such victims remedies and compensation as envisaged by Section 29 of the General Convention on the Privileges and Immunities of the UN (GC) and the related provisions in the MINUSTAH Status of Forces Agreement (SOFA).\(^7\) They were also concerned with the terseness with which the UN had liquidated the affair until then, namely by means of letters from the UN Office of Legal Affairs (OLA) labelled as ‘strictly confidential’ and declaring some 5,000 individual claims for compensation as non-receivable under Section 29 of the GC, because ‘consideration of these claims would necessarily include a review of political and policy matters’.\(^8\) Despite their somewhat baffling language, the letters were assuming that, whereas Section 29(a) mandates the UN to set up ‘appropriate modes of settlement of… disputes of a private law character’ to which the Organization is a party, the Haitian claims had to be regarded as triggering a public law dispute.

In their letter of allegation, the UN experts made clear that they took the complaints of the submitting entities very seriously and engaged, in particular, with the OLA’s abrupt rejection of the petitions. They highlighted the absence in Section 29 and the pertinent SOFA provisions of any policy or political exceptions, and that, in any case, ‘addressing the lack of sanitation and wastewater management would not imply the review of political or policy matters but concerns the


\(^8\) Letter dated 5 July 2013 from Patricia O’Brien, Under Secretary-General for Legal Affairs, addressed to Brian Concannon, Institute for Justice and Democracy in Haiti.
practicalities of setting up facilities at a peacekeeping base’. Tragically, they concluded that ‘[o]therwise, this would imply that the inadequate management of faeces and wastewater produced by peacekeepers reflects the policy of the United Nations’. The experts asked several questions of the SG, including – most significantly – whether the facts summarised in their letter were accurate, whether the UN had put in place compensation processes to the benefit of the victims of cholera, and whether enquiries had been undertaken about the OLA’s contention that the cholera-related claims were not receivable.

The initiative of the four UN experts has prompted the most comprehensive document to date setting out the official position of the Organization on the Haiti Cholera Case. In November 2014, Mr Pedro Medrano, the UN Senior Coordinator for the Cholera Response in Haiti, addressed a 33-page reply to the UN experts. But only five pages of the document deal with the core legal issues arising from the Haitian claims in some depth. The rest is devoted to a detailed account of the history of the UN’s presence in Haiti, to the findings of the UN-appointed Independent Panel of Experts on the Cholera Outbreak in Haiti and the related follow-up by the UN, to the various efforts undertaken by the UN in the aftermath of the outbreak, and to the UN’s general policies and practice concerning accountability for human rights violations caused by its peacekeeping forces. The single remarkable aspect of this part of the reply is the UN’s persistent refusal to acknowledge its responsibility for the epidemic. The reply recalls that the Panel of Experts concluded in 2011 that the outbreak was caused by a ‘confluence of circumstances and… was not the fault of, or due to the deliberate action by, a group or individual’. What the reply fails to mention is that, in the Panel’s view, such confluence of circumstances, including the deficiencies of Haiti’s health care system and water-supply

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9 Case No HTI 3/2014, Joint Letter of Allegation (n 6) 4.
10 ibid.
11 Case No HTI 3/2014, Reply from Pedro Merano, Assistant Secretary-General and Senior Coordinator for Cholera Response, addressed to 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 November 2014).
12 ibid 25-30.
infrastructure, was responsible for facilitating the outbreak and explosive spread of the disease, not for the penetration itself of the cholera strain to Haiti; in this respect, the Panel’s remarks were consistent with the scenario of the importation of cholera in Haiti via the Nepalese contingent of MINUSTAH.14 The reply also fails to mention that, indeed, subsequent findings by the Panel in 2013 indicated that ‘personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti’.15

3. Private versus public law disputes

The UN reply is entirely unsatisfactory with respect to the reasons behind the summary dismissal of the Haiti cholera-related individual claims. It is tautological and begs questions. It states that the UN concluded that those claims ‘raised broad issues of policy that arose out of the functions of the United Nations as an international organization’,16 and that ‘[a]s such, they could not form the basis of a claim of a private law character’17 which would trigger the obligation under Section 29 of the GC and associated provisions in the MINUSTAH SOFA to establish appropriate means of settlement.

According to the reply, disputes of a private law character should be understood as ‘disputes of the type that arise between two private parties’,18 namely, those involving ‘claims arising from circumstances in which the United Nations is acting like a private person’,19 such as contractual, property or traffic accidents disputes. By contrast, ‘claims that would arise between an individual and a public authority’20 should be

14 ‘Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti’ (n 13) 27 (giving account of scientific analyses that had confirmed that ‘the strains isolated in Haiti and Nepal during 2009 were a perfect match’). If that was the source of cholera’s introduction into Haiti, the shortcomings in the wastewater management system at the relevant MINUSTAH camp, as detected by the Panel of Experts, should also be included among the key circumstances that facilitated the outbreak, ibid 21-23.
15 Case No HTI 3/2014, Joint Letter of Allegation (n 6) 2.
16 Case No HTI 3/2014, Reply (n 11) para 97.
17 ibid.
18 ibid para 87.
19 ibid para 89.
20 ibid para 88.
regarded as underlying public law disputes that may be settled only at the international level through the traditional political, diplomatic and judicial remedies available to international law subjects of a public nature (States and IOs).\textsuperscript{21} In and of itself, the invocation of the UN’s liability in tort by alleged individual victims would not generate a private law dispute, as this determination would rest on a series of additional factors, including the ‘nature of the duty’\textsuperscript{22} incumbent on the UN and the ‘nature of the conduct or activity at issue’.\textsuperscript{23}

The reply attempts to justify the purported ‘political/policy issue’ carve-out to the UN’s duty to establish appropriate modes of settlement, which is at the basis of the rejection of the Haitian claims, by citing the 1995 SG Report on the implementation of Section 29 of the GC.\textsuperscript{24} It recalls that the SG ruled out any duty on the UN to create mechanisms for the settlement of private claims ‘based on political or policy-related grievances against the United Nations’.\textsuperscript{25} The SG maintained that such claims usually involved ‘actions or decisions taken by the Security Council or the General Assembly in respect of certain matters’;\textsuperscript{26} they frequently consisted of ‘rambling statements’\textsuperscript{27} challenging the policies of the UN and demanding compensation for damage arising therefrom. According to the 2014 reply, the foregoing are indeed claims ‘attacking the political or policymaking functions’\textsuperscript{28} of the UN and its adoption (\textit{vel non}) of certain policies or practices. As such, they would not give rise to private law disputes.\textsuperscript{29}

The reference to the 1995 SG Report is unfortunate and misleading, at least for two reasons. First, the Haitian cholera-related claims cannot be subsumed within the ‘frivolous’ claims that the SG had in mind, namely claims which directly seek to harass and question the decision-making processes of the political bodies of the UN, say for example, a

\begin{itemize}
\item \textsuperscript{21} ibid.
\item \textsuperscript{22} ibid para 90.
\item \textsuperscript{23} ibid.
\item \textsuperscript{24} ibid para 89.
\item \textsuperscript{26} ibid.
\item \textsuperscript{27} ibid.
\item \textsuperscript{28} Case No HTI 3/2014, Reply (n 11) para 89.
\item \textsuperscript{29} ibid.
\end{itemize}
claim that the UN’s deliberations and operations with respect to the Occupied Palestinian Territory or Iraq have facilitated systematic loss of private property or widespread suffering and starvation. Instead, far from being ‘rambling statements’, the Haitian petitions are merely seeking redress for death and personal injuries arising from the outbreak of cholera in the country allegedly as a result of gross negligence or reckless conduct on the part of the UN. That these petitions may entail an indirect challenge to the sanitary, environmental and waste management policies pursued by the UN when exercising its powers based on Chapters VI or VII of the UN Charter does not modify their essential nature as claims of compensation for damage caused by wrongs that any private party may well commit. Asserting the opposite lends weight to the scholarly perception that the ‘political/policy issue’ carve-out may translate into an arbitrary and open-ended argument in fact shielding the UN from any form of accountability towards aggrieved individuals.  

Secondly, the 1995 Report was one of a series of documents whereby the SG, in the context of the boom in UN peacekeeping and peace enforcement actions during the 1990s, neatly upheld the principle of the UN’s third-party liability for death and personal injuries arising from both the ‘ordinary’ and combat-related operations of UN forces.  

It is difficult to see why claims relating to injuries suffered as a result of humanitarian law violations through military activities of UN forces may be eligible for individual redress, whereas the Haitian cholera-associated petitions should carry the ‘stigma’ of public law claims ruling out any duty to compensate the victims.  

The UN reply quotes three precedents evidencing the consistent practice of the Organization in rejecting claims of a public law nature allegedly similar to those brought by the Haitian cholera victims. Two of these precedents are largely irrelevant. They refer to the claims submitted by (or on behalf of) victims (or their relatives) of the mid-1990s Rwandan and Srebrenica genocides on account of the purported failure of UN peacekeeping forces to prevent those crimes.  

Although there

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30 Mégret (n 1) 170.
32 Cf Mégret (n 1) 168.
33 Case No HTI 3/2014, Reply (n 11) paras 91-92.
may be doubts about whether those claims are accurately classifiable as underlying public law disputes, the position of the UN is more understandable here. Such claims do entail a certain degree of encroachment on the way the UN has carried out its Chapters VI and VII mandates. They directly bring into question the independent exercise of the core functions of the UN and its discretion in respect of key operational and military decisions. The difference with the Haitian claims is glaring. Entertaining the latter claims would not imply any review of the UN’s performance of its Charter-based mandate and decisions vis-à-vis Haiti, ie, of the acts whereby its truly public authority has been exercised in that country. Such mandate and decisions merely stand in the background of quintessentially collateral ‘private’ wrongs.

The third precedent is more pertinent. It relates to the little-known (or softly spoken) story of the relocation by the UN Interim Administration in Kosovo (UNMIK) of certain displaced communities (mostly of Roma ethnic origin) to camps in North Mitrovica which were heavily contaminated by toxic substances, particularly lead. It is a story replete with alleged unjustifiable delays and incomprehensible inertia by the UN authorities in evacuating the camps in the face of dozens of deaths and sick individuals. The compensation claims filed in 2011 by the representatives of the communities were dismissed by the UN on the ground that they ‘involved alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo’; as such, they did not constitute claims of a private law character,

34 With respect to the Srebrenica situation, the European Court of Human Rights has refrained from taking a position on this point: Stichting Mothers of Srebrenica and Others v the Netherlands App no 65542/12 (Decision, 11 June 2013) para 165 (‘Regardless of whether Article VIII, paragraph 29 of the [General] Convention… can be construed so as to require a dispute settlement body to be set up in the present case…’). By contrast, in the context of the same litigation, the Dutch Supreme Court had apparently no doubt that the obligation under Section 29 had not been honoured by the UN: Supreme Court of the Netherlands, Mothers of Srebrenica Association v the State of the Netherlands and the United Nations, LJN BW1999 (Judgment of 13 April 2012) para 3.3.3 (‘Contrary to the provisions of article VIII, § 29… the UN has not made provision for any modes of settlement of disputes…’).

35 See eg, Mégret (n 1) 171-174.

36 Case No HTI 3/2014, Reply (n 11) para 93.

37 P Polansky, UN-led Blood (Kosovo Roma Refugee Foundation, 2005).

38 Letter dated 25 July 2011 from Patricia O’Brien, Under Secretary-General for Legal Affairs, in the matter of a Claim for Compensation on behalf of Roma, Ashkali
but rather amounted, in essence, to ‘a review of the performance of UNMIK’s mandate as the interim administration in Kosovo’. The 2014 UN reply seeks to shed some light onto this puzzling argumentation by adding that, indeed, ‘UNMIK retained the discretion to determine the modalities for implementation of its interim administration mandate, including the establishment of [internally displaced person] camps.’

First of all, one should stigmatise the attempt by the UN to rephrase the content of the claims at issue. The dire environmental, sanitary and security conditions prevailing in (that part of) Kosovo only represented the setting against which the relevant decisions were made and the asserted wrongs were perpetrated by UNMIK. They did not exempt the UN from its responsibility to identify safer sites to relocate the children and adults of the communities than the lead-contaminated areas, and, a fortiori, to secure the prompt evacuation of such areas once scientifically-backed evidence confirmed that deaths and injuries were occasioned by that situation. The emphasis on those dire conditions looks more like an awkward move which aims to place the blame on the Kosovar authorities. Secondly, the case in question may be distinguished from the Haiti Cholera Case on the ground that the compensation claims directly arose from decisions made by UNMIK in the fulfilment of its mandate as a transitional governmental authority, rather than from misconduct incidental to the pursuit of the core mission of MINUSTAH. In this context, it would have been more appropriate for the UN to invoke the defence of ‘operational necessity’, say, that the relocation to safer areas was unfeasible or outweighed by other competing concerns, instead of insisting on the public law nature of the claims. At any rate, that defence is patently unavailable vis-à-vis the Haiti cholera-related petitions. All considered, however, the differences between the two cases are not straightforward. It is difficult to share the view that when the UN is acting as an interim territorial administration ‘there is a much stronger
case\textsuperscript{42} for regarding its actions ‘as addressing political or policy matters of a governmental nature that do not give rise to claims of a private law character’.\textsuperscript{43} On the contrary, it is submitted that the scope and extent of the accountability of the UN towards individual victims, especially when they belong to the most vulnerable sectors of the population (such as the Roma communities), should be magnified when the Organization acts in its capacity as a State-like public body. In similar situations, where the UN is frequently the sole authority exercising effective governmental power,\textsuperscript{44} there must be a limit to the notion that its decision-making discretion is not subject to (indirect) review. The UN retains its freedom to establish camps for refugees or displaced persons wherever it sees fit, as well as to refuse to close down massively polluted or unsafe camps, but it should then shoulder its responsibility for deaths and personal injuries arising therefrom.

Either way, the case of the lead-contaminated camps in Mitrovica is unhelpful to the UN’s defence in the \textit{Haiti Cholera Case}. This is crystal clear if one takes the view that the former is fundamentally different from the latter. Alternatively, if the two are comparable, as the UN reply assumes, this would simply mean that the summary rejection of the Mitrovica claims is also legally untenable.

4. \textit{The immunity issue}

4.1. \textit{A precarious ruling from a US district court}

The letter of allegation from the HRC mandate holders did not ask clarifications or contain significant remarks on the jurisdictional immunity enjoyed by the UN in domestic courts, except for a statement according to which the UN’s duty to provide for modes of settlement of private law disputes under Section 29(a) of the GC can be regarded as a

\begin{itemize}
\item B. Rashkow, ‘Remedies for Harm Caused by UN Peacekeepers’ AJIL Unbound (2 April 2014).
\item ibid.
\item Of course, as in the Kosovo situation, the UN is increasingly accompanied by fellow IOs in the exercise of fundamental functions of State-building, administration of justice, law enforcement, promotion of the rule of law, and so on.
\end{itemize}
‘counterbalance’\textsuperscript{45} to the UN’s immunity from legal process stipulated by Section 2. Nonetheless, the UN reply briefly addressed this issue.\textsuperscript{46} After recalling that the UN had been sued before the United States (US) courts in a number of pending cases instituted by the Haitian cholera victims (or their relatives), it affirmed that ‘the fulfilment of the Organization’s obligation under Section 29(a) is not, and has never been understood, [\textit{sic}] to be a \textit{prerequisite or condition} for the enjoyment of its immunity from legal process’.\textsuperscript{47} Indeed, the reply reiterated the UN’s consistently-held view that its immunity ‘is neither qualified nor limited in any way under the terms of the General Convention’.\textsuperscript{48}

The foregoing observations seem to imply the UN’s acquiescence on the point that compliance with the duty to afford a remedy under Section 29 is at least a counterbalance to its immunity, if not a precondition \textit{stricto sensu}. But this perspective is likely to offer little solace to alleged victims of UN’s wrongful acts, because, as the \textit{Haiti Cholera Case} shows, that counterbalance may be brought into play only if and when the UN unilaterally determines that the relevant claims are of a private law nature, hence receivable. Such unilateralism is also evident in the comment that the duty at stake has never been understood as a prerequisite for the granting of immunity to the UN. This position is a reflection of the views and practice of the Organization itself.\textsuperscript{49}

The UN’s insistence on its absolute immunity even in contexts where doing so appears futile betrays a certain degree of anxiety. Rightly so. The \textit{Haiti Cholera Case} is the prototype of a situation carrying the risk that domestic courts step in and try to make sense themselves of the counterbalance in Section 29 by denying the UN immunity from suit. The case is exceptional in that no modes of settlement whatsoever, including the UN’s internal processes such as local claims review boards, is open to the victims of cholera. There would be no need here for do-

\textsuperscript{45} Case No HTI 3/2014, Joint Letter of Allegation (n 6) 3.
\textsuperscript{46} Similarly, without any apparent reason, the 2011 UN’s letter of dismissal of the claims relating to the lead-contaminated Roma camps in Mitrovica (n 38) concluded with the following statement: ‘Nothing in this communication shall be deemed a waiver, express or implied, of the privileges and immunities of the United Nations, including its subsidiary organs, which are hereby expressly reserved’.
\textsuperscript{47} Case No HTI 3/2014, Reply (n 11), para 100, emphasis added.
\textsuperscript{48} \textit{ibid}.
\textsuperscript{49} See below subsection 4.3 for the practice of domestic courts evidencing a different approach and n 50 for a sample of literature to the contrary effect.
mestic courts to engage in controversial assessments of the adequacy and effectiveness of an existing remedy. The thesis which makes the enjoyment of the immunity of all IOs conditional on the availability of alternative means of redress for the victims is therefore at its strongest.  

Nevertheless, the disregard for the counterbalance in Section 29 by the UN was deemed immaterial for the purposes of the UN’s immunity in the first judicial decision handed down within the ongoing Haiti cholera-related litigation before the US courts. In Georges v United Nations, a US District Court recently held that it lacked jurisdiction to entertain the case, as confirmed by consistent US precedents according to which the UN is entitled to absolute immunity from suit under Section 2 of the GC, save an express waiver by the UN itself. Relying on the Court of Appeal’s Brzak decision, Judge Oetken stated that to consider the immunity of the UN as conditional on the setting up of alternative means of settlement ‘would read the strict express waiver requirement out of the [GC]’; moreover, the text and drafting history of the GC, as well as the ‘reasonable’ views outlined by the US Executive in its Statement of Interest in support of the UN, further demonstrated the fallacy of the ‘alternative remedy’ argument. Although Brzak involved a challenge to the adequacy of the UN’s pertinent internal dispute resolution mechanisms, the sweeping statements by Judge Oetken make clear that, in his view, immunity must likewise be afforded to the UN in situations characterised by a complete absence of individual remedies.


51 US District Court for the Southern District of New York, Delama Georges et al v United Nations et al, 13-CV-7146 (JPO), Opinion and Order of 9 January 2015 (per Oetken J.). This decision has been appealed against and as a result the case is now pending before the US Court of Appeals for the Second Circuit.

52 Brzak v United Nations, 597 F3d 197 (2nd Cir 2010).

53 Georges v United Nations (n 51) 5, emphasis added. This holding seems to preempt any argument to the effect that non-fulfilment of the obligation in Section 29 may amount to an implied waiver of immunity.

54 ibid 5-7.

55 It must be noted, on the other hand, that the District Court did not say anything about the meaning and scope of Section 29 and seemed rather to proceed on the
The main criticism concerning the US District Court’s Georges decision is simply that it cannot be considered as representative of the current state of the law at the global level. There is nothing in this decision that suggests that an identical solution would necessarily prevail in other domestic settings. It is at best a close reflection of US precedents and US court attitudes towards the interpretation of treaties. Thus, Judge Oetken interpreted the GC, on the one hand, in the light of its text and drafting history, and on the other, by substantially deferring to the US Executive. A court more open to the wider framework could well highlight the relevance of other hermeneutic criteria warranting the opposite conclusion and modernising the pertinent provisions of the GC, in particular (i) effective interpretation (ie, affording immunity under Section 2 in these circumstances would unduly set at naught the duty to establish means of settlement for private law disputes under Section 29); and (ii) systemic and evolutionary interpretation (ie, Sections 2 and 29 would be construed in the light of the whole body of contemporary international law, including the way specular provisions in other IO immunity agreements have been read and applied, as well as developments in international human rights law subsequent to the GC). In Judge Oetken’s narrow findings, there is no room for these outreach efforts, even less so for acknowledging the possibility of a norm conflict between the rule of unconditional UN immunity and the human right of access to justice.

4.2. The inconclusiveness of the Strasbourg Court’s case law

The case law of the European Court of Human Rights (ECtHR) on the relationship between the right of access to justice under Article 6 of the European Convention on Human Rights (ECHR) and the immunity of IOs is particularly noteworthy, yet controversial and unsettled. The leading precedents are still the 1999 twin judgments in Waite and Kennedy and Beer and Regan,56 where the Court famously stated that a ‘material factor’57 in reviewing the proportionality of grants of immunity to

assumption that the provision was engaged in the case at hand, ie, that the latter involved a private law dispute.

56 Waite and Kennedy v Germany App no 26083/94 (Judgment, 18 February 1999); Beer and Regan v Germany App no 28934/95 (Judgment, 18 February 1999).
57 Waite and Kennedy (n 56) para 68.
 IOs vis-à-vis Article 6 was ‘whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention’. However, in 2013, faced with a challenge to the immunity of the UN arising in the context of the Srebrenica litigation before the Dutch courts, the ECtHR abandoned the ‘alternative remedy’ test as a critical yardstick for evaluating the ECHR legality of IO immunity. The Court explicitly revisited the test and held that the Waite and Kennedy ruling did not imply that ‘in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court’. On the facts of the case, the patent absence of alternative means of redress for the victims of Srebrenica was irrelevant and the application was dismissed as manifestly ill-founded. Although the foregoing holding was referred to IOs as a whole and – as far as the UN is concerned – did not make any distinction based on the specific UN activities at stake, an overall reading of the 2013 decision suggests that it is narrowly confined to cases involving the UN in the exercise of its powers in the field of international peace and security. Indeed, the ECtHR insisted that the Srebrenica case was ‘fundamentally different’ from all the earlier IO-related cases brought to its attention, because it concerned allegedly wrongful acts by a UN peacekeeping force created pursuant to Chapter VII of the UN Charter. Hence, according to the Court, ‘since operations established by… Security Council Resolutions under Chapter VII of the… Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations’.

This holding must be taken as yet another piece of the unfinished puzzle of the relationship between UN law and the ECHR. For one thing, the Strasbourg Court has actually adjudicated cases involving either indirectly or directly the exercise of Security Council powers

58 ibid, emphasis added.
59 Stichting Mothers of Srebrenica (n 34).
60 ibid para 164.
61 ibid para 165.
62 ibid para 154.
63 Bosphorus Hava Yollary Turizm ve Ticaret Anonim Şirketi v Ireland, App no 45036/98 (Judgment, 30 June 2005).
under Chapter VII, most prominently in the area of targeted sanctions. It has never shown, at least in a clear-cut manner, any particular deference to the UN Charter and has never stated that, by definition, it lacks jurisdiction to review such cases. On the contrary, a few months after the *Stichting Mothers of Srebrenica* decision, in *Al-Dulimi*, the ECtHR applied the equivalent protection test, as developed in the context of the general question of ECHR Parties’ responsibility for transfers of powers to IOs, to the UN and found that the test was not fulfilled by the remedies available at the UN level to the individuals blacklisted pursuant to Security Council resolutions. True, the targeted sanctions cases do not concern immunity issues, but formalism aside, it is undeniable that the *Stichting Mothers of Srebrenica* and *Al-Dulimi* decisions are in contention with one another.

Moreover, it is difficult to identify any plausible reason why the UN should be spared an alternative remedy test in the form of an impartial adjudicatory mechanism as dictated by human rights law, especially in situations similar to the genocide in Srebrenica or the cholera in Haiti. Logically, if the test is retained vis-à-vis much more functionally limited IOs, such as the European Space Agency or NATO, it would appear *a fortiori* applicable to an IO, such as the UN, with exponentially increasing powers and associated occasions where its accountability for harm to private parties is likely to arise. From a legal point of view, the ‘stone guest’ in this framework is obviously the primacy clause in Article 103 of the UN Charter. Aside from the fact that the ECtHR has so far refrained from taking a definite position on the impact of that provision on ECHR obligations, what matters here is to outline how Article 103 might come into play vis-à-vis the immunity of the UN. First, the problem does not normally involve the primacy of obligations stemming

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64 *Al-Jedda v United Kingdom* App no 27021/08 (Judgment, 7 July 2011); *Nada v Switzerland*, App no 10593/08 (Judgment, 12 September 2012).

65 *Al-Dulimi and Montana Management Inc. v Switzerland* App no 5809/08 (Judgment, 26 November 2013) paras 116-121, 134. The case is now pending before the Grand Chamber of the ECtHR, whose much-awaited decision is expected around the end of 2015.

66 *Waite and Kennedy* (n 56); *Beer and Regan*, ibid.

67 *AL v Italy*, App no 41387/98 (Decision, 11 May 2000); *Chapman v Belgium*, App no 39619/06 (Decision, 5 March 2013).

68 See for instance the misleading statements in *Stichting Mothers of Srebrenica* (n 34) para 145.
from Security Council Chapter VII resolutions. A domestic court qualifying UN immunity from compensation claims arising in the context of Chapter VII missions on the basis of existing alternative remedies would not renege on its duty to comply with Security Council resolutions, but rather, arguably, on its duty to afford the Organization ‘such privileges and immunities as are necessary for the fulfilment of its purposes’ under Article 105(1) of the Charter. Secondly, however, it would be too simplistic to assert that the absolute immunity rule stipulated by Section 2 of the GC is entitled to precedence vis-à-vis all other treaties par ricochet, ie, as a reflection of the primacy enjoyed by Article 105(1) of the Charter via Article 103. This opinion would regard Section 2 as confined to spelling out the true meaning of Article 105(1). Functional immunity would in fact translate into absolute immunity, because in principle the UN and IOs as a whole can only act within the scope of their functions, save the possibility of ultra vires decisions, which, far from warranting denials of immunity, would be invalid and engage the international responsibility of IOs. Such a trite argument may be considered as a remnant of strict functionalist thinking, one which is increasingly out of tune with the contemporary evolution of international law and the ongoing transformation of the role of IOs as perceived by scholars and the public at large. In short, the relationship between Article 105(1) of the Charter and Section 2 of the GC is one of the key legal aspects at hand which could usefully be addressed by a fresh pronouncement of an international adjudicatory body. Meanwhile, it is submitted that a domestic court may well take the view that a given act by the UN, say, the mismanagement of waste disposal at peacekeeping bases causing harm to individuals, does not in fact satisfy the functional necessity test inherent in Article 105(1). This is one of the chief reasons why Article 103 cannot be seen as a tie-breaker in our context. The problem of the effect of the Charter obligations’ primacy on customary and treaty law on human rights may be irrelevant, after all.

The *Stichting Mothers of Srebrenica* decision casts doubt on whether a hypothetical application filed with the ECtHR by Haitian cholera victims against an ECHR Party upholding UN immunity would succeed. Indeed, despite the marked differences between the Srebrenica litiga-

69 The argument is routinely recalled especially in the practice of IOs. For skeptical accounts, see eg, Reinisch, Weber (n 50) 63-64; Klabbers (n 3) 68-74.
tion and the *Haiti Cholera Case*, the decision is a powerful reminder of the Strasbourg Court’s reluctance when it comes to reviewing immunity cases which implicate UN operations based on Chapter VII.

In actual fact, another recent decision of the ECtHR concerning the immunity of the UN in a labour dispute gives the impression that the restrained attitude in question applies to all cases which implicate the UN in any manner whatsoever, that is to say not just in relation to its Chapter VII powers, thereby providing an *a fortiori* argument corroborating the foregoing observation on the Court’s judicial policy vis-à-vis UN immunity issues. In *Perez*, the ECtHR rejected an application filed against Germany by a former staff member of the UN Development Programme (UNDP) – a subsidiary organ of the UN covered as such by the latter’s immunities – on account of the deficiencies of the UN administration of justice system, including the UN Administrative Tribunal, that was applicable when she challenged the allegedly unfair termination of her employment contract with the UN. The rather unusual circumstance that the applicant, while insisting on Germany’s responsibility, had not brought suit before any German courts paved the way for the Court’s dismissal of the case on the ground that domestic remedies had not been exhausted. There is reason to doubt the soundness of this finding, as the relevant remedies could be regarded as plainly ineffective, given the monolithic case law of the German courts affording immunity to IOs such as the European Space Agency or the European Patent Organization, despite glaring shortcomings in their internal means of dispute settlement. The perception is that in this case the ECtHR found a convenient way to get rid of an application questioning the immunity of the UN, thus circumventing the issue of the compatibility of the former UN administration of justice system with meaningful due process standards. The Court had before it a 2006 report by an independent panel of experts which had depicted that sys-

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70 See text at nn 33-35.
71 *Perez v Germany*, App no 15521/08 (Decision, 6 January 2015).
72 A few years thereafter, the UN Administrative Tribunal was replaced with a two-tier system consisting of the UN Dispute Tribunal and the UN Appeals Tribunal: see UNGA Res 63/253 (24 December 2008).
73 But see *AL v Italy* (n 67); *Gasparini v Italy and Belgium*, App no 10750/03 (Decision, 12 May 2009).
74 *Perez* (n 71) paras 90, 96.
tem as, *inter alia*, ‘outmoded, dysfunctional...[,] ineffective and... lack[ing] independence’. It acknowledged that such flaws may well ‘raise an issue’ under Article 6 of the ECHR.

### 4.3. The distinct role of domestic courts

The decisions of the ECtHR do not purport to evidence the practice of (European) States Parties to the GC and other IO immunity agreements. Moreover, the role of the Court in immunity cases is clearly distinguishable from that of (European) domestic courts. It is hard to imagine how its jurisdiction may ever be triggered in situations involving denials of IO immunity by those courts. Nonetheless, ECtHR decisions may have a decisive impact also on the latter situations. An ECtHR ruling that the recognition of IO immunity does not violate the right of access to justice offers domestic courts a formidable incentive to follow suit. But this is ultimately just an incentive which may simply be ignored by such courts, which primarily are mandated to administer the human rights guarantees in their constitutions. As interpreted and applied, these guarantees may well induce certain courts to lift the immunity of IOs, including the UN, regardless of the findings of the ECtHR. This latent danger should be kept in mind by the UN authorities when considering the way forward in the *Haiti Cholera Case*.

A precedent in point is the 1992 *Stavrinou* decision by the Supreme Court of Cyprus which accorded immunity to the UN and its peacekeeping force in Cyprus (UNFICYP) in a damages action filed by one of its local employees for injuries suffered while performing his duties. The Court’s conclusion was driven by the existence of an UNFICYP internal settlement system open to the claimant, which made the grant of immunity compatible with the right of access to justice in the Cyprus Constitution. But in recent times, the most significant example is provided by Judgment No 238/2014 of the Italian Constitutional Court. In a situation denoted by (what was perceived as) an absolute lack of meaningful remedies for the victims of Nazi crimes, this

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75 *ibid* para 31.
76 *ibid* para 65.
78 *Simoncioni v Germany*, Judgment No 238 of 22 October 2014.
Court found that the duty to comply with the International Court of Justice (ICJ) *Jurisdictional Immunities* Judgment\(^79\) was unconstitutional for its breach of the Italian Constitution’s general clause on the safeguarding of fundamental rights and the specific clause on the right to effective judicial protection. The Court also ruled that, insofar as it applied to unredressed grave violations of human rights, the customary State immunity rule was never incorporated into the Italian legal system. There can be little doubt that this decision would be squarely – or better, *a fortiori* –\(^80\) transposable to the facts underlying the *Haiti Cholera Case*. It is noteworthy that the inclusion of the key provision of Article 94 of the UN Charter (as implemented by Italy) among the legal rules covered by the declaration of unconstitutionality did not have any significant impact on the Court’s argumentation.

Judgment No 238 may well be regarded as just another prominent example of Italian exceptionalism in the area of international immunities. It may also be forcefully criticised for its radical dualism and for undermining crucial tenets upon which modern international law and relations have been forged. It nonetheless remains a potent demonstration of a domestic backlash against any internationally-cleared attempt at condoning unredressed breaches of human rights, and of the significance of the ‘alternative remedy’ test in immunity cases at large. However one chooses to side, it is pertinent to recall the widely shared view\(^81\) according to which the primary useful function played by the critical engagement of domestic courts with the law of international immunities is that of urging the targeted foreign States or IOs to come back to the negotiating table and to cooperate in good faith in devising methods of affording a remedy to aggrieved individuals.

In any event, Italy’s exceptionalism does not encompass the ‘alternative remedy’ test as applied in the field of IO immunity. There is no

\(^{79}\) *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, (Judgment, 3 February 2012) [2012] ICJ Rep 99. As far as material, the ICJ found that Italy had breached Germany’s right to immunity by allowing compensation claims to be brought against it for violations of international humanitarian law during World War II, ibid para 139(1).

\(^{80}\) If only because of the treaty-based nature of IO immunity as compared to the customary status of the State immunity rule.

need here to trace back the multitude of domestic court decisions that, though almost exclusively in the area of labour disputes with IOs, have accepted that the fulfilment of the test constituted a prerequisite for the enjoyment of such immunity. Three observations would be sufficient. First, a considerable number of these decisions have not simply re-trenched behind the respective national constitutions. They have instead justified the test at hand on the basis of international law arguments, such as effective treaty interpretation and compliance with the ECHR. Secondly, various decisions have applied the test in the context of treaty provisions which are by all means identical to Sections 2 and 29 of the GC, including – most significantly – in cases brought against the specialised agencies of the UN, the ‘framework’ immunities of which are governed by a convention closely modelled, for all relevant purposes, on the GC. These disputes involving the specialised agencies show that no plausible reason warrants a different approach to the immunity of the UN, unless one were of the view that the UN is a sort of super IO entitled to a privileged treatment vis-à-vis its family members. Thirdly, domestic court case law is not, however, uniform, even at the European level. In addition to US courts, significant decisions discarding the ‘alternative remedy’ test have been delivered by United Kingdom and Canadian courts. This oscillating national ju-

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83 Italian Court of Cassation, Drago v International Plant Genetic Resources Institute, ILDC 827 (IT 2007), Judgment No 3718 of 19 February 2007.
84 See eg, Belgian Court of Cassation, Western European Union v Siedler, No S.04.0129.F; General Secretariat of the ACP Group v Lutchmaya, No C.03.0328.F; General Secretariat of the ACP Group v BD, No C.07.0407.F, Judgments of 21 December 2009.
85 See eg, Italian Court of Cassation, Food and Agriculture Organization v Colagrossi, Judgment No 5942 of 18 May 1992; Supreme Court of Justice of Argentina, Dubalde v World Health Organization, D.73.XXXIV, Judgment of 31 August 1999. This Argentine case law is the most compelling example showing that the ‘alternative remedy’ test cannot be viewed as an all European phenomenon, a point which is frequently missed by commentators, see eg, Mégret (n 1) 184.
86 Convention on the Privileges and Immunities of the Specialized Agencies, adopted 21 November 1947 UNGA Res 179(II). Sections 4 and 31 of this Convention are identical to Sections 2 and 29 of the GC.
87 UK High Court of Justice, Entico v UNESCO, Judgment of 18 March 2008 (per Tomlinson J).
risprudence suggests, here too, that an ad hoc ruling by an international judicial body on the relationship between IO immunity clauses and the right of access to justice would represent a key contribution towards the stabilization and predictability of the law.

5. Conclusion: Towards a lump sum settlement?

It may well be that the whole question of the nature of the thousands of claims made against the UN by the victims of cholera in Haiti boils down to pragmatic considerations advising against the viability of compensation on an individual basis. It is safe to assume that the UN regards mass claims of these proportions as politically and financially unsustainable. Thus, were the UN ever to acknowledge its responsibility for the cholera epidemic, the most likely scenario is that of a lump sum settlement agreement between the Organization and the Haitian Government. This scenario finds a well-known precedent in the 1960s agreements concluded by the SG with Belgium and various other countries in the context of claims of compensation for personal injuries and damage to property suffered by nationals of the States in question as a result of wrongful acts by the United Nations Operation in the Congo (ONUC). But, as pointed out below, the replication of this model in the Haiti Cholera Case poses unique questions of credibility and legitimacy.

The UN’s attempt to characterize the case as one solely involving its relationship with the Haitian Government is by all means evident. After ruling out a private law dispute triggering the duty under Section 29 of the GC, the 2014 UN reply to the allegation letter of the HRC mandate holders observed that, however, this was without prejudice to the means of settlement that Haiti might wish to pursue in accordance with the relevant provisions of the GC itself and the MINUSTAH SOFA. There is something decidedly irritating in this statement. Not so much

89 Exchange of Letters Between the United Nations and Belgium Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals (20 February 1965) 535 UNTS 197.
90 Case No HTI 3/2014, Reply (n 11) para 94.
because the suitability of diplomatic protection as an avenue for achieving a reasonable and workable settlement in the interest of all concerned parties should be refuted altogether. The problem with the statement is that it ducks several key legal and factual elements which, for the time being, make the prospect of a dispute between Haiti and the UN unrealistic and a negotiated solution between them very controversial.

For one thing, the glaring asymmetry between States and IOs insofar as access to international dispute settlement bodies is epitomised by the Haiti Cholera Case. It is true that Section 30 of the GC confers compulsory jurisdiction on the ICJ for all differences relating to the interpretation or application of the Convention. But such clause evidently refers to State-to-State disputes, ie, the sole disputes that can be adjudicated by the ICJ pursuant to its contentious jurisdiction. Indeed, Section 30 specifies that when the differences in question arise between the UN and a State Party, they shall be referred to the advisory jurisdiction of the ICJ ‘in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court’. Although it is at times misunderstood, this provision clearly implies the exclusive power of the UN organs and agencies to request advisory opinions of the ICJ. If one were to advocate a broader involvement of the ICJ in the issues discussed in this contribution, the principle of equality of the parties before judicial bodies would require an amendment of Article 96 of the UN Charter, in the first instance. Further, there is reason to believe that a more genuinely third-party adjudicatory forum would be preferable in our case to the double-hatted ICJ, ie, a court which is both one of the principal organs of the UN and a judicial body. One such option could be seen in

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91 Art 34 of the ICJ Statute.
92 Mégret (n 1) 187-188.
93 Indeed the only ICJ precedent directly in point is the Cumaraswamy Advisory Opinion, which was requested by the UN Economic and Social Council: Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion, 29 April 1999) [1999] ICJ Rep 62. It is important to recall that Section 30 constitutes one of the most significant treaty clauses envisaging ‘binding’ advisory opinions by the ICJ (‘The opinion given by the Court shall be accepted as decisive by the parties’).
94 Reinisch (n 81) 583-587.
95 As candidly recalled by the ICJ itself: see Judgment No 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the
the three-member ad hoc arbitral tribunal envisaged by the MINUSTAH SOFA for the settlement of disputes between MINUSTAH and Haiti regarding the interpretation and application of the SOFA. But even here, the UN may simply refuse to accept arbitration by withholding the appointment of a member of the tribunal. After all, the UN is likely to take the view that the Haiti Cholera Case chiefly relates to a ‘question of principle’ concerning the GC, for which the SOFA requires that the aforementioned ICJ advisory proceedings under Section 30 of the GC be utilised. In short, the UN cannot be brought before any international adjudicatory body by Haiti against its will, ie, in the absence of its explicit ad hoc consent.

Finally, as to the deep legitimacy concerns raised by the dealings of the UN with the Haitian Government, it is trite to recall the imbalance between the two parties in potential negotiations addressing issues of compensation for the cholera-related deaths and injuries, as the heavy financial dependence of the country on aid from the UN and associated organizations makes its extremely weak bargaining position crystal clear. It is less trite, though, to highlight the ongoing and substantial suspension of the rule of law in Haiti, recently reported by the New York Times as a country run by a President ‘without the checks and balances of a parliament’, who is increasingly attacked for being surrounded by an ‘interconnected web of nefarious characters and de facto creating ‘an environment of corruption, abuse of power and impunity’.


Para 57 of the MINUSTAH SOFA. This tribunal could be asked to clarify the meaning of the provisions in the SOFA which are a reflection of Section 29(a) of the GC, ie, paras 54-55.

Para 58 of the MINUSTAH SOFA.

Ibid.

‘Haitian Leader’s Power Grows as Scandals Swirl’ (17 March 2015).

Ibid.

Ibid.