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Binding the United Nations

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BINDING THE UNITED NATIONS: COMPULSORY REVIEW OF DISPUTES INVOLVING UN INTERNATIONAL RESPONSIBILITY BEFORE THE INTERNATIONAL COURT OF JUSTICE

Anastasia Telesetsky*

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ABSTRACT

One of the gaps in the International Law Commission’s Draft Articles on the Responsibility of International Organizations is any discussion of mechanisms for judicially reviewing alleged international responsibility of international organizations such as the United Nations. This article explores what judicial mechanisms exist to review actions or omissions which might implicate international legal responsibility of the United Nations and its specialized agencies. The article explores two options under the International Court of Justice Statute for enhancing UN judicial accountability: (1) amending Article 34 of the International Court of Justice Statute or (2) providing for an international agreement requiring the UN to submit disputes implicating responsibility to the advisory jurisdiction of the ICJ. Since States would be unlikely to agree to amend Article 34 because of existing controversies over UN reform, the article concludes that, States should instead enlarge the ICJ’s practice of issuing advisory opinions that “bind” parties to guarantee that the doctrine of international organization responsibility could be coherently apply to the UN.

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INTRODUCTION

As an intergovernmental organization, the United Nations (“UN”) has a recently tarnished record in Haiti. In April 2004, after President Aristide’s departure from Haiti, the United Nations Stabilization Mission in Haiti arrived as a peacekeeping force. While conducting missions within neighborhoods to target rebel leaders, the UN peacekeeping forces were accused of killing civilian bystanders—including children. Regarding these accidental deaths, the UN may be able to invoke a defense of “military necessity” or “operational necessity” in deciding what compensation it may pay. There is no formal judicial review of the UN’s determination on whether or not to compensate for the actions of the UN affiliated peacekeepers.

More recently, the United Nations in Haiti has been accused as an institution of being a vector for cholera since the United Nations deployed a unit of Nepalese peacekeepers in Haiti without testing all individuals in the unit for cholera. At least one epidemiologist suggested that the specific cholera outbreak that killed 2000 and hospitalized 100,000 others was probably imported. As with civilians caught in the crossfire of peacekeepers, the UN will analyze internally whether it proceeded with caution and due care in its humanitarian deployment and whether it will compensate for losses.

Given these two incidents involving peacekeepers operating under the control of the United Nations, does the State of Haiti on behalf of its citizens have a cause of action against the institution of the United Nations for violating basic international human rights law through potentially arbitrarily depriving civilians of their life by exacerbating existing dangerous conditions and creating unnecessary risk? If we accept the relatively uncontroversial principle that international subjects that have rights should also have responsibilities, Haiti may have an actionable claim against the U.N. as breaching customary international legal obligations to protect fundamental human rights by undertaking adequate due diligence.

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4 Id.
and properly supervising its forces.

This raises a number of fascinating international legal questions. If Haiti were to attempt to bring a case within its own courts, would the UN be protected from domestic prosecution by UN claims of absolute privileges and immunities? Could the UN even be prosecuted for violation of fundamental international rights when such rights are not part of the constitutive documents of the organization? This paper will not directly address this larger set of international responsibility and accountability questions but will instead start its analysis from the assumption that the UN like other international legal actors can be held responsible and accountable for breaches of customary international law. This leaves the greater problem of how Haiti practically might be able to bring an international legal claim and seek liability and whether UN and its specialized agencies, as simply a matter of the application of the rule of law, should be empowered to review the legality of their own actions.

What are Haiti’s options for seeking a binding judicial review? It could potentially bring a judicial action against the United Nations peacekeeping agencies responsible for deploying the peacekeeping forces for damages in its own court system. The UN, however, will likely invoke its privileges and immunities available under the UN Charter and the two conventions on privileges and immunities. Using a different tactic, Haiti can entreat the United Nations Secretary-General to pay reparations to its damaged citizens as ex gratia payments. Finally, Haiti can appeal to the good conscience of the member states of the UN agency to see that its citizens have some remedy supplied by the United Nations. None of these options have the certainty of systematized judicial review and all of these options have the potential for widely varying recoveries under disparate remedy theories.

**Paper’s Argument**

This paper begins with the premise that every State is entitled to neutral legal review of UN actions by international legal experts and not just individual administrators of the international system. Given a State’s uncertain options for formally seeking UN liability, this paper argues that there is a need to provide a mechanism for resolving international legal disputes between member states and the UN. Due to the fifty plus years of inertia in attempting to amend Article 34 of the International Court of Justice Statute to include not just States but also international organizations

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5 For the purposes of this paper, the term “UN” is used to encompass all UN institutions including all organizations, agencies, and missions that derive authority under the UN Charter or the constitutive documents for UN specialized agencies.

within the ICJ’s contentious jurisdiction, this article argues for a less obvious but equally viable approach to binding the UN.

This paper begins with an overview of the International Law Commission’s Draft Articles on the Responsibility of International Organizations as a codification of UN legal responsibility and examines the existing challenges of practically assessing UN responsibility and liability. The second part of the paper explores two proposal that would provide meaningful judicial review of UN responsibility and liability: 1) reviving historical efforts to amend Article 34 of the ICJ Statute to give the ICJ compulsory jurisdiction over contentious matters involving the UN as a party and 2) expanding the realm of ICJ “binding advisory opinions” through a treaty on UN accountability. While both proposals would result in the ability of the ICJ to issue binding opinions involving the UN as a party, the paper concludes that a draft treaty rather than an amendment will be politically more viable because it would not trigger the expansive amendment process of the ICJ Statute. This paper argues for the need to ensure that the ICJ as the principal judicial organ of the UN has the functional capacity to review UN actions and make public findings on responsibility and liability.

The key will be for States to identify a mutually agreeable and reliable judicial review mechanism. This mechanism is absent in our current international legal system. As Geoff Gilbert, suggests in his work on the United Nations High Commission for Refugees, the UN is largely judgment proof. Using an example of an administrative decision to close a refugee camp and repatriate refugees who are subsequently brutally persecuted on return, he observes that there is “no obvious mechanism by which UNHCR might beheld accountable, although a State might defend itself…and argue that any breach of its human rights obligations was due to UNHCR.”7 This paper argues for defining an “obvious mechanism” using approaches that are already under the ICJ statute.

I. DRAFT ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: SETTING THE STAGE FOR INTERNATIONAL JUDICIAL REVIEW

In 2009, the International Law Commission finished its draft of 66 articles on the Responsibility of International Organizations and has requested States and international organizations to submit their comments to the UN Secretary-General.8 In many ways, the draft was a continuation of

8 International Law Commission, Report on the Work of its Sixty-first session (2009),
the previous ILC project on responsibility of States, but with the important distinction of extending responsibility to a broad number of new actors defined as “international organizations” including implicitly UN organizations such as UN Secretary-General, World Trade Organization, and the World Bank. Notably, within its adopted articles, the drafters did not define the relationship between responsibility and accountability or attempt to articulate how responsibility for a body such as the UN would translate into accountability. The connection is left ambiguous and we learn from the commentary that the “articles only take the perspective of international law and consider whether an international organization is responsible under that law. Thus, issues of responsibility or liability under municipal law are not as such covered by the draft articles.”9 The articles never indicate that there are no international judicial means of reviewing responsibility against the UN for violations of public international law and few means of pursuing UN responsibility under municipal law unless the UN waives its treaty-granted immunity.

While there is legitimate concern that the application of the articles to any “international organization” applies too broadly to be a useful legal tool, the articles in their current form still offer a propitious opportunity for States to reflect specifically on their concerns regarding UN responsibility and liability. A proliferation of UN sponsored activities within States such as deployments of peacekeeping missions, delivery of infrastructure loans from international economic institutions, implementation of economic sanctions, or provision of disaster relief raises issues about what responsibilities exist when the UN exercises its powers in the context of international law. Article 4 of the draft articles suggest that international organizations should be held responsible for international wrongs where actions can be attributed to an international organization under international law and the action constitutes a breach under international law. But how can the UN be held responsible? Which international actor or actors decides whether an action can be attributed and whether the action amounts to a breach? The draft articles are silent on this point.

While there are references in the articles to an international organization having an obligation to provide reparation, compensation, or satisfaction in the case of a wrongful act,10 what is missing from the current sent of articles as adopted by the ILC is a vehicle for applying the draft articles to actual legal scenarios involving the UN as the coordinator of international disaster services, the command body behind a peacekeeping


9 Id., p. 40, Article 1 Commentary(3).
10 Id., pp. 117-121, Articles 34-36.
mission, or the purveyor of development aid. Article 39 of the draft articles provides that “The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.”\(^{11}\) No mention is made of whether members of an international organization need to provide judicial review of whether compensation is appropriate and if so how much.

This journal article argues that the UN should be subject to formal judicial review for matters that implicate the rights of States under public international law. The General Assembly and the Security Council are inappropriate fora for reviewing such UN actions since they are largely political rather than legal bodies. Municipal courts cannot review issues of UN organization responsibility unless the UN waives its privileges and immunities. There is really only one body who is currently well positioned to judicially review UN compliance with public international law: the International Court of Justice.

If the articles are to have immediate relevance to the UN, what is needed is an explicit linkage in the draft articles between the principles of responsibility and mechanisms of responsibility. The content of the draft articles already provides guidance to the ICJ in understanding attribution of actions to the UN. In order to access the ICJ’s binding jurisdiction, States need some legal mechanism that will address existing gaps between 21st century international law and the content of the 1945 ICJ statute. As will be suggested in Part II below, access can be provided either through a revival of the historical efforts to amend Article 34 of the ICJ statute or by obtaining a supplementary agreement by UN members in response to their obligation under Article 39 of the Draft Articles on the Responsibility of International Organizations of to provide some neutral judicial review mechanism to publicly adjudicate the international responsibility and liability of UN agencies. The remainder of this Part will discuss existing barriers to judicial review of UN responsibility and liability.

As an institution, the UN has the potential to commit numerous violations of fundamental rights including the unlawful destruction or confiscation of civilian property, the violation of due process rights, and the unlawful application of economic sanctions to injure vulnerable groups.\(^{12}\) Where States attempt to hold the UN responsible and demand compensation, reparation or satisfaction, they may find themselves blocked by both international agreements that extend expansive jurisdictional privileges and immunities to the UN thereby largely shielding the UN from

\(^{11}\) Id., pp. 122-125, Article 39.

domestic or international judicial review. While judges have criticized generally the idea of absolute immunity, as an “anachronistic doctrine incompatible with the demands of justice and the rule of law”, such immunity persists in practice.\textsuperscript{13}

The UN invokes its absolute immunity even when to do so will deny the reasonable possibility of a recovery for a third-party. For example, in \textit{Shamsee v. Shamsee}\textsuperscript{14}, the New York Appellate Court dismissed a sequestration order from an estranged wife because the order was directed at the UN as the employer of her former husband. The U.S. Court had granted the plaintiff a sequestration order requiring the UN to pay her spousal support payment from his pension benefits. On principle, the UN refused to comply and requested the U.S. Department of State to “issue a suggestion of immunity from legal process…to the appropriate officials of the court.”\textsuperscript{15} The legally entrenched reality of absolute immunity has led to the unsatisfactory judicial result of \textit{ad hoc} discretionary justice.

\textbf{A. Absolute Immunity}

The pervasiveness of absolute jurisdictional immunity is illustrated well by the ongoing dispute in the Netherlands where the Mothers of Srebrenica, a group of families who lost 6,000 family members in the Srebrenica Massacre of Bosniak men and boys, filed a civil law suit against the Netherlands and the United Nations because of an alleged failure to act effectively to protect civilians in a region that had been declared a safe area by the UN.\textsuperscript{16} The UN never made an appearance in the court case. The Dutch court found that Article 105 of the UN Charter, in conjunction with article II paragraph 2 of the Convention on the Privileges and Immunities of the United Nations ensured that the UN enjoys immunity from legal process. The Court found no indication that the UN had waived this immunity.\textsuperscript{17} As a result the Dutch District Court found that it had no jurisdiction to hear the

\begin{itemize}
  \item \textsuperscript{13} McElhinney v. Ireland, 2001-XI, Eur. Ct. H.R. 37, 55 (2001) (Judge Loucaides Dissenting)
  \item \textsuperscript{14} \textit{Shamsee v. Shamsee} 428 N.Y.S.2d 33 (2d Dept. 1980)
  \item \textsuperscript{15} UN Office of Legal Affairs, Letter to the Permanent Representative of the United States to the United Nations, \textit{UNITED NATIONS JURIDICAL YEARBOOK}, 1978, p. 186.
  \item \textsuperscript{16} Mothers of Srebrenica v. The State of the Netherlands and the United Nations, Rechtbank ’s-Gravenhage , 295247 / HA ZA 07-2973 Judgment in the incidental proceedings, July 10, 2008.
  \item \textsuperscript{17} \textit{Id}. Para. 3.3.; Article 105(3) of the UN Charter, June 26, 1945, \textit{United Nations Yearbook} 831, provides that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”; \textit{Convention on the Privileges and Immunities of the United}, Article II(2), February 13, 1946, 1 U.N.T.S. 15 [hereinafter Nations The Privileges and Immunities Convention] states that “[t]he United Nations […] shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”
\end{itemize}
civil case. The Appellate Court agreed with the District Court’s conclusion in 2010 adding a concern that anything less than absolute immunity could jeopardize the ability of the UN to function in maintaining peace and security with excessive litigation.\(^\text{18}\) Attorneys for the Plaintiffs have appealed the decision to the Dutch Supreme Court and are arguing that the UN may prove judgment proof if it does not provide some international legal settlement mechanism for claimants.\(^\text{19}\) In September 2010, the Dutch public prosecutor agreed to open a criminal investigation of the peacekeeping mission.\(^\text{20}\) The Plaintiffs remain unable to access any judicial forum which will hear its claims of violations of international law by the UN.

Since the UN Charter was drafted at a time when it was uncertain whether the UN would be able to provide any effective international governance, the drafters were highly protective of its infant institutions. As a result, Article 105(3) of the Charter of the United Nations provides that the UN shall enjoy in the territory of each of its Member those privileges and immunities that are necessary for the fulfillment of its purposes. Article II(2) of the 1946 Convention on the Privileges and Immunities of the United Nations and Article III(4) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies\(^\text{21}\) both reflect the post-war sentiment that the UN needed robust immunities to separate its institutions from any national judicial review.

The problem was that no one contemplated in the UN’s early history that the responsibility of the UN might be the appropriate subject of formal adjudicatory review. The 1949 Reparations for Injuries Suffered in the


\(^{19}\) Rachel Irwin, UN Ruled Immune from Srebrenica Prosecution, (April 3, 2010), Institute for War and Peace Reporting, [http://iwpr.net/report_news/un-ruled-immune-srebrenica-prosecution](http://iwpr.net/report_news/un-ruled-immune-srebrenica-prosecution) (Observing that at the end of their appellate decision, the Dutch judges “say they ‘regret’ that the UN ‘has not instigated an alternate course of proceedings’ as they were required to do when the organisation was created in 1946, as a condition of immunity.”)


\(^{21}\) Privileges and Immunities Convention, [supra note 17; Convention on the Privileges and Immunities of the United Nations, Article III(4),November 21, 1947, 33 U.N.T.S. 261 [hereinafter “Privileges and Immunities of the UN”] (“The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”)](http://www.currentintelligence.net/features/2010/9/8/dutch-un-troops-face-srebrenica-probe.html)
Service of the United Nations advisory opinion articulated the evolution of the UN into an institution endowed with international legal personality. Judicial review by the ICJ of UN actions has been limited to advisory opinions requested by UN agencies. For example in Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt, the WHO requested the ICJ to review the legality of the process the WHO was applying to transfer regional offices from Egypt to another State.

Relying on the UN to waive its jurisdictional immunity before submitting to either domestic or international judicial review undermines the legitimacy of public international law as the body of law that has been evolving to manage all public international relationships. Even though the UN is the flagship international institution, the UN continues to have the capacity to operate at the periphery of international law as a result of both its immunity under domestic law and the anachronistic nature of the ICJ statute. Under Article 65 of the ICJ statute, the UN bodies are empowered to “request” an advisory opinion but are not required to seek opinions even if there is a live dispute between a State and a UN institution over an international legal issue. In lieu of an adjudicative process articulating authoritative legal rulings on matters of international organization responsibility and liability, the UN relies primarily on resolving disputes with UN Member states through diplomatic channels which lack the public transparency associated with “good governance” and general practices of rule of law.

B. Ad Hoc Discretionary Justice

In cases where the United Nations has privately acknowledged some responsibility for injuring innocent parties, it has offered compensation to injured parties. For example, as a result of certain acts by the United Nations Operations in the Congo, the United Nations in various publicly distributed agreements with Belgium, Greece, Italy, Luxembourg, and Switzerland agreed not to “evade responsibility where it was established that the United Nations agents had in fact caused unjustifiable damage to innocent parties.”

From the beginning of UN history, the UN has also acknowledged liability for damage caused by the United Nations Emergency Force, the

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23 Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt ICJ, December 20, 1980, Advisory Opinion, ICJ Reports 67.


first internationally organized peacekeeping force.\textsuperscript{26} In 2004, the UN Legal Counsel agreed that the UN must accept international responsibility and pay compensatory liability where “an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation.”\textsuperscript{27}

More broadly, the UN Secretary General stated in a 1965 letter to the Government of Belgium regarding the UN caused damages in Congo that, “It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.”\textsuperscript{28}

While the UN may have squarely and conscientiously assigned payments for “damage caused by members of its forces in the performance of their duties”\textsuperscript{29} during the earliest UN peacekeeping operations, the UN’s practice of paying damages has been predicated largely on moral grounds rather than a legally articulated obligation to pay compensation. What this means is that there is no external check outside of the withholding of dues by member states on the UN’s exercise of its discretion to provide compensation when requested. The discretion to accept or reject responsibility for potential wrongful UN acts leaves numerous States like Bosnia with civilian victims in the precarious position of relying on the UN’s good faith efforts to redress injuries as it sees politically fit.

With the ILC project on responsibility of international organizations potentially being mainstreamed by States, the largely moral driver may be slowly transformed into a legalized regime. Given the statements of the Secretary-general in 1965 combined with recent practice of paying for damages inflicted by peacekeeping troops on civilians, there may be an emerging customary international law that the UN must offer compensation where it is responsible for a breach of international law. If we are at the

\textsuperscript{27} Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN.4/545, sect. II.G.
\textsuperscript{28} LOUIS B. SOHN, CASES ON UNITED NATIONS LAW 53 (2d rev. ed. 1967).
\textsuperscript{29} Report of the Secretary-General on Financing of United Nations Peacekeeping operations (A/51/389) p. 4, ¶¶. 7-8.
point of customary international law on UN responsibility and liability beginning to crystallize, there remains an absence of institutions capable of ensuring that an admissible claim of responsibility would be judicially reviewed rather than simply subject to *ad hoc* judgments of UN agencies.

The current approach of trying to ensure that UN responsibility translates into liability is largely a private diplomatically negotiated matter outside of the review of public tribunals. Domestic courts that have challenged the compliance of the UN with international law including customary international law have been stymied from proceeding by claims of privileges and immunities and unable to proceed to the merits of cases. Even where actions are attributed to the UN, parties may be unable to collect any judgment. For example, the District Court of The Hague in the Netherlands ruled in a civil action that the actions of Dutch soldiers working for the United Nations Protection Force would be “attributed, strictly, as a matter of principle to the United Nations.” The United Nations was, however, never a party to this decision and there was no indication in the court record of how the plaintiff could avail himself of damages attributable to the UN. These *ad hoc* approaches of making qualified attribution rulings in certain cases while applying absolute privileges and immunities in other cases has the potential to lead to both non-enforcement of international law as well as logistical difficulty in collecting damages.

Some UN international bodies do allow for suit in national court but what results is an internationally *ad hoc* approach as national courts apply in a piecemeal fashion their national laws on immunity to interpret international rights and obligations. For example, the World Bank’s constitutive Statute provides that “[a]ctions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for purpose of accepting service or notice of process, or has issued or guaranteed securities.” What this means in practice is that a case brought in the United States has the potential to result in a different legal outcome regarding international obligations than a case in Germany depending on a number of factors including systemwide approaches to law, familiarity of a judge with international law, and constraints of respective domestic laws implementing international obligations.

One of the recurring problems in addressing UN accountability is a

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31 International Bank of Reconstruction and Development Articles of Agreement, December 27, 1945, 2 UNTS 134, Article VII(3)
lack of certainty about where plaintiffs can bring cases identifying potential UN responsibility under international law. As Professor Reinisch observes “In the case of certain international organizations, express treaty-based constitutional provisions have even led to questions of whether or not the respective organizations are bound by ‘extraconstitutional’ legal standards at all. This has resulted in serious doubts about whether any forum has the power to assess this issue.”

While ex gratia payments may satisfy the fundamental need for a remedy without the potential complications of judicial review, this ad hoc approach interferes with the progressive development of international legal norms regarding responsibility. There is nothing systematic about side-payments and there is the potential, particularly where there may be a power imbalance between the UN and its member state, that ex gratia payments do not reflect the gravity of a particular violation.

The following section of this article explores the need to identify a single neutral, international judicial forum to adjudicate issues of UN responsibility under international law. The current approach where the UN is largely immune from any legal proceedings in domestic courts unless it discretionarily submits to adjudication or enters a settlement agreement is inadequate in terms of creating a balanced rule of law framework within the UN.

II. UNIFORM JUDICIAL REVIEW BY THE ICJ OF UN RESPONSIBILITY AND LIABILITY

Given the ad hoc nature of dispute resolution involving UN responsibility, there is a nagging issue of how to uniformly yet equitably approach issues of UN responsibility and liability. This part explores two proposals to address a need for UN judicial review for matters involving UN responsibility: 1) reviving historical efforts to amend the ICJ Statute to give the ICJ contentious jurisdiction over the UN and its specialized agencies and 2) expanding the realm of ICJ “binding advisory opinions” through a supplementary treaty requiring disputes involving the UN to be submitted to the ICJ.

The patchy legal landscape of scattered privileges and immunities for the UN combined with occasional binding decisions under the advisory jurisdiction of the ICJ generates uncertainty in assessing UN responsibility. What is needed to ensure that principles of liability for violations of international law are applied uniformly across the UN system is a single judicial forum that is available to all States and knowledgeable in applying international laws and principles. The best-situated institution for this work is the International Court of Justice as the UN’s principal judicial organ.

32 Reinisch, supra note 12 at 133.
Even though there has been no systematic review of disputes involving the UN’s responsibility, the Court has historically welcomed the adjudication of matters involving the UN as part of their mission to resolve international disputes using international law. In his 1995 address to the UN General Assembly, ICJ Judge Mohammed Bedjaoui suggested a new relationship between States, international organizations, and the court:

States, subjects traditionally described as ‘primary’ or ‘necessary’ components of the international legal order, are, in reality, no longer the only players in international relations, or the only interlocutors where peacekeeping is concerned. International life shows us every single day that, at this level, greater account must be taken of other entities, notably, the international organizations. Access to the Court's contentious procedure, currently reserved for States alone, may therefore now seem too narrow. Among the remedies found for these shortcomings has been the incorporation, into certain treaties, of ad hoc clauses laying down that, in the event of a dispute between the international organization and the States specified therein, that organization will request the Court for an advisory opinion, which the two parties agree will have a "decisive" or "binding" effect. The technique referred to as that of "compulsory advisory opinions" - whose very name underlines its singularity - is, however, no more than a stopgap, which cannot be a substitute for full access by organizations with international legal personality to the contentious procedure of the Court.33

Judge Bedjaoui’s comments articulate a clear demand for expanding ICJ contentious jurisdiction to encompass international organizations including the UN in order to reflect a legal reality that has evolved since 1949. In his comments, he is far more dismissive of the possibility of securing a broader role for binding advisory opinions than this article. As described below, while extending contentious jurisdiction to the UN by amending Article 34 of the ICJ Statute is legally desirable, negotiating a treaty providing for binding advisory opinions may be more politically palatable to some States because it would not trigger an UN Charter style amendment procedure.

A. Option One: Amend Article 34 of the ICJ Statute Second-Level

Article 34 of the ICJ statute provides that “[o]nly states may be

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parties in cases before the Court thereby restricting the court’s *ratione personae* jurisdiction. While legal persons (natural or corporate) cannot appear on their own behalf, States may appear on their behalf if there has been an international legal violation. When the ICJ Statute was promulgated, there was perceived to be no need to provide standing for private persons with disputes against their own States because presumably disputes between natural persons and State could be handled under municipal law. While this rationale may make sense for individual citizens or corporations, the rationale does not apply to international organizations, especially the UN with its bundles of privileges and immunities that shield it from legal process in municipal courts.

The UN’s role under Chapter II of the ICJ statute describing the court’s contentious jurisdiction is restricted to being the provider of “information relevant to cases before” the ICJ where the international organizations “on their own initiative” present such information. This secondary role in dispute resolution where the UN almost serves as a consultant to the court no longer reflects the reality that intergovernmental organizations have international obligations and may be responsible for violation of international law.

In order to secure binding decisions on UN liability, it is theoretically possible to broaden Article 34 of the Statute for the International Court of Justice to give the UN standing under the court’s contentious jurisdiction. This approach has been proposed enthusiastically by jurists and academics over the last 50 years but has yet to maintain enough political momentum.

While theoretically possible to seek amendment, such as an amendment would not be a simple legal proposition since any such amendment would require under ICJ Article 69 an amendment similar to a UN Charter amendment. Any amendment of the ICJ Statute needs a vote of two-thirds of the members of the General Assembly to be ratified by two-thirds of the members of the United Nations including all members of the Security Council. Achieving this level of international consensus may be politically challenging.

The idea of providing standing under the ICJ’s contentious jurisdiction to international organizations is not a new idea and has a

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34 ICJ Statute, *supra* note 6, at Article 34(1).
35 *Id.* at Article 34(2).
36 *Id.* at Article 69, (“Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.”)
37 UN Charter, *supra* note 17, at Article 108.
relatively long history, nearly as long as the ICJ’s history. When the ICJ was created in June 1945 by statute, States were concerned with maintaining continuity between the Permanent Court of International Justice and the new UN Charter-created International Court of Justice. The Permanent Court under the League of Nations had been organized exclusively to settle state-to-state disputes grounded in the classic view of international law as a discipline concerned exclusively with the rights and duties of States.\(^{38}\)

At the 1945 San Francisco Conference, some participants such as Venezuela proposed that international organizations should have standing to appear before the Court in contentious matters.\(^{39}\) While the proposals were not adopted by the conclusion of the conference, the idea remained in circulation and negotiators agreed that international organizations should be engaged in the court process. Specifically Article 34, paragraph 2 provided that the Court could request information from public international organizations on matters before the Court. Under Article 34, paragraph 3, the UN Registrar was required to communicate with international organizations where there were questions about the construction of a constituent instrument or about an international convention adopted under by an international organization. But Article 34, paragraph 1 remained steadfast that only States can participate in cases where the Court exercises its contentious jurisdiction.

The Court’s advisory opinion in its 1949 Reparation for Injuries\(^{40}\) raised some hopes that UN would be eventually subject to ICJ binding judicial review. The Court affirmed that the UN has the capacity to bring international claims because of its status as an international organization formed under the Charter. No specific source of the right to bring claims was discussed and the court simply noted that it was “clear”\(^{41}\) that the UN had the right to bring claims for damages through such methods as “protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the [ICJ’s] Statute.”\(^ {42}\) In spite of the Court’s language, which suggests that the UN

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\(^{39}\) 13 UN Conference on International Organizations 480 (Doc. 284 IV/1/24) (1945) (Venezuela proposed that the text of Article 34(2) be drafted so that “upon request from any of the intergovernmental international organizations or offices dependent on the United Nations, the Court shall settle conflicts of jurisdiction which may arise among them.”)

\(^{40}\) Reparation for Injuries, supra note 22.

\(^{41}\) Id. p. 180

\(^{42}\) Id. p. 177.
might bring general claims under the ICJ Statute as “authorized by the Statute”, the ICJ has restricted the UN and its agencies to requesting advisory opinions from the ICJ since Article 34(1) is unequivocal about the limits of the ICJ’s contentious jurisdiction.

In the 1950s, groups of jurist began to raise concerns about the state-centric limitations of the ICJ. In 1954, the Institut de Droit International expressed concern about the inability of international organizations with a majority of UN member states or ICJ members to appear as respondents before the ICJ. The International Law Association in 1956 proposed an amendment to the ICJ Statute such that the UN and its specialized agencies would be able to appear before the court in contentious cases.

In 1977, the U.S. Department of State in response to Senate Resolution 78 (May 9, 1974) published a study on widening access to the ICJ for individuals, corporations, non-governmental organizations, intergovernmental organizations, and regional organizations for cases raising questions of international law. The report noted that widening access to the court would increase the court’s contribution to the development of international law by promoting “unification in the interpretation and application of international law.” The report examined the possibilities of increasing the number of organizations capable of requesting advisory opinions or amending Article 34(1) of the Statute. On the issue of amending Article 34(1), the Department of State was open to the idea of international organizations being subject to contentious jurisdiction as long as both the General Assembly and Security Council agreed on any potential submission of a matter to contentious jurisdiction. The Department of State recognized in the 1970s that achieving the needed votes for an amendment would be difficult but that it supported an amendment “in principle…at some later, more propitious time.”

Scholars and practitioners have urged for some time that international organizations including the UN need access to ICJ’s contentious jurisdiction. One year after the formation of the ICJ, Director-General of the International Labour Organisation Wilfred Jenks criticized the ICJ’s bifurcated jurisdictional structure finding that “the “inconvenient and irritating restrictions upon access to the Court by the specialized agencies will encourage the latter to rely upon ad hoc tribunals for the determination of questions which might appropriately be referred to the

43 KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 251 (2002) (citing Annuaire de l’Institut de Droit International 45(2) (1954), 298, para. 6.)
44 Id. at 250, citing ILA Report of the 47th Conference, p. 104.
46 Id. p. 201.
Emphasizing the need for consistency in international law, Laurent Jully observing arbitration and settlement trends in 1954 wrote that “the revision of Article 34 will be one of the first tasks to be undertaken as being capable of bringing about an important improvement in this special province of international law.”\textsuperscript{48} Jully, noting the light docket of the ICJ at the time, expressed concern that “[I]t is somewhat paradoxical that the numerous specialized agencies, which stand in close relationship to the United Nations, should be obliged to set up separate and \textit{ad hoc} bodies for the settlement of future disputes, while the Charter has established, or rather confirmed in existence, a first-class judicial organ, benefiting from a long experience as well as a high reputation, and which could certainly deal with more work that is at present being entrusted to it.”\textsuperscript{49}

Cambridge University lawyer Sir Elihu Lauterpacht argued that international organizations should have the power to present claims to the ICJ. In particular, he observed that where an international organization acts as a defendant in a given case such as a responsibility case, the ICJ’s exercise of contentious jurisdiction would be especially reasonable because it would involve a dispute over international law. As he commented, “While it [the rights and duties of international organizations] can, of course, be resolved in any particular \textit{ad hoc} arrangement for dispute settlement involving international organizations...Article 34 of the Statute of the ICJ should be amended [so] that international organizations are no longer \textit{a priori} excluded from participation in the contentious work of that Court.”\textsuperscript{50}

Sir Gerald Fitzmaurice, the United Kingdom’s counsel to the ICJ, observed that there “[t]here is a strong case, though it may not be free from all difficulty” for international organizations to be litigants. Writing in 1976, he observed that “It seems probable that had the basic drafting of the Court’s Statute been carried out within, say, the last twenty years, instead of over half a century ago, the present paragraph 1 of Article 34 of the Statute—while not necessarily including international organizations in terms as entitled to be parties as litigants—it would at least not have been drafted in such a way to exclude them.”\textsuperscript{51}

Recently, Shabtai Rosenne, author of numerous treatises on the ICJ,

\textsuperscript{47} C. Wilfred Jenks, \textit{The Status of International Organizations in Relation to the International Court of Justice}, 32 \textit{TRANSACTIONS OF THE GROTIIUS SOCIETY} 1, 19 (1946).


\textsuperscript{49} Id.


\textsuperscript{51} Gerald Fitzmaurice, \textit{Enlargement of the Contentious Jurisdiction of the Court, in The Future of the International Court of Justice} 479 (Leo Gross, ed. 1976).
explained why in spite of numerous suggestions for reform, nothing has happened to secure the reform. Professor Rosenne, acknowledging that even though there appeared to be a practical need for UN standing in contentious cases, reflected that the lack of reform can be explained by the lack of political will.  

He illustrated his premise with two proposals presented by the States of Guatemala and Costa Rica in 1997 to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. Both of these proposals requested amendment of the ICJ Statute to allow the United Nations and other international organizations to be parties to contentious cases.  

When the proposal was considered, the General Assembly expressed its intent to take no action that might have implications for any changes in the UN Charter or the Statute. In 1999, the proposal for extending contentious jurisdiction to certain international organizations was withdrawn by Guatemala.  

The proposal was “feasible technically but not politically, at least for the time being.” Guatemala’s speech withdrawing its proposal before the Special Committee reflected on the political hurdles with reserved optimism. As Guatemala’s representative stated in reflecting on the withdrawal of their proposal from the Committee’s agenda,  

We consider it advantageous that the predominantly favorable views that, primarily in the academic area, have been expressed with regard to the possibility of expanding the ICJ’s jurisdiction in the manner proposed have been complemented by the reaction of States to that possibility….We consider that we should now take a long-term view and have regard to both the rapidity with which everything evolves in this era of profound and unpredictable changes, and the importance that intergovernmental organizations, whose number grows incessantly, are increasingly taking on. We believe that within this long-term perspective the hope subsists that

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55 Rosenne, supra note 52, at 633.
the proposal we have presented will one day be adopted.\textsuperscript{56}

The U.S. Department of State suggested waiting for a “more propitious time” to seek amendment of the ICJ Statute and Rules and Guatemala pinned its hope on a “long-term perspective”. States have proposed two existing models of how to amend Article 34(1) of the Statute that were amenable to several States in 1997.\textsuperscript{57} The Guatemala proposal included an amendment of Article 34(1) and the addition of a number of new articles. The amendment of Article 34(1) opened the compulsory jurisdiction of the ICJ to the “United Nations or any other international organization comprised of States” as long as the constituent instrument of the organizations permitted ICJ jurisdiction, the State members of the organization agreed in a treaty to compulsory ICJ jurisdiction for the organization, or the State parties to the dispute and the organization agreed to refer the dispute to the Court. \textsuperscript{58} The Costa Rica proposal built on the Guatemala proposal but did not restrict Article 34(1) to international organizations comprised only of States but permitted any international organization that was authorized by its constituent instrument to seek ICJ compulsory jurisdiction. \textsuperscript{59}

The greatest hurdle to making ICJ contentious jurisdiction include the UN is as commentators have pragmatically observed the whole ICJ amendment process. As Shabtai Rosenne alluded to in his treatise on the ICJ, amending the ICJ Statute is not really a technical problem of updating the Statute to reflect current international legal realities but a problem of political will and political inertia. The amendment process is straightforward. Article 69 of the ICJ Statute provides that an ICJ amendment is the same procedurally as a UN Charter Amendment. \textsuperscript{60} The Court has the power to propose amendments to the Secretary-General who

\textsuperscript{56} Translation Of A Statement By Guatemala At The 5th Mtg. Of The Sixth Committee On The Report Of The Special Committee On The Charter Of The United Nations And The Strengthening Of The Role Of The Organization (Agenda Item 159) (13 October 1999), \url{http://www.un.int/guatemala/english/speeches/juridico/1999/13-oct-1999.html}

\textsuperscript{57} Guatemala and Costa Rica submitted the proposals. In contemporary press releases, other nations supported the proposals including Cuba. \url{http://www.un.org/News/Press/docs/1998/19981016.gal3073.html} and Georgia \url{http://www.un.org/News/Press/docs/1998/19981020.gal3075.html}. In the state’s speech to withdraw its proposed amendment, Guatemala refers to support in 1978 from sixteen states including Guatemala and two Security Council states.

\textsuperscript{58} Guatemala Proposal, \textit{supra} note 53, at Section B.

\textsuperscript{59} Costa Rica Proposal, \textit{supra} note 53.

\textsuperscript{60} There is additional language in Article 69 providing that the amendment process is subject to General Assembly provisions that may be adopted concerning the participation of states which are parties to the ICJ Statute but not members of the UN. See “States Entitled to Appear before the Court” \url{http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=b}
will then propose these amendments to States. 61

The problem lies in politically securing an amendment that is procedurally equivalent to a UN Charter amendment. The UN Charter provides in Article 108 that an amendment to its Charter require an adoption by two-thirds of the members of the General Assembly and ratification by two-thirds of the members of the United Nations including all of the permanent members of the Security Council. Likewise, an amendment to the ICJ statute would require the same two-thirds adoption and ratification from the UN’s current 192 member states. The reaction of the permanent members of the Security Council remains an unknown. Among the permanent Security Council members, only the UK has recognized the compulsory jurisdiction of the court over itself suggesting that it might be open to the compulsory jurisdiction being extended to UN. 62 France has also availed itself of the ICJ’s contentious jurisdiction. As described above, While the US expressed in its domestic policy thirty years ago an interest in broadening access to the ICJ, it is unclear whether the same policy reform interest remains. China and Russia have never appeared before the ICJ.

A request to open up an UN Charter-like amendment process is likely to stall because of its potential to influence other aspects of UN governance that are currently disputed. An opportunity to revise the ICJ Statute may be perceived by some States as a larger opportunity to reform the UN. The larger questions of other areas of UN reform requiring the same series of votes from the General Assembly, ratifications by member states, and approval by the Security Council would quickly dwarf concerns of institutionalizing ICJ contentious jurisdiction over issues involving UN responsibility.

In addition to the issues of amendment, there is one other issues that requires some thought about whether Article 34 reform would be sufficient to review UN responsibility and accountability. Even if international organizations and in particular the UN was able to appear, would they be compelled to appear? One of the recurring issues with pursuing a judicial matter against the UN is the prevalence of absolute immunity. Unless the UN was required to submit to compulsory jurisdiction with a revision of Article 36, the UN may very well choose not to submit to the ICJ contentious jurisdiction. The following section looks at one judicial mechanism that could provide similar results to a revision of Article 34 and Article 36 without needing to revise the ICJ Statute.

61 ICJ Statute, supra note 6 at Article 70.
B. Option Two: Obtain Binding Advisory Opinion under Supplementary Treaty

Presently only States can receive judicial review of contentious matters by the ICJ under Article 34 of the ICJ Statutes. UN organs and UN specialized agencies are limited to requesting advisory opinions under Article 65 which provides that “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”

While the court does deliberate on matters involving UN rights and responsibilities under its advisory jurisdiction, these opinions are considered to have less weight than a similarly situated contentious jurisdiction decision.63 In part, this goes to the issue of whether the deliberations of the court are res judicata when the ICJ acts in its advisory capacity versus its contentious capacity or whether the ICJ is simply providing well-reasoned and legally articulated suggestions when it issues an advisory opinion.

Alexander Fachiri writing about the Permanent Court of International Justice on which the ICJ was largely modeled suggested that international court advisory opinions should be considered the same as any other international court judgment. He wrote, “It is submitted that the principles laid down and points decided in advisory opinions have the same effect by way of precedent as the judgments of the Court, and will contribute to an equal degree in the development of international law...The Court itself has shown its appreciation of the importance of its advisory opinions by framing them with elaboration and including a full statement of the reasons upon which the conclusions arrived at are based.”64

The modern interpretation is that generally unless there is language in a given treaty requiring parties to request an advisory opinion that will bind the parties to the treaty that a ICJ advisory opinion will have no binding force.65 In the realm of ascertaining responsibility and assigning liability, the inability to bind parties to a particular decision is problematic. Yet as Fachiri implies, there is no reason that the Court acting under its Article 65 powers cannot issue decisions with the same binding force as contentious decision since the Court uses largely the same procedure in an advisory case as it does in a contentious cases and the Court is still

63 A. Gros, Concerning the Advisory Role of the International Court of Justice, in TRANSITIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP JESSUP 315 (W. Friedmann, ed. 1972).
exercising authority in a judicial fashion.

International legal practitioners have perceived this “double standard” problem and have sought to remedy it through a novel approach to applying the Court’s advisory jurisdiction. Laurent Jully observed that in the 1950s, international organizations were finding alternative approaches. He found that “[I]n order to evade the obstacle of Art. 34—perhaps not as formidable as it looks at first—public international organizations have used two distinct legal devices: The first is a treaty provision whereby a dispute as to the interpretation or application of the treaty in question…shall be submitted to the Court for an advisory opinion, it being clearly understood that the parties will consider the opinion given by the Court as decisive…The other device used by international organizations is the classical one of arbitration.”

In the text that follows, this paper will explore the idea of developing a supplementary treaty requiring the UN to submit to advisory opinions. This paper will not explore arbitration as a second device to avoid “the obstacle of Art. 34” since arbitration lacks some of the important procedural components of the ICJ. For example, unlike Article 34 decisions or advisory opinions, arbitration reports may be kept confidential from the public. In spite of the advantages of efficiency generally associated with arbitration, the evolution of public international law must remain a matter for public deliberations.

In some limited instances, treaties have been negotiated providing the ICJ with the ability to issue binding opinions under its Article 65 powers. These treaties such as the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies contain clauses referring a dispute between the treaty members to the ICJ for a final binding decision on the parties. The “compromissory clauses” in various international agreements requesting ICJ resolution of disputes between the UN and a State have been recognized by some scholars as adequate, albeit, indirect legal authority for triggering ICJ decisions under Article 65 of the ICJ Statute which might bind the parties.

The legal reasoning allowing for such binding advisory opinions in spite of there being no such authority in the ICJ Statute or Rules was articulated early in the ICJ’s existence in the Judgments of the

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66 Jully, *supra* note 48 at 391.
67 Privileges and Immunities Convention, *supra* note 17 at Article VIII Sec. 30.
68 Privileges and Immunities of the UN, *supra* note 21, at Article XI, Sec. 32, 33.
69 Roberto Ago, “Binding” Advisory Opinions of the International Court of Justice, 85 A.J.I.L. 439, 441 (Jul. 1991). (Describing Professor Paolo Benvenuti’s work such that “the ‘binding force’ attributed under certain conditions to an advisory opinion, far from being an exception to the rule, is consistent with the natural and customary effects of the definition of rights and obligations by the Court in exercising its advisory jurisdiction.”).
Administrative Tribunal of the ILO upon complaints made against the UNESCO. The Court took the position that the ILO statute at issue in the case was nothing more than “a rule of conduct for the Executive Board, a rule determining the action to be taken by it on the Opinion of the Court.” As long as the Court does not feign to be acting under the ICJ Statute or its rules when it issues an advisory opinion that is adopted by two parties as a “binding advisory opinion”, the Court reasoned that it could issue advisory opinions that would functionally bind the parties. Whether a decision in practice was binding or not was of little concern to the Court as long as the parties did not invoke ICJ Rules and Statutes to transform an advisory opinion into a “binding” advisory opinion.

In many cases, the subject of “binding” advisory opinions is largely a matter for academic debate since the number of treaties providing for ICJ review in the case of a dispute with UN institutions are narrowly limited to headquarter agreements, privileges and immunities agreement, and arrangements related to specific UN facilities. There is no language in general subject multilateral treaties under which the UN is expected to invoke the ICJ’s advisory jurisdiction to conclusively decide a matter between parties. Not unsurprisingly, human rights treaties, environmental treaties, or humanitarian law treaties do not explicitly address UN responsibility or liability since the UN is not in the practice of formally confirming most of these treaties. Yet this omission leaves a lacunae in jurisprudence where States as individual members within a general subject treaty regime are subject to international judicial review mechanisms while the UN remains accountability-free as long as it has not specifically consented to bringing a dispute with a State or another UN agency to the ICJ. This means that in practice, there are few opportunities to judicially review the responsibility of the UN for any breach of either customary international law or treaty law.

The failure to agree upon a binding mechanism to hold the UN

70 Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO, October 23, 1956, Advisory Opinion, 1956 ICJ Rep. 77.
71 Id. at 84.
responsible for international legal violations, outside of the small population of treaties concluded between the UN and States which invoke the mechanism of “binding” advisory jurisdiction, remains a systematic problem. Even in recent international discussions over recommended environmental liability mechanisms, there has been no explicit recognition of the possibility for disputes arising between the UN and States. For example, the Committee of Permanent Government Representatives to UNEP in a recent document designed to ensure liability mechanisms for victims of pollution and environmental damages encouraged each State to create domestic law that would assess strict liability to operators for activities dangerous to the environment. The draft never contemplated that the UN itself could engage in dangerous environmental activities and that, unlike private operators, it would be able to avail itself of certain privileges and immunities that would shield it from operator liability under domestic law. This oversight or deliberate omission is significant. In some respects, the UN as a multilateral institution that frequently operates across borders has a far greater potential for creating environmentally dangerous conditions than many UN States who are disengaged from global affairs.  

While Judge Bedjaoui in his comments to the General Assembly was highly critical of binding advisory opinions as “stop-gap measures”, these hybrid opinions shouldn’t be so readily dismissed and should be regarded instead as offering a unique opportunity for reforming the UN system to better reflect legal reality without triggering the general amendment process that a revision of Article 34 would require. To the extent that States agree in principle that the UN should be held accountable where there has been a demonstrable breach of international law, there is room for a narrowly tailored treaty that would require both the UN institutions and the UN member States to submit any disputes that they have with each other arising under treaty or customary international law, including disputes on behalf of injured third-parties, to the advisory jurisdiction of the ICJ for a binding opinion. Such a treaty would avoid the problem of these opinions currently being applied as “stop-gap measures” and would provide instead a degree of certainty, uniformity, and predictability in the context of dispute settlement between States and the UN as well as presumably between UN agencies.


75 UN employs approximately 64,000 staff which is equivalent to the population of each of a number of the smaller UN States including Dominica, Marshall Islands, and Barbados. At least some of these staff are involved in due diligence work on large potentially environmentally damaging infrastructure projects.
The UN has complied with opinions obtained under the ICJ’s advisory jurisdiction by recommending that the Security Council act in accordance with ICJ opinions, establishing Special Committees to respond to ICJ opinions, and passing resolutions specifically adopting ICJ opinions. Even without the court’s exercise of contentious jurisdiction binding the UN, the UN has fully implemented advisory jurisdiction opinions as authoritative judicial decisions. From the perspective of good faith compliance, compelling the UN to submit to Article 65 advisory capacity of the court should not lead to widely different outcomes than if the court exercised compulsory jurisdiction over the UN under its Article 34 powers to resolve contentious disputes.

Article 66 of the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations provides some drafting guidance on measures that might ensure binding advisory jurisdiction over the UN. Article 66 provides that in cases of interpretation under the Vienna Convention, the ICJ may give a binding decision if 1) “a State is party to the dispute to which one or more international organizations are parties” and the State asks “the General Assembly or the Security Council” or other qualified UN agency “to request an advisory opinion of the International Court of Justice” or 2) the United Nations as a party to the dispute decides to request an advisory opinion.

While the Vienna Convention provides an approach for States and an approach for the UN to trigger ICJ binding advisory jurisdiction, under neither approach is the UN compelled to appear. Rather, the State and the UN both “may” request opinions. The notion of exercising discretionary power in judicial review is problematic. In the context of the ICJ’s discretionary power under Article 65 of the ICJ Statute, scholars have argued that “the idea of discretionary power, even if it is moderated by the safeguards in the Court’s jurisprudence, is puzzling… the textual argument on which it is based (the ‘may’ in Article 65 of the Statute) is very weak and should yield to the spirit of the provision on the advisory function which testifies to the obligatory co-operation of the Court with the UN organs in the solution of legal questions.” Likewise, the possibility of States and the UN being left to their discretion to request opinions after a reasonable amount of time has elapsed for resolution raises questions about whether the UN is cooperating with the ICJ court to resolve outstanding legal issues with implications for ensuring UN responsibility.

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76 AMR, supra note 65 at 116-118.
Where States want to be certain that they have a forum to address UN responsibility for international legal violations, the UN should be required to submit any live dispute concerning potential UN responsibility or liability under international law to the ICJ for an advisory opinion under Article 65. As with the Vienna Convention and other conventions providing for “binding advisory opinions”, the States should agree that any ICJ decision would be equivalent to a judgment and binding on all parties.

In order to avoid the shield of privileges and immunities that have prevented domestic courts such as the Dutch Courts from entering judgments of liability against the UN, any supplementary treaty must explicitly waive the invocation of UN privileges and immunities for cases referred to the ICJ for an advisory decisions. The treaty might also, for justice and efficiency purposes, establish a reasonable time frame within which UN was expected to submit unresolved disputes such as within one year of the dispute being brought to the attention of the UN.

With the adoption of a treaty assigning “binding” advisory jurisdiction over most international legal claims involving the UN as a party, there are number of advantages that encompass justice and efficiency concerns. The single ICJ venue avoids the possibility of fragmented interpretations of international law by various domestic systems or internal UN administrative agencies while also ensuring that the domestic privileges and immunities do not insulate the UN from international responsibility and liability claims. Likewise, the single ICJ venue should provide continuity in international decision-making since the ICJ will have a history of the cases that it has previously decided and may decide to employ similar analytical frameworks in determining responsibility and allocating liability.

Any treaty concluded between State parties could exempt certain types of cases from ICJ advisory review. While this paper proposes that the ICJ should be the court of first resort for matters that implicate international organization responsibility, not all cases would necessarily be appropriate for its review. Where there are cases that implicate largely UN internal matters, such as the application of UN employment rules, the review of these cases arguably should remain under the jurisdiction of the United Nations Administrative Tribunal. As Former ICJ Judge Roberto Ago eloquently argued in a separate opinions when the ICJ issued a “binding” advisory opinion on an UN internal matter, the ICJ exceeded its authority since “the International Court of Justice is thus compelled to resolve questions that, for the most part, do not involve the application of those rules of international law” which it is mandated to apply.79

Another type of case that might be exempted from judicial review

79 Ago, supra note 69 at 444-445.
would be the review of the legality of Security Council resolutions. 80 With the ICJ’s case Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, the Court was confronted with the legality of a specific Security Council resolution requiring Libya to submit to diplomatic and commercial sanctions in response to Libya failing to comply with another Security Council Resolution requiring it to surrender two of its nationals for trial in the United Kingdom. Ultimately, the Court never ruled on the legality of the Security Council Resolutions and instead limited its decision to holding that the UN Charter trumped the 1971 Montreal Convention. 81 In spite of the ICJ being the lead judicial organ for the UN, there would likely be strong resistance from Security Council members if the substance of Security Council resolutions were to be the subject of an ICJ advisory opinion.

The proposal for a new treaty to waive UN privileges and immunities before the ICJ and recognize ICJ jurisdiction over disputes between UN agencies and between States and the UN is a reasonable end result of fully recognizing UN legal personality. While some States may be relieved with having a judicial outlet for their contested matters with the UN, the UN as an institution may be disquieted by this proposal. Current dispute resolution of matters involving the UN and breaches of international law is predicated on diplomatic interventions. UN officials may be uneasy with relinquishing case-by-case diplomatic solutions in favor of resolutions grounded in international legal interpretations.

Yet, the negotiation of such a treaty would address the recurring issue that States acting both on their own behalf and on the behalf of third-parties such as State residents lack any adequate judicial forum for engaging the UN. The explicit identification of the ICJ as the judicial dispute settlement body responsible for adjudicating UN responsibility would satisfy the international requirement under Section 29 of the Convention on Privileges and Immunities that the UN create “appropriate modes of settlement...[for] disputes involving any official of the United Nations who by reason of his official position enjoys immunity” 82 as well as the emerging requirement under Section 39 of the Draft Articles on the Responsibility of

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81 Libya v. United States and Libya v. United Kingdom, Provisional Measures, Order of April 14, 1992, 1992 ICJ. 114. (The case has been discontinued since September 10, 2003 when the parties agreed that Libya was in compliance with the requirements of the Security Council.)
International Organization that members of a responsible international organization “take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation” where it is responsible for a violation.

How such a treaty would be negotiated raises a number of interesting questions. Would the treaty be negotiated exclusively by UN Member States? Would States be able to make reservations regarding which advisory opinions would be deemed binding and would this interfere with the object and purpose of the treaty to provide uniform judicial resolution to matters involving UN responsibility and liability? Would the UN be invited to formally confirm the treaty? Could a failure of the UN to formally confirm the treaty prevent States from bringing this supplementary treaty into force?

These are matters that would need to be taken under advisement by the negotiating parties, which may or may not include the UN. What is certain is that the concept of international organization responsibility as articulated in the draft articles lacks substance without any articulated formal judicial review measure. Twenty years ago, former ICJ Judge Ago asked whether the time hasn’t finally come “to allow international organizations prosecuting claims against states or resisting claims by them to take the main road, rather than the byway of an ‘advisory’ procedure artificially given decisive value and binding effect, which so ill become its intrinsic nature?”

Even if the “main road” is preferable to “by-way”, without a collective agreement or at least internal momentum to amend the ICJ statute as Judge Ago and Judge Bedjaoui urge, the next best option has to be to rely on the existing mechanisms of the ICJ statute as triggered by a supplementary treaty. While less of an elegant solution to a simple amendment of the ICJ statute, this second option is immediately viable. Perhaps, just perhaps, in efforts to negotiate a treaty to secure regular advisory jurisdiction over UN contentious matters, States will muster the political will to make amendments to Article 34 and 36 of the ICJ statute. Until then, States are confined to the existing tools within the ICJ statute, which are sufficient although not perfect for ensuring judicial review of matters involving UN responsibility and liability under international law.

The proposal for formalizing the mechanism of “binding advisory opinions ” to include a broader array of international actions serves the dual goals proposed by the International Law Association’s Committee on Accountability of International Organisations. In their draft report, the

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83 Ago, supra note 69 at 451.
committee called for rules that “will have to keep the balance between preserving the necessary autonomy in decision-making of International Organisations and guaranteeing that the International Organisations will not be able to avoid accountability.”

CONCLUSION

In order for international law to maintain its credibility among member states, there needs to be both continuity and predictability in the interpretation of the law of international responsibility as it applies not just to States but also to the UN. Currently, the responsibility of the UN for breaches of international law is approached on an ad hoc basis. In some instances, it has acknowledged its responsibility and made discretionary damage payments. In other instances, organizations have been protected by privileges and immunities.

When the UN has damaged or caused inadvertent harm to groups or individuals as a result of their activities, there is a need for judicial review to ensure that the international law of responsibility is interpreted consistently and applied uniformly. To create this assurance, one judicial body should address these rare but important cases. As argued above, the appropriate body is the International Court of Justice.

This article has reviewed two possibilities for achieving review of the international legality of UN actions. Numerous ICJ jurists and some States have called for an enlargement of the number of parties who can invoke the ICJ’s contentious jurisdiction. As Former ICJ Judge Ago reflected, the “disparity of treatment [between States and the UN] might have had a raison d’etre when those international organizations had not yet become active participants in international life as distinct legal persons with their own interests and rights, different form those of the states that constitute them…But can this differentiation be justified now that it has become commonplace for international organizations and states to be parties, on an equal footing, to disputes concerning the interpretation and application of bilateral agreements, as well as general conventions?”

This paper conclude that while a revised Article 34(1) which includes the UN as parties to contentious jurisdiction is attractive for simplicity, the proposal is fraught with bigger political issues involving stubborn discussion over UN institutional reform. While such amendments would have a major impact on both the law of international responsibility, international liability and international institutions, these amendments are unlikely to materialize because they would require opening up an

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85 Ago, supra note 69 at 450.
amendment process akin to amending the UN Charter.

A more viable political option is to accept the ICJ Statute and Rules as they are and instead provide for a supplementary convention that would specifically require the UN to submit disputes over issues of international law to the advisory jurisdiction of the ICJ unless the UN is able to reach an acceptable settlement within a reasonable time frame. This supplementary treaty would be an important step towards transparently ensuring that the rule of law is available for State parties who cannot privately resolve their legal grievances with the UN.

In disaster-ridden Haiti, the families of the children who were mistakenly shot by UN peacekeepers and the families of cholera victims might receive some solace in knowing that the UN does not operate with impunity because it has failed to provide a standing claims commission or grievance process for individuals injured by UN bodies. Rather, the UN, if it is to reflect the rule of law upon which it is founded, must be held to the same standards of judicial review as States and be held judicially responsible for those actions and omissions that violate fundamental public international law. As international law has evolved, both States and the UN agencies must have a reliable forum to pursue emerging issues of identifying international responsibility and assigning accountability. The institutions that the community of nations created through the UN Charter must not be above or separated from the rule of law.

The proposals in this paper are an attempt to ensure that States can on behalf of their citizens have some recourse to adjudicating international organization responsibility. By calling for judicial review by the ICJ, this article’s endeavors to make another contribution to the line of already robust scholarship by ICJ judges and international legal academics seeking to declare that the UN when it acts is not separate from but equal to other recognized international actors. Unlike some international reforms that threaten the status quo of international interactions, the enlargement of ICJ jurisdiction is not a threat to States but a promise that the UN as a subject will be responsible for complying with the same body of public international laws as States.

While the international community has missed past opportunities to address UN accountability, the time is now propitious to evolve the UN system to reflect international legal realities. The ILC Draft Articles on the Responsibility for International Organizations provide the policy-making momentum for States to enter a supplementary treaty or amend ICJ Article 34 in order to ensure that the UN’s actions are grounded in the foundations of international law. The continued efforts at differentiating UN actions from transboundary state actions is legally disingenuous. As Karl Wellens has observed, “there is no inherent reason why remedial outcomes of
restitution, damages, specific performance, satisfaction and injunctive relief, applicable under the regime of state responsibility should not also become available under the organizational responsibility regime.”

Our faith in a system as a just and fair system depends on the system being capable of responding justly and equitably to crises and disputes. States have already formally commended the ILC’s Articles on State Responsibility and are exploring the possibility of a convention on State responsibility for internationally wrongful acts. Even though the ILC’s Draft Articles on the Responsibility of International Organizations are still a work in progress and are unlikely to have the same favorable reception as the draft articles on State Responsibility, the current drafting process presents an unprecedented opportunity for States to overcome a half a century of inertia. States should use this opportunity to champion the rule of law for both States and the UN by ensuring that the ICJ truly serves as “the principal judicial organ” for all UN institutions.

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88 ICJ Statute, supra note 6 at Article 1.