THE NECESSITY OF A HUMAN RIGHTS ACCOUNTABILITY FOR THE UNITED NATIONS

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Abstract:

The United Nations is an exceptional organization that covers nearly all states of the world. The UN has not only contributed greatly to the maintenance of international peace and security but has also contributed significantly to the development of the present international human rights regime. With the end of the Cold War and the new geopolitical order in the early nineties, the concept of peace maintenance changed more and more to active peace-enforcement. UN operations gradually turned into “peace-making” operations, like those in Yugoslavia and Rwanda in the first half of the nineties. This new type of peacemaking also led to new tasks for the UN, which besides peacekeeping also has to deal with multidimensional policing and administrative tasks which might even lead to the administration of whole territories. These new state-like activities evidently cause state-like behavior, and it is for this reason that the United Nations is increasingly being criticized as a human rights violator or even, like in Bosnia or Rwanda, responsible for not preventing genocide.

This article does not aim to find out whether the United Nations is responsible for human rights violations or genocide. Moreover, we will argue that the international system lacks an efficient framework to determine such responsibility effectively and independently, and suggest that the UN should be monitored and scrutinized by independent human rights bodies. We will analyze and illustrate the immunity enjoyed by the United Nations on the basis of Art. 105 of the UN Charter and the dispute settlement procedures under section 29 and 30 of the 1946 Convention on the Privileges and Immunities of the United Nations. We will point out the weaknesses of non-contractual claims arising in regions affected by a conflict, as the claim reviews require either the cooperation of the host state or are carried out by local UN review boards. Particular attention is given to the relationship between UN immunity and the international human rights regime, and the concept of *jus cogens* and the differences and similarities between UN immunity and the immunity enjoyed by national states. We will examine both national and international jurisprudence on immunity in the case of human rights violations. We will demonstrate that while state accountability has constantly increased, UN immunity and the corresponding accountability are still based on the terms of 1945 and require reform. Finally, we will discuss the possibilities of tying the United Nations closer to the international human rights regime.
1 Introduction

The United Nations is an exceptional international organization. It not only includes nearly all States of the world, but also stands for ambitious principles and broad competences. The most important of these principles is without any doubt “to maintain peace and international security”, as stated in the very first sentence of the UN Charter and repeated on numerous occasions therein. To achieve these goals, the UN has coercive measures at its disposal which allow the compulsory enforcement of these principles.

During the Cold War, the five permanent members of the Security Council blocked each other in most of the important decisions, leaving to the UN the important but limited role of a guardian of peace. With the end of the Cold War and the new geopolitical order in the early nineties, this concept changed more and more to active peace-enforcement. UN operations gradually turned into “peace-making” operations, like those in Yugoslavia and Rwanda in the first half of the nineties. This new type of peacemaking also led to new tasks for the UN, which besides peacekeeping also has to deal with multidimensional policing and

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1 The only recognized state which is not a member of the UN is the Vatican. The Republic of China (Taiwan) is, with around 23 million inhabitants, the most populous territory which is not a member of the United Nations.

2 U.N. Charter art. 1 para. 1. This principle is reiterated in numerous articles of the UN-Charter.

administrative tasks which might even lead to the administration of whole territories as for example in East Timor or Kosovo.

However, this change in the activities of the United Nations is not only an opportunity to develop a distinct profile and contribute more actively towards the maintenance of global peace and security, but also involves new responsibilities and challenges. These new state-like activities evidently cause state-like behavior, and it is for this reason that the United Nations is increasingly being criticized as a human rights violator. That national states can be held accountable under public international law already seems to be somewhat normal: the International Court of Justice, the Security Council and the General Assembly of the United Nations, regional organizations like the Organization of American States and the Council of Europe and several human rights bodies are the best-known examples of this development in international law. All these organs and organizations focus primarily on the responsibility of the state and its representatives and nearly all of them are closely linked to the United Nations.4

But which international responsibilities does the United Nations bear as an organization? Unlike for states, there are no international bodies to monitor the international responsibilities of the UN. Nation states are all members of the UN, and are quite reluctant to demand such accountability, not just because of the special position of the United Nations in international law. On the other hand, and because of the change in the characteristics of

UN missions, the number of claims from individual persons against the United Nations is on the increase.

This article aims to analyze the accountability of the United Nations against individuals. We will use the 1995 genocide in Srebrenica as an example and guideline, as this case is - from a legal point of view - so far the best illustrative example of the subject. However, this article does not aim to find out whether the United Nations is responsible for the genocide. Moreover, we will argue that the international system lacks an efficient framework to determine such responsibility effectively and independently, and suggest that the UN should be monitored and scrutinized by independent human rights bodies.

Firstly we will analyze and illustrate the immunity enjoyed by the United Nations on the basis of Art. 105 of the UN Charter and the dispute settlement procedures under section 29 and 30 of the 1946 Convention on the Privileges and Immunities of the United Nations. We will show how the United Nations deals with civil actions by individuals and that the organization has established an effective and independent system to fulfill its contractual obligations. On the other hand, we will point out the weaknesses of non-contractual claims arising in regions affected by a conflict, as the claim reviews require either the cooperation of the host state or are carried out by local UN review boards.

Particular attention is given to the relationship between UN immunity and the international human rights regime, and the concept of *jus cogens* and the differences and similarities between UN immunity and the immunity enjoyed by national states. We will examine both national and international jurisprudence on immunity in the case of human rights violations. We will demonstrate that while state accountability has constantly
increased, UN immunity and the corresponding accountability are still based on the terms of 1945 and require reform. Finally, we will discuss the possibilities of tying the United Nations closer to the international human rights regime.
UN human rights violations?

Is the United Nations a human rights violator? Before 1990, this question would probably have been considered merely academic;\(^5\) the United Nations was seen as a protector of human rights and as promoter of the international human rights system.

Particularly since the early nineties, UN troops and UN personnel all over the world have been increasingly and repeatedly involved in human rights violations on UN missions. This issue obtained a broader public awareness at the beginning of the millennium when several scandals of sexual abuse, extortions and theft by UN workers were reported, most notably in Western Africa and Kosovo. The United Nations took this issue very seriously, and after an analysis of the situation set out several reforms in the supervision of its employees and field workers. Internal administrative responsibility is borne by the United Nations Office of Internal Oversight Services, which disposes of its own Investigation Division.

One indicator of the relative success of this policy change is that the sexual abuses investigated have decreased from a peak in 2006 with 269 cases to “just” 37 in 2011. Remarkably, prior to 2004 cases of sexual abuse did not appear in the Investigation Division’s statistics.\(^6\) Based on already existing legal instruments, the United Nations has


also analyzed and reviewed the external civil and criminal accountability of its workers.\textsuperscript{7} At the same time the issue was discussed extensively in the academic literature, so that there are now several works relating to the responsibility of United Nations personnel in peacekeeping operations and field missions.\textsuperscript{8}

But does this involve the responsibility of the organization? How acts and omissions by UN agents and organs might be attributed to the organization has, for a long time, received little attention in the academic literature. The 2011 ILC Draft Articles on the Responsibility of International Organizations have to some extent clarified the issue, as they reflect the current customary international law. According to articles 6-8 of the Draft, acts of organs or agents of the organization shall be considered an act of the organization itself, even when the organ or agent exceeds or contravenes instructions.\textsuperscript{9} This means on the one hand that the human rights abuses of UN personnel might, obviously depending on the circumstances, be attributable to the United Nations. But the responsibility of the United Nations goes further than being responsible for its employees and might also include the acts and omissions of


UN organs, e.g. for decisions taken within the Security Council. The main objective of the United Nations is to maintain international peace and security, and it is obvious that this question does not arise on a daily basis. But this problem is not merely academic, as two involvements of the UN in genocides in the mid-nineties show.

When the massacre of the Tutsi by the group of the Hutu began in Rwanda in April 1994, the United Nations was already present with approximately 2500 soldiers under the peacekeeping mission UNAMIR.\textsuperscript{10} However, upon the recommendation of the Secretary General, the number of UN peacekeeping soldiers was reduced to approximately 270, who had a mandate limited to merely observing facts. Only three weeks after the reduction the mandate was expanded by the Security Council. However, the states never provided sufficient soldiers to fulfill the mandate.\textsuperscript{11} Ultimately, both the Security Council and the UN member states failed to effectively stop the genocide, where in just three months nearly 800,000 people were massacred. In 1999, UN Secretary General Kofi Annan recognized that the United Nations and the whole international community had failed to prevent the


genocide.\textsuperscript{12} However, neither the behavior of the UN nor its member states were ever subject to any kind of legal or quasi-judicial proceedings.

One year after Rwanda, the genocide of Srebrenica occurred during the Yugoslav wars. It did not reach the numbers of deaths experienced in Rwanda, but with about eight thousand people killed\textsuperscript{13} it was the largest genocide in Europe since the end of World War II. From a legal perspective, the uniqueness of this genocide lies in the fact that the United Nations had had a peacekeeping mission in Yugoslavia since 1993\textsuperscript{14} whose mandate included coercive elements based on Chapter VII of the Charter. Furthermore, in a subsequent resolution and in order to prevent possible massacres to the civilian population of Bosnia, the Security Council declared Srebrenica and its surroundings “\textit{as a safe area which should be free from any armed attack or any hostile act.”}\textsuperscript{15}

Up to date, nobody has summarized the events which occurred in 1995 in the United Nations safe haven better than the International Criminal Court for the former Yugoslavia in its first paragraph in the case against Radoslav Krstić:

\begin{quote}
Despite a UN Security Council resolution declaring that the enclave was to be “free from armed attack or any other hostile act”, units of the Bosnian Serb Army (“VRS”) launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and
\end{quote}


\textsuperscript{13} It is important to note that this issue obviously does not allow any quantitative assessment.


elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.\textsuperscript{16}

During these events, the UN had about 400 Dutch peacekeeping soldiers stationed in Srebrenica. In order to prevent the genocide, the UN troops tried to accompany the transports, as they thought that the Bosnian Serb army would have refrained from the genocide in their presence. However, the Bosnian Serb Army prevented the accompaniment of the vehicles, and the Dutch soldiers took no further action to prevent the genocide, which virtually occurred before their eyes.\textsuperscript{17}

The legal ‘coming to terms with the past’ of these incidents took place mainly at the International Criminal Tribunal for the Former Yugoslavia, which opened criminal cases against approximately one hundred sixty people. Additionally, the International Court of Justice clearly declared the events of Srebrenica to be genocide\textsuperscript{18}, and under the leadership of the European Union several states exerted political pressure on countries of the former Yugoslavia.


\textsuperscript{17} The Secretary-General, Report of the Secretary-General pursuant to General Assembly resolution 53/35 The Fall of Srebrenica; U.N. Doc. A/54/549 (Nov. 15, 1999).

\textsuperscript{18} Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1 (Feb 26).
However, for the families of the victims, these international measures did not go far enough. Via an association called “The Mothers of Srebrenica” they demanded the accountability of the United Nations for the occurrences of 1995. While the UN troops obviously did not participate actively in the genocide, there is a consensus in international law that an international obligation might also derive from omission, and the first article of the 1948 Genocide Convention clearly states the obligation to prevent genocide. It can be assumed that the safe zone around Srebrenica was established for that purpose. On the other hand, it is important to note that the specific circumstances of the genocide were relatively complex and we cannot therefore come easily to the conclusion that there was an effective responsibility or liability on the part of the United Nations.

The main question in this context is rather how the victims could assert their rights and determine where the responsibilities lie in the killings of their families. If, in the case of the United Nations, a nation state was involved, the answer would be relatively simple: the victims could not only rely on more or less independent national courts, but also on an international and regional system of human rights protection. This discrepancy becomes clear in the case of the Mothers of Srebrenica. The association of the victims filed two substantially identical complaints against both the United Nations and the Dutch state at a Dutch court for

21 The Secretary General, supra note 17 (For a detailed analysis of the situation. For example, at the time of the genocide, UN soldiers were being held as hostages elsewhere in Bosnia, who probably would have been executed in the case of a military intervention to prevent the genocide.).
their responsibility in the failure to prevent the genocide. While the association won the case in the second instance against the nation state\(^\text{22}\), the proceedings against the UN were dismissed.\(^\text{23}\)

The case against the United Nations was rejected on the basis of Article 105 of the UN Charter, under which the United Nations enjoys immunity from national courts in any UN member state. As a result, the families of the victims did not have an effective forum in which to file their requests against the UN, whose general propose is to maintain peace and security and which declared the area of the genocide to be a safe haven. Subsequently we will discuss the concept of United Nations immunity, compare it to the immunity of nation states, and see if this immunity can be limited in the case of possible human rights violations by the UN.

\(^{22}\) Mehida Mustafic-Mujic et. al. / Neth., Gerechtshof [Hof] [Ordinary Court of Appeal], The Hague, 5 Juli 2011, 200.020.173/01 (Neth.); Hasan Nuhanovic / Neth., Gerechtshof [Hof] [Ordinary Court of Appeal], The Hague, 5 Juli 2011, 200.020.174/01 (Neth.).

\(^{23}\) Mothers of Srebrenica Association, et. al. / Neth., U.N., Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 13 April 2012, 10/04437 (Neth.).
3 The status quo of claims against the UN

3.1 Legal foundations of UN immunity

The basis of UN immunity is Article 105 of the UN Charter, which reads as follows:

**Article 105**
1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

Article 105 deals both with the immunity of the organization (paragraph 1) and its representatives and officials (paragraph 2). The third paragraph introduces the possibility of detailing and specifying these privileges on the basis of a proposal by the General Assembly for international agreements. Just six months after its foundation, the United Nations and its member states concluded the 1946 *Convention on the privileges and immunities of the United Nations*[^24], which so far has been ratified by 157 member states.[^25] Due to this broad acceptance, and especially because of the close connection to the third paragraph of Art. 105 of the UN Charter, it can be assumed that the Convention applies universally to all UN

The 1946 Convention sets out and details the privileges of the United Nations against States, such as the inviolability of its property and archives and ease of communication. Article II, section II of the Convention lays down that:

The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

This corresponds to an absolute concept of immunity, where the United Nations enjoys protection from any national judicial process, regardless of its subject or nature. This unconditional and broad immunity can only be waived voluntarily. In contrast to this, states nowadays enjoy only restricted immunity, limited to acts where States act in exercise of their sovereignty (acts jure imperii) but not in the sphere of civil law (acts jure gestionis). This doctrine emerged in the second half of the 20th century, in particular via the European Convention on State Immunity of 1972 and via the United States Foreign Sovereign Immunities Act of 1976. The 2004 United Nations Convention on the Jurisdictional


Immunities of States and Their Property,\textsuperscript{30} which is currently open for ratification by Member States, provides evidence for this development and the nearly universal acceptation of the distinction between sovereign and private acts.

The difference between the immunity of the United Nations and nation states can be explained by observing that absolute UN immunity dates back to and is still based on the terms and conditions of 1946. At that time, the newly founded organization simply received the same privileges as states. However, and unlike the case of nation states, UN immunity was never subject to any major controversies, restrictions or reforms, and remained unchanged. As a result, we are now facing an increasing gap between the unchanged UN privileges of 1946, limited national immunities, and the active involvement of the United Nations in active conflicts of the twenty first century.\textsuperscript{31}

3.2 UN immunity in practice

The only exception to UN immunity in the 1946 Convention is the possibility that the United Nations may waive this privilege on a voluntary basis. However, such a decision to waive lies with the sole discretion of the Secretary General. While it is obvious that the bearer of a right may voluntarily refrain from it, it is important to note that the granting and, even more importantly, the non-granting of such a waiver is not regulated by any guidelines and


is neither subject to legal supervision nor does it require any explanations from the UN. So far, the UN has waived its immunity only in cases of little to no political significance, such as minor accidents on UN property or traffic accidents with UN personnel involved. In nearly all cases of this kind, immunity is waived voluntarily by the Secretary General of the United Nations in order to give the injured person the possibility to claim their rights at an independent court.

Due to the limited activity of the UN during the cold war, cases of immunity with greater political significance did not play a major role until the early nineties. Other international organizations enjoy similar privileges and immunities to those of the United Nations and have established similar practices regarding the voluntary waiver of these rights, also mainly in cases of minor accidents. This is very consistent with the purpose of


33 Id.


35 Singer, supra note 31, at 85-86.

immunity, which is intended to protect the political independence of international organizations from their member states.\textsuperscript{37}

3.3 Section 29

In addition to the possibility to waive immunity, sections 29 and 30 of the 1946 Convention contain two provisions relating to the settlement of disputes by the United Nations. Regarding civil claims Article 8, Section 29 states:

The United Nations shall make provisions for appropriate modes of settlement of:
(a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
(b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

In accordance with Section 29, the United Nations includes arbitration clauses in all its contractual relations under private international law,\textsuperscript{38} such as contracts of sale, rental and leasing of property. In this way, the United Nations waives its right of immunity after the completion of the contract and guarantees to the counterpart an evaluation via independent quasi-judicial bodies. The arbitration clauses thus guarantee contractual partners of the UN access to an independent quasi-judicial decision. In general this system works without any major difficulties.

\textsuperscript{37} MANFRED WENCKSTERN, HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS. DIE IMMUNITÄT INTERNATIONALER ORGANISATIONEN, 140 (1994).\textsuperscript{.}

Since the UN General Assembly considered peacekeeping missions subject to section 29, there is no reason to doubt that claims resulting from UN field operations are also covered by the dispute settlement provisions of the 1946 convention. However, these types of claims are neither resolved by an independent body nor has the UN Secretary General ever waived UN immunity in order to guarantee an independent review process. The claims tend to be resolved by the UN administration itself.

In order to fulfill its obligations under Section 29 and to deal with the new kind of peacekeeping operations since the end of the cold war, the United Nations developed a model status of forces agreement in the early nineties which has to be concluded in every UN field mission between the United Nations and the host state. The model agreement foresees in its article 51 the creation of a commission for civil claims by private parties. The claims commission is based on cooperation between the United Nations and the host country, where one member shall be appointed by the UN Secretary General, one by the host government and the third member shall be appointed jointly by the two parties. If no agreement is reached, the third member of the Claims Commission shall be appointed by the president of the ICJ.


41 Id.
This agreement shows the awareness of the UN regarding violations by its forces and appears to be a solution in accordance within the obligations of section 29. However, these status of forces agreements also contain a couple of weaknesses. As acknowledged by the United Nations itself, the model status of forces agreement requires cooperation between the UN and the receiving government, which is normally not a problem in classical consensus-based peacekeeping operations based on Chapter VI of the UN Charter. However, it is especially the conflictive new type of peace-enforcement conflicts with mandates based on Chapter VII of the Charter which lack the consensus of the receiving government or where weak governments lack the ability to establish effective consent.42

An exception was the peacekeeping mission in Bosnia, which was one of the few Chapter VII-based peacekeeping operations where the UN concluded a status of forces agreement.43 However, and as Wellens supposes, due to the lack of political will by the parties a claims commission in Bosnia was never established.44 As a consequence, the status of force agreement is ineffective in these new kinds of conflicts.


44 Otto Spijkers, The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court, 13 J. OF INT’L PEACEKEEPING, 13, 197, 208 (2009); U.N. GA., Administrative and
Since the UN mission UNEF I in the Suez Canal in 1956, the UN has used local boards to settle civil claims resulting from its operations. The main difference between the local boards and the SOFA standing commission is their composition, as the local boards are composed exclusively of UN personnel\textsuperscript{45} and do not share their responsibility with the host state or even independent supervisors. In general, the local boards have worked without any major problems under the cooperative Chapter VI peacekeeping missions when they had to deal only with isolated cases and minor violations by UN personnel. But again, it is the new kind of conflicts and operations which cause difficulties. The local boards are generally only composed of three UN staff members, and they rapidly reach the limits of their administrative capabilities.\textsuperscript{46} Additionally, the local boards lack fundamental principles of independent quasi-judicial supervising bodies: They are not only composed exclusively of UN personnel; their meetings are neither open to the public nor are the outcomes of the meetings published in any way.

\textsuperscript{45} KIRSTEN SCHMALENBACH, DIE HAFTUNG INTERNATIONALER ORGANISATIONEN IM RAHMEN VON MILITÄREINSÄTZEN UND TERRITORIALVERWALTUNG 455-456 (2004).

3.4 The deficiencies of Section 29

It is important to recall that the UN is not part of the 1946 Convention, which was concluded exclusively by 157 states. As a consequence, the UN does not have any direct obligations as a result of the convention. However, and as noted correctly by Reinisch, it is clear that the UN is not only the beneficiary of the 1946 Convention, but also bears implicit obligations.\(^47\) This was indirectly confirmed by the International Court of Justice, which pointed out that claims against the UN shall not be dealt under national law, but that the United Nations shall make provisions in accordance with section 29.\(^48\) Consequently, there is no doubt that UN also has duties and obligations under the 1946 Convention and must establish an effective system of settlement.

In 1966, a national Belgian court analyzed the relationship of section 29 to United Nations immunity. During the peacekeeping mission in Congo, the property of Mr. Manderlier, a Belgian national, was destroyed by UN peacekeeping forces. The United Nations, on the basis of an agreement with the Belgian government, offered Mr. Manderlier a lump sum, but Mr. Manderlier rejected the payment and sued the UN for damages and compensation at a national Belgian court. The court carefully examined both article 105 of the UN Charter and the 1946 Convention on the Privileges and Immunities of the United Nations, and then turned to the key question of the case: whether a procedure under section


29 of the 1946 Convention was *conditio sine qua non* that the UN enjoys immunity under national law. At the end the court rejected the claim, but formulated a surprisingly open critique of the UN system of dispute settlement under section 29:

The defendant considers quite wrongly that the previously mentioned Agreement, reached between the U.N. and Belgium on 20 February 1965, constitutes the appropriate method of settlement provided for by Section 29. The defendant had the claims addressed to it, and in particular those of the plaintiff, examined by its own authorities, without argument of any kind. It then took a unilateral decision by which, according to its letter of 20 February 1965, it believed itself bound to limit its spontaneous intervention. The defendant has thus in reality been judge in its own cause. Such a procedure in no sense constitutes an appropriate method of settlement for deciding a dispute.\(^49\)

In 1999 the International Court of Justice reaffirmed in an Advisory Opinion the position of the national Belgian court. In its ruling over the immunity of special rapporteurs to the United Nations, the ICJ concluded that the question of immunity must be separated from the question of compensation. The court pointed out that it should not be upon the

\(^{49}\) Manderlier v. Belg. & U.N., Belgium, 45 I.L.R. 446 (Civil Tribunal of Brussels) (Belg.), at 452. (emphasis added).
national courts to determine UN responsibility and that the United Nations must establish mechanisms in accordance with section 29.  

In the recent case of the Mothers of Srebrenica, all parties admitted before the Dutch court that the victims did not have an adequate claims mechanism in accordance with section 29 at their disposal. However, as in the Manderlier case and according to the opinion of the International Court of Justice, the courts of the Netherlands concluded that the lack of a procedure of Section 29 cannot limit the immunity of the United Nations.

The consequence of this is that the United Nations has an international obligation to settle its civil claims, but by contrast there is insufficient state practice to limit the immunity of the United Nations in national courts. While the latter is obviously desirable in order to guarantee the independence of the United Nations from national influences, it leaves individual persons without effective legal remedies. As a consequence, claims against the United Nations on the basis of the 1946 Convention should and must be resolved by the United Nations via an effective international procedure under (public) international law.

50 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, supra, note 48, paragraph 66. It is noteworthy that the ICJ avoided the debate on whether the United Nations is legally bound by the 1946 Convention. The exact wording used by the Court was that “the United Nations may be required to bear responsibility”.

51 The United Nations was not present at the court hearings, but its interests under article 105 of the UN Charter were defended by the Netherlands.

3.5 Section 30 – The International Court of Justice

Section 29 of the 1946 Convention only deals with civil claims procedures, but does not focus on legal responsibility under public international law. Apparently, section 30 offers the possibility of a review by the International Court of Justice:

Section 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

The main objective of Section 30 is to establish the jurisdiction of the International Court of Justice for disputes between States, as provided for in Article 36 of the Statutes of the International Court of Justice. Likewise, it establishes the possibility to provide an advisory opinion on the interpretation of the 1946 Convention between the United Nations and its member states. In this way, the court may give opinions on any question regarding UN immunity. However, it is important to note that according to the wording of section 30, the jurisdiction on the advisory opinions is subject to the procedures set forth in article 96 of the UN Charter and article 65 of the ICJ Statute. This means that an advisory opinion must be requested by an organ of the United Nations.

Notwithstanding the possible supervision of the ICJ, section 30 still has several shortcomings. While it is true that section 30 establishes jurisdiction between nation states, it is important to note that the main content of the 1946 Convention focuses on the relationship between the United Nations and its member states, guaranteeing the
independence of the UN as an international organization. It is therefore not surprising that no cases have been initiated under section 30 so far.

Unlike section 29, section 30 does not provide for the participation of individuals; they are dependent on diplomatic protection and the defense of their interests by their national states. At the General Assembly, the request for an advisory opinion requires two thirds of the votes, which obviously depends on the political interests of individual members. But even if a majority is obtained, control of the responsibility of the United Nations would lie, just as in the case of the local boards in section 29, within the responsibility of the United Nations itself, where UN organs would decide on the formulation of the questions to be asked to the ICJ at the advisory opinion. As a consequence, section 30 does not contain efficient mechanisms to deal with human rights violations against individuals by the United Nations.

53 While other UN organs might also request advisory opinions from the ICJ, this is either politically unrealistic (as in the case of the Security Council), or the organs are limited to their respective competences.

4 Immunity at National Courts

4.1 Human Rights Accountability at National Courts and Regional Human Rights Courts

In his lawsuit from 1965, and as a basis for his arguments under section 29, Mr. Manderlier also alleged human rights violations against the United Nations. The Belgian national argued that his rights to a fair trial – as established in article 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights – had been violated. The Belgian national court dismissed the argument, as the United Nations is not a member of the European Convention on Human Rights, and as the Universal Declaration of Human Rights is not a binding instrument of human rights law and only has the character of a recommendation.

About forty years later, the Mothers of Srebrenica presented similar arguments against the United Nations in their lawsuit at a Dutch court. The association of the families of the victims of the genocide argued that their right to a due process had been violated, as set out in article 6 of the European Convention on Human Rights and article 14 of the International Convent on Civil and Political Rights. Both the court of first instance and the Dutch court of appeal recognized the customary nature of the right to a fair trial and concluded that during the foundation of the UN it had not been the intention to set aside such a fundamental


\[ 56 \] Belgium, Civil Tribunal of Brussels, supra note 49, at 452.

(customary) human right by the UN Charter. In its decision, the Dutch Court of Appeals weighed the interest of the United Nations to act independently from national jurisdiction against the right of a fair trial by the individuals. By recalling that the United Nations was not actively involved in the genocide, the argument of the independence of the Organization finally prevailed.\textsuperscript{58}

Overall one has to agree with the ruling of the Dutch court. The United Nations has far-reaching competences that even include the authorization of military force, and a revision of such decisions by national courts would obviously limit the independence of the United Nations in a very significant way. On the other hand, it is also clear that this conclusion means a limitation of the human rights of individuals.

Other international organizations enjoy immunity in very similar terms to the United Nations. The fact that this immunity can be limited by national and regional human rights courts becomes clear when one looks at other subjects of international law. One consequence of this immunity is that labor disputes between international organizations and their employees cannot be resolved before the courts of the national host State. Normally, international organizations establish internal mechanisms to settle their labor disputes, either through the administrative tribunal of the International Labor Organization\textsuperscript{59} or, as in the case

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\textsuperscript{58} Association of Citizens Mothers of Srebrenica et. al. / Neth. & U.N., Gerechtshof [Hof] [Ordinary Court of Appeal], The Hague, 30 maart 2010, 200.022.151/01 (Neth.), at paras. 5.1., 5.5 & 5.7.
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\end{flushleft}
of the United Nations, through its own courts. However, especially within European courts there is widespread acceptance of limiting the immunity of international organizations if their internal labor dispute settlement procedures do not meet the standards of a fair trial. In the case of an employee of the European Space Agency against Germany, the European Court of Human Rights held the following view:

For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.

In addition to these cases regarding international organizations, there are similar cases on the relationship between the immunities of states and human rights. The immunity of states is comparable with that of international organizations, as in both cases the objective is to guarantee the independence of the subjects of international law. And it was the United Nations itself which expected that changes in the immunity of states could influence its own privileges. As early as 1985, the UN recognized that:

Although not directly applicable to international organizations, the changing doctrine of sovereign immunity and in particular the more restrictive approach to the commercial activity of foreign sovereigns will inevitably have an impact on the way national courts view the activities of international organizations. The United Nations, however, has continued to enjoy unrestricted immunity from legal process and has experienced no particular difficulties in this regard.

62 Secretariat of the United Nations, supra note 34, at 161.
The key case is Al-Adsani vs. The United Kingdom. Mr. Al-Kuwaiti Adsani was a pilot during the Second Gulf War, when some video tapes with sexual content of an influential sheik in the government of Kuwait came into his possession. After the Iraqi occupation, Kuwait’s government arrested and tortured Mr. Al-Adsani, who fled to the UK and filed a lawsuit against the State of Kuwait at a British court. As British courts refused to admit the case because of Kuwait’s state immunity, Mr. Aldsani appealed to the European Court of Human Rights, invoking his right to a fair trial as stipulated in article 6 of the European Convention on Human Rights. In its ruling, the European Court of Human Right distinguished between international criminal responsibility and civil liability. While the Court recognized the existence of the international practice of limiting state immunity in criminal cases, it did not come to the same conclusion in civil law suits. However, while the court noted the increasing importance of human rights, in its view this immunity prevails, even in the case of serious human rights violations.

It is important to note that the case at the European Court of Human Rights was decided with the narrowest possible outcome of nine votes to eight. Although the judgment is obviously legally valid, it does not have to same moral force as if it had been made by a unanimous vote, especially as the European Court of Human Rights made it quite clear that this matter was currently changing in favor of human rights.

64 A reading of the strong criticism in the dissenting opinions is recommended.
4.2  *Jus cogens* issues

In the Al-Adsani case, that of the Mothers of Srebrenica and in other cases, the victims of human rights violations argued that *jus cogens* violations might break the immunity of international organizations. As is generally known, *jus cogens* norms are the material “constitution” of public international law and have an imperative character. Although there are no constitutive lists of rights which have such an imperative character, it is generally accepted that the prohibition of torture and the prohibition of genocide are *jus cogens*.65

In 1999, an ILC report in preparation for the United Nations Convention on Jurisdictional Immunities of States and their Property recognized the tendency to limit state immunity in the case of *jus cogens* violations, but it also recognized that, so far, immunity had prevailed in the majority of cases.66 Both the European Court of Human Rights in Al-Adsani67 and a Canadian national court in a very similar case came to the same conclusion.68 The International Criminal Tribunal for the Former Yugoslavia has also analyzed the relationship of *jus cogens* to immunity. The judges, among them Antonio Cassese, argued that:


67 Al-Adsani v. United Kingdom, *supra* note 63, para. 61, (quoting the cases Pinochet and Furundzija).

It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. [...] Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorizing act.69

So far, the International Court of Justice has given an opinion on the relationship of immunity to *jus cogens* human rights violations on two occasions. By analyzing the legality of an arrest warrant against a former Congolese Minister, the court concluded that there is no established practice or exception limiting judicial immunity.70 Much more significant is a judgment on two decisions of Italian71 and Greek72 courts, when they admitted civil claims for damages resulting from German war crimes sixty years after the end of WWII. As war reparations are part of public international law and subject to dispute settlement between states, Greece and Italy clearly violated the immunity of Germany. The Italian judgment in particular argues in detail that state immunity is steadily losing ground against *jus cogens* violations. Germany initiated proceedings at the International Court of Justice against this


Italian interpretation in 2008, and finally won the case in February 2012.\textsuperscript{73} The International Court of Justice has relatively clearly rejected the limitation of immunity in the case of \textit{jus cogens} violations of human rights. In its ruling, the Court qualified immunity as a part of procedural norms, which “are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State.”\textsuperscript{74}

It seems fairly clear that, via this judgment, the ICJ has limited the tendency to restrict immunity to \textit{jus cogens} violations. Consequently, the restriction of UN immunity is currently and from a legal point of view impossible. On the other hand, in the medium to long term this judgment may not impair the formation of a corresponding state practice in national courts, as the tendency to limit immunity in the case of severe human rights violations already seems to be too well-established. Developments at the European Court of Human Rights will be of fundamental importance, where the subject has already failed with a razor-thin majority on one occasion, and where the judges in the minority have spoken in their dissenting opinions of a lost opportunity.

\textsuperscript{73} Jurisdictional Immunities of the State (F.R.G. v. Italy, Greece intervening): Greece intervening), 2012 I.C.J. 99 (Feb. 3).

\textsuperscript{74} Id at para 93.
5 Human rights accountability on the part of the United Nations?

Today there is no longer any doubt that international organizations may be bound by international law.\textsuperscript{75} This also applies to the United Nations, as both an interpretation of the 1946 Convention as well an ICJ advisory opinion show. In 1949 the General Assembly requested an advisory opinion from the International Court of Justice on “Reparations for injuries suffered in the service of the United Nations”. The ICJ firstly recognized the legal personality of the UN on the basis of the 1946 Convention and its capability to claim the rights of its agents under international law. In its reasoning, the Court recognized that UN agents are entrusted with important missions in disturbed parts of the world and are subject to unusual danger to which ordinary persons are not exposed, and therefore require special protection.\textsuperscript{76} As the advisory opinion not only focuses on the rights of the UN, but also on its obligations, there is no doubt that the United Nations also bears obligations, which means that other subjects under international law may claim their rights.

These international obligations also include customary international human rights and actually, there are very good arguments that the United Nations is already bound by international human rights treaties.\textsuperscript{77} Furthermore, the United Nations is not only the moral author of the international human rights regime, but also recognizes respect for human rights.

\textsuperscript{75} Verdirame, \textit{supra}, note 5, 55-56.


as one of its fundamental purposes.\textsuperscript{78} Moreover, especially in the field of human rights there is an increasing tendency in international law to recognize individuals as partial subjects in international law.\textsuperscript{79} There is no reason why obligations should apply to other subjects of international law but not to the United Nations.

Just as the International Court of Justice noted in the case of Germany vs. Italy, we must distinguish between the possible illegality of an international act or the lack of an independent review and its enforcement. The main problem lies not in the material illegality, but rather in the procedural design and how UN accountability can be independently determined without affecting the important independence of the United Nations. This question can only be resolved in international law, as any supervision by national or regional entities would affect precisely that immunity and the independence of the United Nations. However, this requires that the United Nations recognizes its external responsibilities in this area and develops its own independent review mechanism, as it cannot be bound by other subjects of international law without its consent.\textsuperscript{80} It is obvious that such a reform would mean a significant change in the (self-)understanding of the United Nations’ role. Until now, the predominant view was that international institutions played an important role in the

\textsuperscript{78} U.N. Charter art.1, para. 3.

\textsuperscript{79} KNUT IPSEN, VÖLKERRECHT, 97 (2004).

\textsuperscript{80} Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 34, Mar. 21, 1986, 25 ILM 543, (not yet in force).
supervision of states in a state-dominated world, but were not seen as human rights violators.81

The concept of the (passive) accountability of international organizations is relatively novel in international law and did not enjoy much attention until the late 1980s and early 1990s. An International Law Association Committee has identified three levels of accountability of international organizations. First, “the extent to which International Organizations, [...] are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring,[...]'”, secondly, “tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law” and thirdly, the “responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights [...])”.82

Of these three levels of accountability, the United Nations has at least partly implemented two until now. Contractual relations, minor accidents and internal labor issues are already subject to external supervision and independent scrutiny. Politically sensitive areas such as the missions to Bosnia or Rwanda are monitored internally, mostly by the General Assembly or the Secretariat. On peace-keeping and peace enforcement missions, sections 29 and 30 of the 1946 provide a sufficient legal basis for tortious claims. However,

81 Verdirame, supra note 5, at 53.
and as already shown, both the bilateral standing commissions and the local review boards have structural and administrative weaknesses, especially in cases of greater political impact, and require reform.

The third level of accountability of internal organizations – the review of presumably illegal actions – has not yet been implemented by the United Nations in any of its operations. A supervision of the United Nations by international human rights bodies seems to be the most obvious and viable way to determine UN accountability. Over the last few decades, the experience of the international human rights system has shown that compared to monetary compensation, the moral and political component often plays a much more important role in proceedings against states. Nearly all international human right bodies have a very high degree of independence from nation states and international organizations, and also have the necessary experience in dealing with individuals. Additionally, human rights bodies have the advantage that the consequences of a possible breach of obligations can be designed more flexibly.

But how can this be implemented technically? A possible solution could be that the United Nations directly becomes a part of the international universal human rights system such as the International Convent on Civil and Political Rights. The United Nations has a legal personality and there is no doubt that the UN may also enter into treaty relations with other subjects of international law.\footnote{JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 278, (2002).} Despite the fact the UN Charter does not include a general treaty-making competence, there are at least six provisions from which such a
competence may be deduced and there is no doubt that the United Nations possesses treaty-making power.\textsuperscript{84} Up to date, the United Nations has signed more than 2,000 international agreements. In this way, victims of presumable UN human rights violations have direct access to human rights bodies, in a very similar way to that which they would have against nation states.

However, it is important to notice that the vast majority of UN treaty provisions are of a technical, administrative or executive nature; in fact, the Vienna Convention on the Law of the Treaties between States and International Organizations\textsuperscript{86} is the only open multilateral treaty which the United Nations is party to. The intention to conclude one or more of the universal human right treaties would certainly cause great difficulties within the United Nations regarding its implementation. The UN lacks a clear attribution of competences for the conclusion and ratification of its international obligations, and such a far reaching commitment would certainly lead to considerable resistance from many UN members and is therefore highly unlikely.

On the other hand, the United Nations could expand its existing section 29 instruments. This would mean that especially the local review boards would have to be strengthened and equipped with an effective level of independence from the rest of the UN administration. A permanent independent (human rights) commission or access by victims to the United

\begin{footnotes}
\item[85] Klabbers, Jan, \textit{supra} note 83, at 278.
\item[86] Vienna Convention on the Law of Treaties between States and International Organizations, \textit{supra} note 80.
\end{footnotes}
Nations internal justice system could be a solution, and would probably be viable without any legislative changes and on the basis of the 1946 Convention. Obviously, any reform procedure must go hand in hand with the utmost transparency and openness towards the public.

Before the question of how human rights can be implemented is posed, however, the issue is whether the United Nations will actually take this step. The United Nations has contributed greatly to the development of the international human rights system, and thus fundamentally changed the relationship of the state to individual persons. But the UN itself still remains stuck in the concept of 1945/46. If the UN wants to continue to be a serious protector of human rights and guardian of international peace and security, it must respond to new challenges. Or, as expressed by Frédéric Mégret and Florian Hoffmann:

The logical conclusion, at any rate, is that the United Nations, even if it wanted to (which by all accounts it does not), could not have it both ways, namely to be a leading human rights actor while being immune to criticism for human rights failures.87

87 Mégret, Frédéric and Hoffmann, Florian, supra note 77, p. 318.
6 Conclusions

The United Nations has contributed a great deal to the preservation of world peace and the development of the international human rights system. But the United Nations is also increasingly involved in human rights violations, not just by its personnel but also by acts and omissions by its highest organs. In contrast to human rights violations by nation states, there are no legal forums which could determine the accountability of the United Nations.

The United Nations enjoys absolute immunity before national courts on the basis of Article 105 of the UN Charter and the Convention on the privileges and immunities of the United Nations from 1946. Besides a clear tendency to limit immunity in cases of violations of *jus cogens*, immunity prevails even in cases of severe human rights violations according to the current jurisprudence, most notably the recent case of Germany vs. Italy at the ICJ. Accountability of the United Nations before national courts is therefore currently impossible and ultimately has to be rejected because of the importance of the independence of the United Nations from national influences.

The obligation of the United Nations to establish an effective dispute settlement mechanism can be clearly inferred from the Convention of 1946. This works relatively smoothly for contractual relationships and minor compensations, but the settlement procedures related to field missions contain major deficiencies. Joint commissions require cooperation with the host state and have therefore remained insignificant in Chapter VII-type UN operations. Local boards are composed exclusively of UN personnel and have worked without any major problems under the cooperative Chapter VI peacekeeping missions. However, local boards are exclusively composed of three UN staff members, and they rapidly
reach the limits of their administrative capabilities. Additionally, they lack the fundamental principles of independent quasi-judicial supervising bodies, and their meetings are neither open to the public nor are the outcomes of the meetings published in any way.

The United Nations must assume its responsibility in the field of human rights, especially as it is their most important promoter. Membership of the UN in the main international human rights treaties would be desirable, but due to the lack of experience in the conclusion of open multilateral treaties and the lack of clear internal treaty-making competences, this possibility is very unlikely. But on the basis of the 1946 Convention and its section 29, the United Nations can carry out a reform without any legislative changes. An independent body which acts instead of the local boards and is based on international human rights law, and which receives and decides on the claims of individuals against the United Nations would, without any doubt, increase the credibility of the United Nations.