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Contemplating on Section 29 of the Convention on the Privileges and Immunities of the United Nations

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Chapter 1. Introduction

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.¹

This is an excerpt from a letter of the Secretary-General to the representative Soviet Union who was dissatisfied with the UN's compensation to Belgium nationals and requested him to cancel the lump-sum agreement with Belgium in 1965.² The Secretary-General made clear that compensating individuals, "who have suffered damages for which the Organization was legally liable", had always been the policy of the UN. This policy was proclaimed again in the report of the Secretary-General in 1996.³

But, from the early 2010s, it seems that this policy had been discarded. When cholera victims in Haiti requested compensation for their damages from the UN in 2013, the United Nations rejected the request. This refusal caused controversy. Firstly, the reason for the refusal was somewhat unreasonable to many scholars and human rights lawyers. Secondly, there were actually no other ways for the victims to seek compensation for their illness and injuries because the UN enjoyed immunity from domestic court, once the UN declared that the claim was non-receivable. It raised a question about the relationship between immunity of the UN and individual's right to an effective remedy.

In 1946, a Convention which specified immunity of the UN was adopted in General Assembly of the United Nations. It seemed that drafters of the Convention worried about the side effects of granting immunity to the UN. Thus, they devised a provision which obligated the UN to provide an appropriate dispute settlement mode for private parties in case of

¹ Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics, Doc S/6597, in UN Juridical Yearbook (1965) at page 41, <<http://legal.un.org/unjuridicalyearbook/volumes/1965/>>

² Letter dated 2 August 1965 from the Acting Permanent Representative of the Union of Soviet Socialist Republics to the Secretary-General, in UN Juridical Yearbook (1965), at pages 40-41

³ Report of the Secretary-General on Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, 20 September 1996, UN Doc A/51/389, at para 6, <http://www.un.org/ga/search/viewm_doc.asp?symbol=A/51/389>

‘disputes of a private law character to which the United Nations is a party’.⁴ Drafters might have already anticipated something like Haiti cholera case would be happening in the future and might have thought that injured parties should get an opportunity to get a remedy within the UN system. Anyway, they tried to prepare a minimal safeguard for private third-party claimants against the side effects of granting powerful immunity to the UN in the Convention system.

But, in Haiti cholera case, the UN rejected the massive claims from the cholera victims on the grounds that these claims were not of private law character. Cholera victims tried to request a meeting with the UN legal office in order to complain about the UN’s rigid interpretation on private law character, but the UN rejected it again. Haiti Cholera victims had no choice but to lodge a claim against the UN before the US District Court. But I think that the UN legal office already knew the result of the claim in light of previous case laws. In the end, the claim was dismissed as the UN anticipated. The Haitian cholera victims had no further way to seek a remedy. Was it the best choice for the UN at that time?

After some years, the UN apologized to Haitian people and announced a plan for establishing the Trust Fund for eliminating cholera in Haiti for some reasons. But the UN did not acknowledge its responsibility and the Funding mechanism was dependent on the contributions from the member states of the UN and other organizations. Can we see this plan as an appropriate alternative remedy for the cholera victims?

In Kosovo lead poisoning case, the UN rejected the claims of Roma people for seeking compensation for lead poisoning damages by stating that the claims “amounted to a review of the performance of UNMIK’s mandate.”⁵ But Kosovo lead poisoning victims could rely on a temporary human rights panel for their claims unlike the Haitian cholera victims. This temporary character human right panel recommended that the UN compensate them on the human rights law aspects. Could we regard this human rights panel as an appropriate alternative remedy for the lead poisoning victims?

What are the problems of the current practice of dealing with private law character claims with regard to its peacekeeping operation? What should the UN do in order to improve the

⁴ Article VIII Section 29, Convention on the Privileges and Immunities of the United Nations, 1946

⁵ Letter from Pedro Medrano, Assistant Secretary-General Senior Coordinator for Cholera Response, to Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque, 25 November 2014, at para 100, <<https://www.scribd.com/doc/261396640/Secretary-General-s-response>>

current practices? The Haiti Cholera and lead poisoning cases gave us a lot of questions to answer. In this paper, I will deal with these questions and related issues. I will look into the tension between the right to enjoy immunity and obligation to give an appropriate remedy in the international organizations. Before entering into the main issue, I will briefly look into the convention which stipulates the privileges and immunities of the United Nations. Then, in Chapter 3, I will handle the relationship between the right to enjoy immunity and obligation to provide an alternative remedy. In Chapter 4, I will follow the trace of the previous modes of implementing obligation to give a remedy for private third-party claimants. Then, I will introduce the UN's new excuses for refuting private claims for compensation in Chapter 5. The UN sometimes has provided temporary or alternative mechanisms for dispute settlement. I will deal with the issues related to these temporary solutions of the UN in Chapter 6. And then, I will point out problems of the current implementation of the Section 29 obligation and the temporary mechanisms by the UN and suggest improvements in Chapter 7.

Chapter 2. Before entering into main issues

One of the main themes in this paper is a relation between the right to enjoy immunity and the obligation to provide an appropriate remedy of the United Nations. So it would be appropriate to look into where the obligation and the right come from before dealing with main issues. In this chapter, I will introduce ‘the Convention on the Privileges and Immunities of the United Nations’ and related articles of the Convention which stipulate immunity and the obligation to provide a remedy. At the end of the chapter, I will deal with an issue that the UN should be bound by the provisions of the Convention, especially Section 29 even though the UN is not a contracting party to the Convention.

2.1. What is the Convention on the Privileges and Immunities of the United Nations?

In order to understand ‘the Convention on the Privileges and Immunities of the United Nations’ (hereafter ‘the General Convention’ or ‘CPIUN’), we need to take a look at the article 105 of the Charter of the United Nations first. The article 105 generally declared the UN “shall enjoy...privileges and immunities as are necessary for the fulfilment of its purpose.”⁶ The article 105 (3) of the UN Charter implicitly implies that special Conventions may be needed to implement such privileges and immunities in more detailed way⁷ by stating “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”.⁸

The UN Secretariat described the relationship between the UN Charter and the General Convention like following, “the Charter of the United Nations does not specify the exact scope and extent of the legal capacities and privileges and immunities of the Organization. In this regard, it only sets out the major principles that are premised on a functional necessity approach . . . These principles have been developed in [the General Convention]”⁹ Also,

⁶ Article 105 (1), Charter of the United Nations, 1945

⁷ A. Reinisch, ‘Introduction to the General Convention’ in A. Reinisch (ed.) *The Conventions on the Privileges and Immunities of the United Nations and its specialized Agencies : A Commentary*, Oxford(2016), at page 7

⁸ Article 105 (3), Charter of the United Nations, 1945

⁹ The Office of Legal Affairs, *Legal Opinions of the Secretariat of the United Nations*, 7 February 2006, UN Juridical Yearbook 2006, at page 442, para 3,

according to A. Reinisch, “detailed provisions of the General Convention have been viewed as a specification of the general ones contained in Art. 105 UN Charter not only by scholars and in diplomatic practice, but also in judicial decisions”¹⁰ such as *Georges v. the United Nations* case.¹¹

So we can interpret that the General Convention came into the world in the form of a multilateral treaty in order to specify privileges and immunities declared in the UN Charter, which are necessary for the UN to exercise its function independently from a State. The General Convention was adopted by the General Assembly of the United Nations on 13 February 1946 and entered into force after seven months of its adoption.¹² As of 31 July 2018, the number of Contracting Parties to the General Convention is 162.¹³

2.2. What is Article VIII Section 29 of the CPIUN?

One of the big differences between the UN Charter and the General Convention is that the latter includes a provision which obliges the UN to make appropriate settlement mechanisms for disputes of a private law character in its own manner while the former does not. This provision is the Article VIII Section 29 (hereafter ‘Section 29’) of the General Convention. Let us look at the provision closely.

SECTION 29. 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) ...¹⁴

<<http://legal.un.org/unjuridicalyearbook/volumes/2006/>>

¹⁰ Supra note 7, Reinisch (Introduction), at page 9

¹¹ *Georges v. United Nations*, Opinion and Order of the US District Court, Southern District of New York, 13-CV-7146 (JPO), 9 January 2015, at page 4, <<http://www.ijdh.org/wp-content/uploads/2014/12/62-Opinion-and-order-of-the-District-Court.pdf>>

¹² A. Reinisch, Introductory Note on Convention on the Privileges and Immunities of the United Nations in Audiovisual Library of International Law, <<http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html>>

¹³ United Nations Treaty Collection Homepage,

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-1&chapter=3&lang=en>

¹⁴ Convention on the Privileges and Immunities of the United Nations, 1946

Section 29 of the CPIUN imposed on the UN a legally binding obligation to “make provisions for appropriate modes of settlement of disputes arising out of disputes of a private law character.”¹⁵ This provision is especially important in the General Convention system because the UN enjoy immunities from domestic courts so this provision is the only gateway through which individuals harmed by the UN’s activities could seek a remedy.

It was generally considered that Section 29 stemmed from the International Labour Office (ILO) draft article 18 of ‘a proposal of a resolution on the status, immunities, and other facilities to be accorded to the ILO by Governments’ which was submitted in 1945. Before this ILO draft article in 1945, there was no clause to obligate the international organizations to provide alternative dispute settlement mechanism to third-party claimants in return for enjoying immunity.¹⁶ Let me introduce a draft article 18 para 2 of the ILO proposal.

18. (2) The International Labour Organisation shall make provisions for the determination by an appropriate international tribunal of:

(a) Disputes arising out of contracts to which the Organisation is a party which provide for the reference to such a tribunal of any disagreement relation thereto;

...¹⁷

Although the aspirational endeavor of the ILO to establish ‘an appropriate international tribunal’ to deal with a variety of claims against the ILO was failed in the form of the original submission at the time, its general idea influenced the Preparatory Committee of the UN.¹⁸ In the end, the Preparatory Committee submitted a draft recommendation on privileges and immunities in which the article 8 para 3 included the obligation to ‘make provision for appropriate modes of settlement.’¹⁹ The Committee did not fix the method of dispute settlements, “but rather left the choice as to what is appropriate to be decided on a case-by-

¹⁵ Article VIII Section 29, Convention on the Privileges and Immunities of the United Nations, 1946

¹⁶ K. Schmalenbach, Dispute Settlement (Article VIII Sections 29-30 General Convention), in A. Reinisch (ed.) *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary*, Oxford (2016), at page 531

¹⁷ International Labour Office, Official Bulletin, 10 December 1945, Vol. XXVII No. 2 at 219; reprinted in C. Jenks, *International Immunities* (Stevens, 1961), at page 42

¹⁸ C. Jenks, *International Immunities* (Stevens, 1961), at page 43; Supra note 16, Schmalenbach, at page 532

¹⁹ Preparatory Commission of the UN(Sub-Committee on privileges and immunities), Draft Recommendation on Privileges and Immunities, 8 December 1945, UN Doc PC/LEG/34, <http://www.un.org/en/ga/search/view_doc.asp?symbol=PC/LEG/34>

case basis.”²⁰ Maybe it was due to the failure of ILO’s aspirational plan to establish an international tribunal in the form of its proposal at the time.²¹

Among other things, I will especially focus on disputes of a private law character arising out of UN peacekeeping operations such as third-party claims for compensation for injury or death in this paper because severe criticisms on UN’s implementation of Section 29 are raised in regard of the UN’s peace-keeping operations. Section 29 also related to the other private law nature disputes such as commercial contracts claims, disputes related to inner employment and vehicles incident claims. But, according to the inner report of the UN, it seems that mechanisms of dealing with these claims are well established as follows.

Claims arising out of commercial contracts have been settled by negotiation and arbitration; disputes concerning contracts of employment have been determined by means of internal appellate procedures. Other claims of a private law nature, for example, in respect of personal injuries incurred on United Nations premises or caused by vehicles operated by the United Nations, have for the most part been met by means of insurance coverage or, in the relatively few cases where such coverage did not exist, by agreement following discussions between the United Nations and the injured party.²²

Actually, Section 29 is much related to the Article II Section 2 of the CPIUN. Even Schmalenbach describe Section 29 as the ‘flip side of’ the Article II Section 2.²³ Let us look at Section 2 of the CPIUN.

2.3. What is Article II Section 2 of the CPIUN?

Reinisch explained the difference between the state immunity and immunity of international organization as follows; “as opposed to State immunity, which has largely been developed through customary international law and recently underwent a codification exercise in the

²⁰ Supra note 16, Schmalenbach, at page 532

²¹ Supra note 18, Jenks

²² The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat, 8 March, 5 Many and 23 May 1967, DOCUMENTS A/CN.4/L.118 and Add.1 and 2, in Yearbook of the ILC 1967 Volume II, at page 217, para 44, <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1967_v2.pdf>

²³ Supra note 16, Schmalenbach, at page 529

form of a 2004 UN Convention, the immunity of international organizations is mostly based on treaties.”²⁴ The United Nations is no exception. The immunity of the United Nations is also founded on treaties. One of them is the General Convention. Among several articles of the General Convention, the Article II Section 2 (hereafter ‘Section 2’) stipulates immunity of the UN.

SECTION 2. 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 shall extend to 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.²⁵

Section 2 guarantees the UN immunities ‘from every form of legal process’. On the aspect of intensity, Section 2 is a little bit different from the article 105 of the UN Charter. Comparing the phrases in the General Convention and the UN Charter, it seems that Section 2 gives the UN a kind of ‘absolute immunity’²⁶ whereas the article 105 grants the UN only ‘functional immunity’²⁷ because it describes that the UN enjoys immunities “as are necessary for the fulfilment of its purpose.”

Why did the General Convention accord more powerful immunity to the United Nations than the UN Charter did? It seems that drafting history documents of the General Convention does not give us a clear clue for explaining the different choice of terms between Section 2 of the General Convention and the article 105 of the UN Charter.²⁸ But the following records of the Preparatory Commission of the UN might give us a faint clue for why the General Convention granted absolute immunity to the UN.

if there is one certain principle it is that no member state may hinder in any way the working of the Organization or take any measures the effect of which might be to

²⁴ Supra note 7, Reinisch (Introduction), at page 5

²⁵ Article II, Section 2, Convention on the Privileges and Immunities of the United Nations, 1946

²⁶ A. Reinisch, Immunity of Property, Funds, and Assets (Article II Section 2 General Convention), in A. Reinisch (ed.) *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary*, Oxford (2016), at page 67

²⁷ M. Gester, Article 105, in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, at page 1139

²⁸ Supra note 26, Reinisch (Section 2), at page 63

increase its burdens, financial or other.²⁹

Also, Reinisch pointed out there were rare precedents for the members of the Preparatory Commission to be able to refer to when they had to make privileges and immunities articles in that time like below;

At the time of the adoption of the Charter of the United Nations there were not many legal instruments that could have served as examples for what was intended to be achieved . . . Thus, the privileges and immunities of international organizations was largely uncharted territory.³⁰

Maybe, a combination of two factors is the main reason for the General Convention to include absolute immunity provision? Firstly, the Preparatory Commission could not grasp all possible situations in which the activities of international organizations would be hampered by a State because of rare precedents. Secondly, one of the most important things for a new organization is that it should be free from an interference of a State.

2.4. Is the UN bound by the General Convention despite of the fact it is not a Contracting Parties to the General Convention?

Section 29 imposes obligations on the United Nations to ‘make provisions for appropriate mode of settlement of disputes of private law character’. Currently, 162 countries are Contracting Parties to the General Convention. However, the United Nations itself is not a Contracting Party.³¹ “The General Convention was concluded between the member States of the UN without the direct participation of the organization.”³² Does it mean that the United Nation is not necessarily bound by the all provisions of the General Convention?

Reinisch interpreted that it is unclear whether the United Nations could be seen as a party to

²⁹ Committee 5, Preparatory Commission of the United Nations, 2 December 1945, UN Doc PC/LEG/22, at page 4, <http://www.un.org/en/ga/search/view_doc.asp?symbol=PC/LEG/22>

³⁰ Supra note 12, Reinisch (Introductory Note)

³¹ Supra note 13, UN Treaty Collection

³² Supra note 7, Reinisch (Introduction), at page 11

the General Convention or only a beneficiary. He argued that “while the UN itself and many legal scholars seem to lean towards the view that UN is a party to the General Convention, some have regarded it as only a third party beneficiary.”³³ He gave several examples for supporting the argument that the UN could be seen as a party to the General Convention. One of the examples is a memorandum of the UN Office of Legal Affairs. It stated that ‘since the convention was adopted by the General Assembly on 13 February 1946 it became binding on the United Nations.’³⁴

Also, the Secretary-General cited the following paragraphs of ‘the First Report of the Sub-Committee on Privileges and Immunities’ in his written statement for *Mazilu* case when he argued that the United Nations is a party to the General Convention.

The General Convention on immunities and privileges of the United Nations is, in a sense, a Convention between the United Nations as an Organization, on the one part, and each of its Members individually on the other part. The adoption of a Convention by the General Assembly would therefore at one and the same time fix the text of the Convention and also imply the acceptance of that text by the United Nations as a body.³⁵

Then, he argued that Section 35 of the General Convention, which stipulates that “Convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession”³⁶, reflected the conclusion of the First Report of the Sub-Committee so it was evident that the UN was a party to the General Convention.³⁷ However, he also mentioned the possibility of non-acknowledgment of the UN as an official party to the General Convention like below;

Nevertheless, even if the Organization should not be considered as a "party" *strictu sensu* to the General Convention, it is clearly a "third organization" that can derive

³³ Ibid., at pages 11-12

³⁴ Memorandum by Division of Immunities and Registration of Treaties of 20 December 1948; reprinted in Supra note 7, Reinisch (Introduction), at page 11

³⁵ Sixth Committee, First Report of the Sub-Committee on Privileges and Immunities, 26 January 1946, UN Doc A/C.6/17, at para 5, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.6/17>

³⁶ Final Article, Section 35, Convention on the Privileges and Immunities of the United Nations, 1946

³⁷ Written Statement submitted on behalf of the Secretary-General of the United Nations, in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, ICJ Pleading (1992), at pages 184-185, at para 51, <<https://www.icj-cij.org/files/case-related/81/9705.pdf>>

obligations and right, under that instrument...³⁸

But, the ICJ did not give its opinion on this matter.³⁹ Whereas it seems unclear whether the UN is a party or beneficiary to the CPIUN, “it seems clear that the UN is bound by the provisions of the General Convention”⁴⁰ considering the memorandum of the UN Office of Legal Affairs and the statement of the Secretary-General in *Mazilu* case and so on. So it is clear that we can say the UN has a legal obligation to implement Section 29 of the Convention.

³⁸ Ibid., at page 185, para 53

³⁹ Supra note 7, Reinisch (Introduction), at page 13

⁴⁰ Ibid.

Chapter 3. The relationship between the right to enjoy absolute immunity and the obligation to provide an appropriate remedy (between the right of Section 2 and the obligation of Section 29 of the CPIUN)

In this chapter, I will look into the relation between the right to enjoy absolute immunity and the obligation to provide an appropriate remedy. The key question is this: even if the UN does not implement Section 29 of the General Convention, immunity which the UN has enjoyed in accordance with Section 2 of the General Convention could be maintained? As for the general International Organizations, it seems whether they give appropriate remedies to private claimants could be a key factor in determining to grant immunity to them. However, it appears that the logic does not apply to the United Nations. Are there special reasons for this? What if the right to remedy would amount to *jus cogens* norms status in the future? In this chapter, I will deal with these issues. In the end, I will look into the question whether the United Nations could be escaped from the substantial obligation besides exempting from domestic jurisdiction based on absolute immunity.

3.1. Conditional immunity

In *Wait and Kennedy* case, the Grand Chamber suggested that immunity of international organizations could be dependent upon whether it gives injured parties alternative remedy by stating,

For the Court, a material factor in determining whether granting...immunity from...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.⁴¹

It should be noted that the Court used ‘material’ rather than ‘convincing’ as an adjective which modifies ‘factor.’⁴² In this aspect, it could be also interpreted that international

⁴¹ *Waite and Kennedy v. Germany*, Judgment of European Court of Human Rights, 18 February 1999, Application No. 26083/94, at para 68, <<http://hudoc.echr.coe.int/eng?i=001-58912>>

⁴² A. Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals, *Chinese Journal of International Law* (2008), Vol. 7, No. 2, at page 292,

organization still enjoys immunity from domestic court in some special cases even if it does not give ‘reasonable alternative means’ to claimants. But considering the tendency that the Court does not use radical terms in its judgment, it would be more appropriate to understand the ECtHR’s interpretation as more emphasizing the conditional aspects of guaranteeing immunity depending on the availability of alternative means.

‘Conditional Immunity’ perspective lays stress on seeking a possibility for an individual’s right to a remedy not to be totally crushed under the shadow of immunity. Before *the Wait and Kennedy* case, some courts gave their opinion that the situation, in which the UN deprived an individual of her right to get a remedy, was not appropriate on the human rights aspects although they did not declare that ‘the right to a remedy’ prevailed over ‘immunity of the UN’.⁴³ For example, in *Manderlier* case, the Brussels Appeal Court declared that “the action brought against the United Nations was inadmissible”, but expressed its regret by stating “this situation, which does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights, may be regrettable”.⁴⁴ Also, the ICJ stated “it would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff”⁴⁵ in its Advisory Opinion in 1954.

In *Georges v. the United Nations* case, the plaintiffs argued that the drafters of the General Convention intended to give the UN conditional immunity based on the following sentences of study document of the preparatory commission of the UN.⁴⁶

It is desirable that where the United Nations or a specialized agency concludes contracts with individuals or corporations, it should include in the contract an undertaking to submit to arbitration disputes arising out of the contract, if it is not prepared to go before the Courts. Most of the existing specialized agencies have already

<<https://doi.org/10.1093/chinesejil/jmn020>>

⁴³ Supra note 26, Reinisch (Section 2), at page 72

⁴⁴ ‘*Manderlier v. United Nations and Belgian State*, Decision of the Brussels Appeals Court on 15 September 1969’, in UN Juridical Yearbook (1969), at page 237, <<http://legal.un.org/unjuridicalyearbook/volumes/1969/>>

⁴⁵ *Effect of awards of compensation made by the UN Administrative Tribunal*, Advisory Opinion of July 13th, 1954, ICJ Reports 1954, at page 57, <<https://www.icj-cij.org/files/case-related/21/021-19540713-ADV-01-00-EN.pdf>>

⁴⁶ *Georges v. United Nations*, Memorandum of law in opposition to the government’s statement of interest, the US District Court, Southern District of New York, 15 May 2014, at page 19, <<http://opiniojuris.org/wp-content/uploads/Dkt34-Georges-v.-UN-Ps-Opposition-Brief.pdf>>

agreed to do this.⁴⁷

3.2. Unconditional Immunity

But the US District Court did not accept the plaintiffs' argument in *Georges v. the United Nations* case. The Court in *Georges* case pointed out that *travaux préparatoires* of the CPIUN did not clearly show any intention that absolute immunity of the UN depends on its implementation of Section 29 of the CPIUN. The Court interpreted that the drafting history of the General Convention shows at most the commitment of the UN to provide a dispute settlement mechanism for private law claims in accordance with Section 29 and it does not indicate that this mechanism is a prerequisite for enjoying immunity.⁴⁸ The Southern District Court interpreted that the UN could still enjoy absolute immunity from domestic court regardless of its implementation to Section 29 of the General Convention as follows,

Because the UN has failed to provide *any* mode of settlement for the claims at issue here, Plaintiffs argue, it is not entitled to benefit from the CPIUN's grant of absolute immunity. This argument is foreclosed by *Brzak* . . . The Second Circuit rejected this argument on the ground that it ignores the "express waiver" requirement of the CPIUN . . . nothing in the text of the CPIUN suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29.⁴⁹

The US District Court in *Georges* case accepted the logic of the Second Circuit's decision in *Brzak v. United Nations*. According to *Brzak* case reasoning, nothing can deny an absolute immunity which the UN enjoys unless it expresses its intention to waive immunity in a clear form.⁵⁰ This interpretation is not new.⁵¹ About fifty years before the decision of *Georges*

⁴⁷ Report of the Preparatory Commission of the United Nations, 23 December 1945, UN Doc PC/20, at page 62, <http://www.un.org/en/ga/search/view_doc.asp?symbol=PC/20>

⁴⁸ *Georges v. United Nations*, Opinion of the US District Court, Southern District of New York, 13-CV-7146 (JPO), January 2015, at page 6, <<http://www.ijdh.org/wp-content/uploads/2014/12/62-Opinion-and-order-of-the-District-Court.pdf>>

⁴⁹ *Ibid.*, at page 5

⁵⁰ *Brzak v. United Nations*, Decision of the US Court of Appeals for the Second Circuit, 2 March 2010, Docket No. 08-2799-cv, at page 6, <https://cases.justia.com/federal/appellate-courts/ca2/08-2799/08-2799-cv_opn-2011-03-27.pdf?ts=1410917113>

case, the Brussels Court of First Instance also gave the similar interpretation on a relationship between Section 2 and Section 29 of the General Convention like below,

The immunity from every form of legal process granted to the United Nations under the Convention on the Privileges and Immunities of the United Nations is unconditional and is not limited by article VIII, section 29 of the Convention in question, or by article 10 of the Universal Declaration on Human Rights, or by Article 105 of the United Nations Charter⁵²

The Belgium Court interpreted that the UN Charter and the General Convention ‘have equal force,’ so the functional immunity of the former could not hinder the application of absolute immunity of the latter.⁵³ The Belgium Appeals Court also upheld the First Court’s decision by pointing out that the UN’s absolute immunity which the General Convention confers is not conditional upon compliance of its obligation to implement section 29 of the General Convention.⁵⁴ In addition, Brussels Appeal Court pointed out that the Universal Declaration of Human Rights does not have legally binding character and could not modify the force of positive rule although article 10 of the Universal Declaration of Human Rights “declares everyone is entitled to a hearing by a tribunal.”⁵⁵

3.3. Why ‘*Waite and Kennedy* logic’ could not be applied to the United Nations?

Someone may raise such a question, “Why ‘*Waite and Kennedy*’s material factor logic’ could not be applied to the United Nations?” According to the ‘*Waite and Kennedy*’ case decision, availability of alternative means is a ‘material factor’ for determining to grant international organizations immunity from domestic court.⁵⁶ But why did not any domestic courts or regional human rights tribunals lift the veil of immunity of the UN even in case of a situation

⁵¹ Supra note 26, Reinisch (Section 2), at page 76

⁵² ‘*Manderlier v. United Nations and Belgian State*, Decision of the Brussels Court of First Instance on 11 May 1966’, in UN Juridical Yearbook (1966), at page 283, <<http://legal.un.org/unjuridicalyearbook/volumes/1966/>>

⁵³ ‘*Manderlier v. United Nations and Belgian State*, Decision of the Brussels Court of First Instance on 11 May 1966’, in 45 ILR (1966) 446, at page 453

⁵⁴ ‘*Manderlier v. United Nations and Belgian State*, Decision of the Brussels Appeals Court on 15 September 1969’, in UN Juridical Yearbook (1969), at page 236, <<http://legal.un.org/unjuridicalyearbook/volumes/1969/>>

⁵⁵ Ibid.

⁵⁶ Supra note 41, *Waite and Kennedy*

in which the UN did not provide any alternative means to private law claimants in accordance with Section 29 of the Convention?

I think that we need to focus on the term ‘material factor.’ Material factor does not amount to ‘absolute’ or ‘convincing’ factor level on the aspects of intensity.⁵⁷ Aside from the availability of alternative means, there might be other material factors such as the extent of the necessity of guaranteeing immunity for the independence, characters of the international organizations and status of the international organization in international affairs when deciding to grant a certain international organization immunity from domestic jurisdiction. As for the United Nations, I think the ‘material factor’ logic could not undermine absolute immunity of the United Nations given other important factors such as the UN’s status in international affairs and the necessity for its independence from an interference of states.

3.4. What if the ‘right to a remedy’ would amount to *jus cogens* norms in the future?

Freedman argued that ‘right to a remedy’s elevation to *jus cogens* norms might be a solution to side effects of absolute immunity which the UN unconditionally enjoys in his article.

Exploring the possibility that the right to access a court or to a remedy is *jus cogens* would enable a national court to uphold a challenge to the UN’s immunity without breaching its own obligations.⁵⁸

However, I have a different opinion with him. I think that the status of *jus cogens* norms itself could not affect an absolute immunity of the UN from domestic jurisdiction given the decision of Strasbourg Court in *Stichting Mothers of Srebrenica* case. In that case, the ECtHR gave its view that a civil claim could not override immunity of a state even if in case of violation of *jus cogens* norm by a state. The Court added that the same is true of immunity of the United Nations.

The applicants argued that since their claim was based on an act of genocide for which they held the United Nations (and the Netherlands) accountable, and since the

⁵⁷ Supra note 42, Reinisch (Immunity of IOs)

⁵⁸ R. Freedman, ‘UN Immunity or Impunity? A Human Rights Based Challenge’, *European Journal of International Law*, Volume 25, Issue 1, 1 February 2014, at pages 253-254. <<https://doi.org/10.1093/ejil/cht082>>

prohibition of genocide was a rule of *ius cogens*, the cloak of immunity protecting the United Nations should be removed . . . the present case does not concern criminal liability but immunity from domestic civil jurisdiction. International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*. In respect of the sovereign immunity of foreign States this has been clearly stated by the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, §§ 81-97. In the Court's opinion this also holds true as regards the immunity enjoyed by the United Nations.⁵⁹

3.5. But an obligation to compensate is not affected by immunity from domestic court

But enjoying immunity from all forms of domestic jurisdiction does not mean that international organization could be escaped from the obligation for compensating to injured parties. In *Cumaraswamy* case, the ICJ interpreted that obligation to compensate is different from immunity from domestic jurisdiction. In results, the Court gave its opinion that the United Nations' obligation to implement Section 29 of the General Convention still remains regardless of enjoying immunity from all forms of domestic jurisdiction.

Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that '[t]he United Nations shall make provisions for' pursuant to Section 29.⁶⁰

Also, the ILO preparatory proposal on immunities, which was not only contributed to the

⁵⁹ *Stichting Mothers of Srebrenica v. Netherlands*, Decision of ECtHR, 11 June 2013, App No. 65542/12, at paras 152 and 154, <<http://hudoc.echr.coe.int/eng?i=001-122255>>

⁶⁰ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, at para 66, <<https://www.icj-cij.org/en/case/100>>

birth of Section 29 but also influenced the overall General Convention⁶¹, pointed out that enjoying immunity has nothing to do with the exemption from the substantial obligation as follows;

The nature and effect of these immunities are frequently misunderstood ... Such immunity is not a franchise to break the law, but a guarantee of complete independence from interference by national authorities with the discharge of official international duties. In general such immunity confers only exemption from legal process and not exemption from the obligation to obey the law.⁶²

⁶¹ Supra note 18, Jenks

⁶² General Note: Third Item on the Agenda: The Status, Immunities and Other Facilities to be Accorded to the International Labour Organization, ILO Official Bulletin, Vol. XXVII, No.2, 10 December 1945, at page 219; reprinted in A. Miller, 'The Privileges and Immunities of the United Nations', International Organization Law Review, Vol 6, Issue 1 (2009), at pages 95-96, <<https://doi.org/10.1163/157237409X464224>>

Chapter 4. Previous modes of implementing Section 29 of the CPIUN

In this chapter, I will look into how the UN has been implementing its obligation of Section 29 in regard of its peace-keeping operations during the past years. But it was found that there is a big gap between a principle and a practice. Section 29 obliges the UN to ‘make provisions’ for appropriate modes of settlement, but did not stipulate the UN to ‘implement’ appropriate modes of settlement. It seems that the UN has been misusing this gap very well. The UN has concluded the Status-Of-Force Agreement (SOFA) with a counterpart government including a provision for settlement of private law claims. However, the UN has ‘not implemented’ it in accordance with the provision of the SOFA. Given the difference between the provision and implementation of it in practice, it seems that the effectiveness aspect has been prevailing over the impartiality one in practice from the beginning. Let me introduce previous modes of implementing Section 29 of the General Convention in principle and in practice.

4.1. Standing Claims Commission (in principle)

The United Nations Emergency Force I (UNEF I) is the first United Nations peacekeeping force.⁶³ The Status-Of-Force Agreement (SOFA) between the UN and Egypt government was concluded on 8 February 1957.⁶⁴ Article 38 of the SOFA stipulates that the claims of private law character should be settled by a Claims Commission as follows;

SETTLEMENT OF DISPUTES OR CLAIMS

38. Disputes or claims of a private law character shall be settled in accordance with the following provisions:

- (a) The United Nations shall make provisions for the appropriate modes of settlement of disputes or claims arising out of contract or other disputes or claims of a

⁶³ UNEF I Background in UN Peacekeeping Homepage, <<https://peacekeeping.un.org/sites/default/files/past/unef1backgr1.html>>

⁶⁴ Summary study of the experience derived from the establishment and operation of the Force, 9 October 1958, UN Doc A/3943, at para 134, <http://www.un.org/ga/search/viewm_doc.asp?symbol=A/3943>

private law character to which the United Nations is a party other than those covered in subparagraphs (b) and (c) following.

(b) Any claim made by

(i) an Egyptian citizen in respect of any damages alleged to result from an act or omission of a member of the Force relating to his official duties;

...

shall be settled by a Claims Commission established for that purpose . . .⁶⁵

So, in principle, we could say that the UN made a provision in accordance with the obligation of Section 29 of the General Convention from the earlier period of its peace-keeping operations. However, according to the UN inner document, the Claims Commission was never established during the UNEF 1 operations periods and the private claims were addressed by informal negotiation in practice.⁶⁶

And then what is the Claims Commission in theory? In order to answer this question, we need to look at the article 51 of the model status-of-forces agreement (SOFA). The model SOFA was prepared by Secretary-General at the request of the General Assembly in 1989.⁶⁷ The article 51 of the model SOFA stipulates that a standing claim commission shall be established in order to deal with private law character claims as follows;

Except as provided in paragraph 53, any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of [host country/territory] do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose.⁶⁸

In theory, a standing claim commission consists of three members. Two of the members

⁶⁵ 'Exchange of letters constituting an agreement concerning the status of the United Emergency Force in Egypt (8 February 1957)' in United Nations Treaty Series Volume 260, at page 82, <<https://treaties.un.org/doc/Publication/UNTS/Volume%20260/v260.pdf>>

⁶⁶ Supra note 64, Summary study (1958), at para 141

⁶⁷ Report of the Secretary-General on Model status-of-forces agreement for peace-keeping operations, 9 October 1990, UN Doc A/45/594, at page 1, <http://www.un.org/ga/search/viewm_doc.asp?symbol=A/45/594>

⁶⁸ Ibid., at page 13, para 51

would be appointed respectively by the Secretary-General and the Government. Last member, a chairman of the commission, would be selected by the Secretary-General and the Government in collaboration. At least, two members' approval is necessary for all decision of the commission to take effect. Initially, there is also a possibility of appealing against the ruling of the commission if the Secretary-General and the Government allows,⁶⁹ but the appealing procedure was abolished in 1997 by the suggestion of the then Secretary-General.⁷⁰ The reasons for such abolition are a little bit astonishing to me. The UN deleted sentences related to an appeal because 'appeal to a tribunal' is very similar to standing claims commission in the aspects of procedure and composition and could be seen as a 'duplication of the proceeding in the standing claims commission.'⁷¹ I think the UN should have supplement an appealing procedure instead of repealing it in that case. It is absurd to erase appealing procedure phrases by only reason of similarity with standing claims commission. I think it is a bureaucratic decision for the sake of the effectiveness of the claim commission system. It dismissed aspects of guaranteeing injured parties more impartial remedies. However, even such standing claims commission was never established in the entire UN history.⁷² For this reason, the UN confessed that it could not evaluate the advantages and disadvantages of the Claim Commission system properly in the 1996 report.⁷³ But I think that the Claim Commission system is more appropriate than the Local Claim Review Board one on the aspect of impartiality. Let me introduce the Local Claim Review Board system.

4.2. Local Claim Review Board (in practice)

According to the UN internal document, in practice, local claim review boards were established instead of the Claim Commissions in the past UN peace-keeping operations and dealt with the third-party claims as follows;

Instead, it has been the practice, with respect to most past and present United Nations operations, for a local claims review board established in the mission on the

⁶⁹ Ibid.

⁷⁰ Report of the Secretary-General on Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, 21 May 1997, UN Doc A/51/903, at page 11, note 2, <http://www.un.org/ga/search/viewm_doc.asp?symbol=A/51/903>

⁷¹ Ibid.

⁷² Ibid., at page 4, para 8

⁷³ Supra note 3, Report on Administrative aspects of PKO (1996), at para 47

basis of authority delegated by the Controller to examine, approve or recommend settlement of third-party claims for personal injury or death and for property loss or damage that are attributable to acts performed in connection with official duties by civilian or military members of the mission.⁷⁴

The local claim review board directly dealt with third-party claimants. In this aspect, the local claim review board is distinguished from the lump-sum agreement system in which the UN directly negotiated with the counterpart government, not with the claimants. For this reasons, I categorized a lump-sum agreement as an alternative mode to Section 29 rather than a mode of implementing Section 29. Thus I will introduce a lump-sum agreement in Chapter 6.1 as one of the alternative modes to Section 29. In the course of the first UN peace-keeping operation, Egyptian Government established the Liason Office for taking charge of a channel between claimants and the local claim review board. The UN Legal Advisor made the point clear that a role of the Liason Office should not be siding with claimants against United Nation Emergency Force.⁷⁵

The Egyptian Government is not an interested party in any claim by a private individual, so that I trust that there is no implication that UNEF and the Egyptian Government represent opposite sides in a dispute. While your Liaison Headquarters may serve as a channel for claim in appropriate instances, and in helping us arrive at disinterested estimates of any case, it would be a serious matter if it were to take a partisan stand in pressing claims against us.⁷⁶

Its big difference with the Claim Commission is that the local claim review board consists of only UN staff members such as Legal Advisor, Administrative Officer and Finance Officer and so on⁷⁷ whereas the Claim Commission composes of three members respectively selected by the UN, the Government and both of them. In this aspect, the ILA doubted its impartiality and advanced a view that the local claim review board could not be regarded as an appropriate mode of settlement mechanism for private third party claimants in its 2004

⁷⁴ Ibid., at para 20

⁷⁵ K. Schmalenbach, 'Third Party Liability of International Organizations', in Langholtz, Kondocho and Wells (eds.), *International Peacekeeping : the Yearbook of International Peace Operations*, Volume 10, (Martinus Nijhoff, 2006), at page 41, <<https://doi.org/10.1163/187541106X00034>>

⁷⁶ Letter from Cox (UN Legal Adviser) to Captain Shafay (Legal Officer, Egyptian Liaison Staff Headquarters) on 24 August 1957, text reprinted in *ibid.*

⁷⁷ *Supra* note 3, Report on Administrative aspects (1996), at page 13

Berlin report.

For each peacekeeping operation an internal local claims review board composed exclusively of staff members of the IO is established. The independence of these boards and the objectivity of their rulings, which are not made public, give rise to concern; this claims settlement procedure cannot be considered as an adequate alternative mechanism for the protection of private third party interests and rights.⁷⁸

The Secretary-General also expressed his concern over a possibility of risk for the local claim review board not to be seen as an impartial body from the outside in 1997.

The local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case. Based on the principle that justice should not only be done but also be seen to be done, a procedure that involves a neutral third party should be retained in the text of the status-of-forces agreement as an option for potential claimants.⁷⁹

However, up to date, the local claim review board, which only composed of the UN staffs, still has been in charge of all third-party claims related to peacekeeping operations.

⁷⁸ ILA, 'Report of the Seventy-First Conference at Berlin: Accountability of International Organizations', 2004, at page 39

⁷⁹ Supra note 70, Report on Administrative aspects of PKO (1997), at para 10

Chapter 5. The UN's new excuses for refuting private law character claims

When the injured parties file a claim to the United Nations in accordance with the article 51 of the model SOFA, the claim should be of private law character. In a number of cases, the UN rejected the claims from the injured parties on the grounds that the claims did not fall within the scope of private law character one. To put it briefly, the UN does not accept the public law character claims. But, from the early 2010s, it seems that the UN misused this so-called acceptable test in order to evade difficult circumstances or its responsibility. In this chapter, I will introduce these cases and some important criticisms on them. While going through this chapter, we can raise such a question, “was it the best choice for the UN at that time?”

5.1. Background

Section 29 of the General Convention “does not define the phrase ‘dispute of a private law character’ and the *travaux préparatoires* of 1945 do not disclose the reasons for this particular choice of words.”⁸⁰ It seems that the UN had just regarded it as “disputes of the types that arise between two private parties” and have been applying it into practice for a long time.⁸¹ In 1995, the UN had reviewed Section 29 procedures in general and had officially tried to categorize private law claims related to United Nations peace-keeping operations. One of the categories is “third-party claims for compensation for personal injury/death or property loss/damage.”⁸²

Then, the UN also stated that it would not engage in political or policy-related third party claims. Without explaining details of those claims, it just simply stated that the political or policy-related claims are usually “related to actions or decisions taken by the Security Council or the General Assembly in request of certain matters”⁸³ and “Such claims, in many instances, consist of rambling statements denouncing the policies of the Organization and alleging that specific actions of the General Assembly or the Security Council have caused

⁸⁰ Supra note 16, Schmalenbach, at page 551

⁸¹ Supra note 5, Letter from Pedro Medrano (2014), at para 87

⁸² Secretary-General, Review of the efficiency of the administrative and financial functioning of the United Nations : Procedures in place for implementation of article VIII, section 29, of the CPIUN, 24 April 1995, UN Doc A/C.5/49/65, at paras 15-22, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.5/49/65>

⁸³ Ibid., at para 23

the claimant to sustain financial losses”.⁸⁴

The United Nations has rejected claims on the grounds that they were political or policy-related third party claims in a number of cases. For example, when the Rwanda government “requested the establishment of a claims commission for the purpose of considering claims by fourteen Rwandan nationals arising out of the alleged failure of the United Nations Assistance Mission in Rwanda (UNAMIR) to provide protection in the context of the 1994 genocide” in 1996, the United Nations rejected the request on the grounds that the claim is political or policy-related third party one.⁸⁵ Also, when “a claim was submitted on behalf of relatives of those killed after the fall of Srebrenica in 1995 alleging that the United Nations had failed to protect the inhabitants of Srebrenica” in 2002, the UN declined the claim on the similar grounds with Rwanda case.⁸⁶

I did not object the UN’s interpretation that these claims were political or policy-related third party claims. It is okay thus far. The problem is that the UN invented a new category which could belong to political third party claims in 2011. If a claim requires the review of performance or policy matters, the UN started to categorize it as a political or policy-related third party claims. In other words, the UN added a new barrier to Section 29 of the CPIUN. Let me introduce two related cases.

5.2. Kosovo lead poisoning case

In 1999, three internally-displaced persons (IDP) camps were set up in northern Kosovo in order to house minority groups such as Roma and Ashkali people who had been victims of ethnic violence during the armed conflict between Serbia and other Albanian groups.⁸⁷ But the problem is that those camps were built too near lead mining and smelting complex and the living and hygiene conditions in the camps were extremely poor.⁸⁸ Those regions were under the administration of the United Nations Mission in Kosovo (UNMIK) pursuant to the

⁸⁴ Ibid.

⁸⁵ Supra note 5, Letter from Pedro Medrano (2014), at para 91

⁸⁶ Ibid., at para 92

⁸⁷ New York Times, U.N. Offers Regret but No Compensation for Kosovo Poisoning Victims, 26 May 2017, <<https://www.nytimes.com/2017/05/26/world/europe/un-ukraine-kosovo-roma-lead-poisoning.html>>

⁸⁸ N.M. and Others v. UNMIK, Opinion of the Human Rights Advisory Panel, 26 February 2016, Case No. 26/08, at paras 44-45, <<http://www.unmikonline.org/hrap/Eng/Cases%20Eng/26-08%20NM%20etal%20Opinion%20FINAL%2026feb16.pdf>>

Security Council Resolution 1244 (1999).⁸⁹ Despite of several alarms and warnings about the critical levels of lead concentrations within the camps by health organizations and its internal investigation, no actions were taken for long years.⁹⁰ Three camps were finally shut down in 2010, 2012 and 2013 respectively.⁹¹

In 2011, 138 members of the Roma, Ashkali and Egyptian communities lodged a claim against the UN through the UN Third Party Claims Process, “seeking compensation for damages to their health suffered as a result of lead contamination in camps established by the [UNMIK] for internally displaced persons (IDP).”⁹²

On 25 July 2011, the UN declared the claim was not receivable as follows,

The claims were considered by the Organization not to be of a private law character since they amounted to a review of the performance of UNMIK’s mandate as an interim administration, as UNMIK retained the discretion to determine the modalities for implementation of its interim administration mandate, including the establishment of IDP camps.⁹³

Its response is controversial. The UN did not accept the claim proposal by the only reason that the claim is likely to require ‘a review of the performance of the UNMIK’.

5.3. Haiti cholera case

Cholera broke out in Haiti in October 2010, several days after that the Nepalese peacekeepers joined in the United Nations Stabilization Mission in Haiti (MINUSTAH).⁹⁴ From October 2010 to July 2018, cholera has taken away 9,603 lives and infected 812,317 people in Haiti.⁹⁵ Many Scientific researches pointed out that human wastes from peacekeeping camp, which

⁸⁹ Ibid., at para 46

⁹⁰ Ibid., at paras 46-51

⁹¹ Ibid., at paras 61

⁹² Supra note 5, Letter from Pedro Medrano (2014), at para 93

⁹³ Ibid., at para 100

⁹⁴ Philip Alston, Report of the Special Rapporteur on extreme poverty and human rights, 26 August 2016, UN Doc A/71/367, at para 2, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/71/367>

⁹⁵ Pan American Health Organization, Epidemiological Update Cholera, 6 August 2018, at page 2, table 1, <https://www.paho.org/hq/index.php?option=com_docman&task=doc_view&Itemid=270&gid=45805&lang=en>

were dumped into a river, were a source of an outbreak of cholera.⁹⁶ In November 2011, the representatives for cholera victims in Haiti submitted claims to the MINUSTAH claims unit and United Nations Headquarters, formally asking that “the UN comply with their obligations by establishing a standing claims commission and/or providing settlement for the victims’ injuries.”⁹⁷

On 21 February 2013, the UN replied that the claims were not receivable as follows,

With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [General Convention].⁹⁸

The UN refuted the claim proposal again by the similar reason with Kosovo lead poisoning case that the claim would result in involving ‘a review of policy matters’. How do we interpret this somewhat unreasonable response of the UN?

5.4. Human Right Advisory Panel’s initial refusal of claims from Kosovo victims

It is interesting to look into the reasoning of an inadmissible declaration by the Human Right Advisory Panel on the claim from the Kosovo lead poisoning victims in 2010. The European Roma Rights Centre (ERRC) requested a compensation representing the lead poisoning victims through the third party claims process of the UNMIK on 10 February 2006.⁹⁹ But the process had been continuously delayed. The claimants only received two letters in October 2008 and in August 2009 from the Under-Secretary-General for Legal Affairs which respectively stating that “review of this matter is ongoing” and that a more substantive response would be given in the near future.¹⁰⁰

Meanwhile, Ms. Dianne Post filed a claim to the Human Right Advisory Panel on behalf of

⁹⁶ Supra note 94, Alston, at para 2 and 16

⁹⁷ Georges v. the UN, class action complaint to the US District Court, 9 October 2013, at para 12, <<http://www.ijdh.org/wp-content/uploads/2014/12/1-Complaint-against-Ban-Ki-moon-and-UN.pdf>>

⁹⁸ Letter from Patricia O’Brien (Under Secretary-General for Legal Affairs) to Mr. Concannon (Director of the Institute for Justice & Democracy in Haiti), 21 February 2013, at page 2, <<http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf>>

⁹⁹ N.M. and Others v. UNMIK, Decision of 31 March 2010, Case No. 26/08, at para 5, <http://www.unmikonline.org/hrap/Eng/Cases%20Eng/DC_No_26-08-2.pdf>

¹⁰⁰ Ibid., at para 6

the lead poisoning victims on 4 July 2008.¹⁰¹ But the Panel did not think that the claim was admissible. The Panel distinguished the substantive parts with procedural ones in the claim and considered that former parts needed to be dealt with through the UN Third Party Claims Process.¹⁰² Also, the HRAP gave a view that the substantive and procedural aspects are ‘so interlinked’ that it would be unappropriated to separate them and handle it respectively in the third party claims process and the Human Right Advisory Panel one. Thus, the Panel declared that the claim was non-receivable on 31 March 2010¹⁰³ and it should be dealt with through the third party claim process.¹⁰⁴

The substantive complaints ... are all directly linked to the initial operational choice to place the IDPs in the camps in question and/or the failure to relocate them, and the subsequent effects which resulted in personal injury, illness or death. The Panel considers that these parts of the complaint fall *prima facie* within the ambit of the UN Third Party Claims Process and therefore are deemed inadmissible.¹⁰⁵

The procedural complaints ... such as the complaints about violations of the procedural aspects of the right to life and the prohibition of inhuman or degrading treatment, as well as about violations of the right to a fair trial and the right to an effective remedy, concern acts, omissions or situations that clearly did not result in personal injury, illness or death, nor in property loss or damage. As such, these parts of the complaint are therefore not covered by the UN Third Party Claims Process.¹⁰⁶

It is worth noting that the Panel considered that the claim belongs to the scope of third party claims process except the procedural aspects of the human rights. It runs counter to the opinion of the legal office of the UN in 2011. It might constitute one of the good evidence that the non-receivable interpretation of the UN in 2011 was excessive.

¹⁰¹ Ibid., at para 9

¹⁰² Ibid., at para 40

¹⁰³ Ibid., at para 42

¹⁰⁴ Ibid., at para 51

¹⁰⁵ Ibid., at para 40

¹⁰⁶ Ibid., at para 41

5.5. Evaluation on strict admissibility test of the UN

There are a lot of criticisms on the UN's interpretations on private law character claims. As for Kosovo lead poisoning case, Kristen Boon raised a question on UN's response to the Kosovo lead poisoning claim. Especially, she viewed that continuous delay of moving Roma people out of lead-polluted areas is not under the 'operational necessity' although the initial decision to move people into the areas near lead mine might belong to 'the scope of operational necessity'.

By choosing to put the camp in that particular location, however, the U.N. introduced the harm to that population. While the camps might, in the short term, have fallen within the scope of operational necessity, it is not clear why they continued to be categorized as such, given the widespread knowledge of the problem and the five years delay in moving the population.¹⁰⁷

Okada criticized the UN's methods to evade responsibility with using technical terms such as 'amount to' and 'necessarily include' as follows;

However, to expand the category of non-receivable claims by using such phrases as 'amount to' and 'necessarily include', is unjustifiable. In other words, to limit the scope of the obligation under section 29 to disputes which have nothing to do with the performance of the UN functions is improper because it is not compatible with the fact that the obligation corresponds to the very broad immunity of the UN enshrined in Section 2. It also goes against the intention of the drafters of the CPIUN.¹⁰⁸

Freedman also points out the UN's limited interpreting aspect of 'private law claim' in Haiti case.

Although the claims are torts based on negligence, gross negligence, and/or recklessness, the UN insists that they relate to policies rather than the ways in which MINUSTAH members implemented those policies. The claims, then, fall outside the

¹⁰⁷ K. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, Chicago Journal of International Law: Vol. 16: No.2, Article 2, at page 358, <<http://chicagounbound.uchicago.edu/cjil/vol16/iss2/2>>

¹⁰⁸ Y. Okada, Interpretation of Article VIII, Section 29 of the Convention on the Privileges and Immunities of the UN, International Organizations Law Review, 15 (2018), at page 69, <<http://doi.org/10.1163/15723747-01501003>>

special rules for private law disputes arising from peacekeeping operations.¹⁰⁹

Alvarez made a sarcastic comment that the UN made a distinction between the public and private law character claim depending on a scale of a claim as follows;

According to the United Nations' own account of when it is liable for the actions of its peacekeeper, it seems to be saying that the United Nations is responsible only for the small torts of its agents (such as traffic accidents) but not for large ones that cause the deaths of 8,500 and counting?¹¹⁰

He also emphasized that the UN's excuse of 'involving review of policy matters' does not change a private tort claim into a public law claim.

whether peacekeepers should be screened or treated prior to arrival or what supervision should be exercised when they build their latrines – those questions surely cannot transform a private tort claim into something else. Virtually all tort claims – including claims for negligent driving – raise questions about the day to day policies of the entity being sued. Tort law is not just about compensating injured parties; it is about changing the behavior and operational policies that encourage or fail to prevent negligence.¹¹¹

I think that the UN's interpretation on the scope of private law character is too narrow. Both of the above cases actually related to private law character. Despite having known about serious circumstances, leaving vulnerable people in high-density lead-polluted areas for a long time constitutes torts. This directly resulted in harming people in the camp with lead poisoning disease. Also, the Haiti cholera claim seems to be a general torts claim based on negligence. However, even if the case fell under the scope of private law character, another test of the UN is waiting. If the case seemed to be related to the failure of the action of the peace-keeping or interim mission, the UN refuted it by stating it involved in a "review of the

¹⁰⁹ Supra note 58, Freedman, at pages 253-254

¹¹⁰ J. Alvarez, The United Nations in the time of cholera, *AJIL Unbound*, Vol 108 (2014), at page 22, <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/div-classtithe-united-nations-in-the-time-of-choleradiv/71D599792A077E230934CE85215731C4>>

¹¹¹ *Ibid.*, at page 26

performance” or a “review of political and policy matters.”

In that case, there would be no other ways for injured parties to get a remedy. I think that ‘*raison d’etre*’ for the Section 29 of the General Convention is minimalizing side effects of the ‘absolute immunity’ which is conferred to the UN by Section 2 of the General Convention. The UN should have given injured parties an appropriate remedy within its system at the expense of enjoying absolute immunity from domestic jurisdiction. But the United Nations did not. In that case, a State of injured parties could “seek to resolve disputes on the interpretation...of the SOFA through the dispute settlement provision provided for in the SOFA”.¹¹² But, in most cases, the help of the UN desperately was needed in that State, so the government of the State had no choice but not to confront with the UN. This situation resulted in a loophole of the General Convention system in which drafters seemed to intend to offset side-effects of enjoying absolute immunity by devising Section 29 provision. Then are there any possible ways to close this big loophole? I will deal with this issue in Chapter 7.

¹¹² Supra note 5, Letter from Pedro Medrano (2014), at para 94

Chapter 6. Previous and recent alternative modes to Section 29

Sometimes, the UN sought for temporary and exceptional solutions in response to massive claims besides the way of using a local claim review board. I will call these temporary ways as alternative modes to Section 29 whether these exceptional ways are appropriate or not. In this chapter, I will look into how the UN implemented or is implementing these alternative modes to the Section 29. And then, I will examine that these ways could be seen as an appropriate alternative mode of settlement. These so-called temporary settlement mechanisms were rigged up by different reasons such as the necessity to deal with a massive number of claims effectively, public pressures or human right body's recommendations. Let me introduce them one by one.

6.1. Lump-sum Agreement

On February 1965, the Secretary-General suggested lump-sum agreement for settling a massive number of claims against the UN by Belgian nationals who “suffered damage as a result of harmful acts committed by ONUC” to Belgium Government.¹¹³ On the same date, Belgium Foreign Minister accepted the proposal of the UN.¹¹⁴ Considering the fact that these exchange letters between the UN and Belgium were issued on the same date, it appears that the lump-sum Agreement was coordinated between two parties in advance. Also, it seems that the Belgium Government exercised diplomatic protection against the UN given the following excerpt of the *Manderlier* case in 1966; “at first the U.N. disputed the facts of the claim, but after intercessions by the Belgian Government it declared that it was prepared to accept financial liability where the damage is the result of action taken by agents of the United Nations”.¹¹⁵

The UN disclosed that it only accepted 581 cases as valid claims for compensation among approximately 1,400 claims which were submitted by Belgian nationals after an examination

¹¹³ Exchange of Letters constituting an Agreement between the United Nations and Belgium relating to the settlement of claims filed against the UN in the Congo by Belgian nationals (20 February 1965) in UN Juridical Yearbook (1965), at page 39, <<http://legal.un.org/unjuridicalyearbook/volumes/1965/>>

¹¹⁴ Ibid., at page 40

¹¹⁵ Supra note 53, *Manderlier* (1966), at page 446

of the UN officials.¹¹⁶ In case of concerning such massive claims, it appeared that the UN delegated the distribution of the total sum of money to counterpart government. The letter of the Secretary-General certainly stipulated that “the distribution to be made of the sum referred to in the preceding paragraph shall be the responsibility of the Belgian Government.”¹¹⁷ But, in case of concerning a small number of claims, it seems that the UN itself calculated a proper amount of indemnities for each individual. For example, according to the lump-sum agreement between the UN and Switzerland, the total amount of final settlement was 28,000 dollars for five claimants and different amounts of indemnities were allocated to each claimant by the UN (M^{me} Jean-Claude Favre: \$25,000, Disco de Schulthess and Co.: \$578, Paul Stoudmann: \$713, Manfred Blaser: \$1548, Marius Golay: \$161).¹¹⁸ The UN concluded lump-sum agreements with other countries such as Swiss on 3 June 1966,¹¹⁹ Greece on 20 June 1966¹²⁰, Luxembourg on 28 December 1966¹²¹ and Italy on 18 January 1967.¹²²

It appears that a lump-sum agreement approach gives the UN a lot of advantages on the aspects of expediency and efficiency according to the UN internal document.¹²³ The document also pointed out drawbacks of a lump-sum agreement approach by stating “the choice of a lump-sum settlement as a mode of handling third-party claims is largely dependent on the State’s willingness to espouse the claims of its nationals.”¹²⁴ Accordingly, a satisfaction of claimants about the lump-sum settlement totally relies on the ability of a State. For example, Okada pointed out that “the Congolese Government, whose nationals incurred the major part of injuries caused by the ONUC, failed to conclude an agreement with the UN,

¹¹⁶ Supra note 1, Letter from SG (1965)

¹¹⁷ Supra note 113, Exchange Letters (1965), at page 39

¹¹⁸ Exchange of Letters constituting an Agreement between the United Nations and Switzerland relating to the settlement of claims filed against the UN in the Congo by Swiss nationals (3 June 1966) in UN Treaty Series volume 565, at page 195, <<https://treaties.un.org/doc/Publication/UNTS/Volume%20565/v565.pdf>>

¹¹⁹ Ibid.

¹²⁰ Exchange of Letters constituting an Agreement between the United Nations and Greece relating to the settlement of claims filed against the UN in the Congo by Greek nationals (20 June 1966) in UN Treaty Series volume 565, at page 5

¹²¹ Exchange of Letters constituting an Agreement between the United Nations and Luxembourg relating to the settlement of claims filed against the UN in the Congo by Luxembourg nationals (28 December 1966) in United Nation Treaty Series volume 585, at page 149, <<https://treaties.un.org/doc/Publication/UNTS/Volume%20585/v585.pdf>>

¹²² Exchange of Letters constituting an Agreement between the United Nations and Italy relating to the settlement of claims filed against the UN in the Congo by Italian nationals (18 January 1967) in United Nation Treaty Series volume 588, at page 198, <<https://treaties.un.org/doc/Publication/UNTS/Volume%20588/v588.pdf>>

¹²³ Supra note 3, Report on Administrative aspects of PKO (1996), at para 34, 35

¹²⁴ Ibid., at para 37.

whereas the governments of the European countries did succeed.”¹²⁵

I think that a lump-sum settlement lacks an involvement of individual victims in the process. Thus, individual opinions might be easily disregarded during the negotiation between the UN and the related government. For example, Belgium citizen filed a claim against the UN and Belgian State before the Civil Tribunal of Brussels because he was dissatisfied with the terms of the lump-sum agreement which stipulated that “any person who accepted compensation thereunder thereby waived all further rights of action against the United Nations”.¹²⁶ Also, in most cases, injured parties have no choice but to receive their allocated indemnities and could not rely upon appeal process after the conclusion of the lump-sum agreement. In *Manderlier* case, the Brussels Court of First Instance gave a negative view on the mode of lump-sum settlement.

It was quite untrue to say, as the U.N. contended, that the procedure it had adopted in the present case was an appropriate method of settlement within the meaning of Section 29. It had had the plaintiff's claim examined by its own authorities without any kind of judicial hearing, and then insisted that it was bound by their decision. It had in effect been judge in its own cause.¹²⁷

6.2. A New Approach

On 19 August 2016, the Secretary-General announced so-called ‘A New Approach to cholera in Haiti.’ ‘A New Approach’ is consists of two tracks. Track 1 is the UN’s systematic approach to eliminate cholera in Haiti in the long run through improving water, sanitation and health system in Haiti. Track 2 mainly consists of direct “material assistance and support to those Haitians most directly affected by cholera.”¹²⁸ Could we see ‘A New Approach’ as an appropriate alternative way to Section 29 of the General Convention?

Requirements of the claimants mainly consists of three parts; “(i) monetary compensation (minimum of \$100,000 for each cholera death and \$50,000 for each person who contracted a non-fatal case), (ii) the establishment of a United Nations-funded nationwide program for

¹²⁵ Supra note 108, Okada, at page 54

¹²⁶ Supra note 53, *Manderlier* (1966), at pages 446-447

¹²⁷ Ibid., at page 447

¹²⁸ A new approach to cholera in Haiti : Report by the Secretary-General, 25 November 2016, UN doc A/71/620, at para 5-6, <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/620>

clean water, adequate sanitation and appropriate medical treatment to prevent the further spread of cholera; and (iii) a public apology, including an acceptance of responsibility for introducing cholera to Haiti.”¹²⁹ Could we regard ‘A New Approach’ meet the requirements of the Haitian cholera victims sufficiently?

6.2.1. Apology aspects

On 1 December 2016, the Secretary-General made a public apology to Haitian people in General Assembly.

The United Nations deeply regrets the loss of life and suffering caused by the cholera outbreak in Haiti. On behalf of the United Nations, I want to say very clearly: we apologise to the Haitian people.¹³⁰

But it should be noted that he apologized to Haitian people in general terms, not to Haitian cholera victims directly. Also, he did not acknowledge the cause of cholera is the UN peace-keeping force. Although the Secretary-General used the terms, ‘responsibility,’ he did not choose the words, ‘legal responsibility.’ Instead, he expressed it as a ‘moral responsibility.’

We simply did not do enough with regard to the cholera outbreak and its spread in Haiti... For the sake of the Haitian people, but also for the sake of the United Nations itself, we have a moral responsibility to act... Eliminating cholera from Haiti, and living up to our moral responsibility to those who have been most directly affected, will require the full commitment of the international community and, crucially, the resources necessary.¹³¹

Although the Secretary-General apologized to Haitian people in general terms, he did not acknowledge a fault of United Nations’ peace-keeping mission and attach the ‘moral’

¹²⁹ Supra note 5, Letter from Pedro Medrano (2014), at para 84

¹³⁰ Secretary-General's remarks to the General Assembly on a New Approach to Address Cholera in Haiti, 1 December 2016, <<https://www.un.org/sg/en/content/sg/statement/2016-12-01/secretary-generals-remarks-general-assembly-new-approach-address>>

¹³¹ Ibid.

adjective to ‘responsibility’ in order to make clear that ‘responsibility’ which he mentioned does not mean ‘legal responsibility.’ In other words, the UN did its best not to impress that it had legal responsibility for the Haitian cholera victims in its official announcement. Accordingly, it seems that the apology without the acknowledgment of the responsibility went against the initial requirement of the Haitian victims.

6.2.2. Compensation aspects

Compensation issue is much related to Track 2 of ‘A New Approach.’ But Track 2 does not have specific plans except further consideration through consultations with victims’ family and their communities. As for indemnities, it seems that only the families of those individuals who died of cholera would be recipients for the direct payment. There was no mentioning of giving indemnities to cholera sufferers in the initial report of ‘A New Approach.’¹³² This may cause dissatisfaction to many cholera sufferers in Haiti. The UN also concerned this aspect in its second report on ‘A New Approach.’

During the preliminary consultations, many interlocutors expressed concern that an individual approach could be perceived as favouring some victims over others (the households of those individuals who had died from cholera over the much greater numbers of individuals who had contracted cholera and recovered), create negative incentives, cause tensions and divisions within communities and possibly lead to violence within communities.¹³³

Although ‘the United Nations Haiti Cholera Response Multi-Partner Trust Fund’ was established in October 2016, the main purpose of this fund is supporting for Track 1 projects. According to the initial plan, another fund for Track 2 was supposed to be established separately. But, as of June 2017, the fund for the indemnities did not seem to be made.¹³⁴

¹³² Supra note 128, A New Approach (2016), at para 54-59

¹³³ Secretary-General, New approach to cholera in Haiti, 3 May 2017, UN Doc A/71/895, at para 53, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/71/895>

¹³⁴ ‘Moreover, there are no more funds available for Track 2 of the new approach, which is ... meant to address the suffering that so many Haitians have endured...Further funding is critical if Track 2, a vital component of the New Approach, is to be implemented.’, Deputy Secretary-General's remarks to the General Assembly on Haiti, 14 June 2017, <<https://www.un.org/sg/en/content/dsg/statement/2017-06-14/deputy-secretary->

The most vulnerable part of ‘A New Approach’ is its voluntary characters. Its funds mainly depend on donations of States or other organizations. Its initial aim was to collect up to 400 million dollars. As of July 2018, only 15.9 million US dollars were contributed to ‘A New Approach’ Funds according to a website run by cholera victims Advocate group.¹³⁵ It only constitutes about four percentages of the total target figures.

As of indemnities, it seems that there are two problems. The first one is that identifying those who had died cholera and family is not easy. The UN analysed that ‘further verification exercises’ is necessary due to current limited and insufficient data on cholera death. The UN estimated that “such mapping, registration and validation exercises could take up to eight months and cost some \$4.5 million.”¹³⁶ The second one is the initial plan’s determination. According to the determination, the UN would not commence even consultations process with victims, their families and communities’ ‘without an assurance of adequate funding for Track 2.’¹³⁷ This is because the UN viewed that engaging ‘in consultations without any assurance of funding for Track 2 would be counterproductive and ethically fraught.’¹³⁸ This work has not been started yet because of lack of sufficient contributions from member states of the UN and other organizations.

Cholera victims do not receive indemnity from the UN until now. Considering a current situation of scarce funding resources, it seems that there is no possibility for them to receive it in the near future. Without giving indemnities to victims, ‘A New Approach’ is just an extension of what the UN had already made efforts to eliminate cholera in Haiti before the plan.

I interpret that no acknowledgment of its responsibility led to creating voluntary fund mechanism and this voluntary character also necessarily resulted in current fund resources fell far short of the target amount. But it might be too early to evaluate ‘A New Approach’ at this moment in time. We might need to wait more time to see this aspirational plan could be suited to an appropriate alternative to Section 29. But, currently, it appears that ‘A New Approach’ could not become an appropriate alternative to Section 29 given its non-acknowledgment of responsibility and no guarantee of giving indemnity to victims due to the

[generals-remarks-general-assembly-haiti-prepared](#)>

¹³⁵ Time2deliver homepage run by the Institute for Justice & Democracy in Haiti, <<http://www.time2deliver.org/>>

¹³⁶ Supra note 133, A New Approach (2017), at para 52

¹³⁷ Ibid., at para 59

¹³⁸ Supra note 128, A New Approach (2016), at para 37

funding system dependent upon the voluntary contributions.

6.3. A Trust Fund

On 26 May 2017, the Secretary-General made an announcement to establish a Trust Fund for assisting community-based projects for the Roma, Ashkali and Egyptian communities.¹³⁹ Requirements of the lead poisoning victims mainly consist of three parts such as “making a full apology, providing compensation to the 138 individuals represented before the panel, and giving urgent medical treatment to those affected by long-term lead poisoning.”¹⁴⁰ Could we regard ‘A Trust Fund’ meet the requirements of the representative for the lead poisoning victims sufficiently? Could we see ‘A Trust Fund’ as an appropriate alternative way to Section 29 of the General Convention?

6.3.1. Apology aspects

The Secretary-General expressed public regret to ‘138 individuals from the Roma, Ashkali and Egyptian communities’ who ‘suffered lead poisoning and other serious health consequences as a result of their relocation to internally-displaced persons (IDP) camps in northern Kosovo’ through the statement of his spokesperson on 26 May 2017.¹⁴¹ Also, he expressed a kind of ‘guarantees of non-repetition’ by stating “the organization will also continue to draw lessons from its experience in Kosovo and from the work of the Panel and take action to prevent such situations from happening again.”

But he did not use ‘apology’ terms and did not acknowledge a fault of the United Nations Interim Administration Mission in Kosovo (UNMIK). He just used ‘regret’ terms in his statement as follows; “The Secretary-General wishes to express the Organization’s profound regret for the suffering endured by all individuals living in the IDP camps.” What was the reaction of the injured party? The response of a representative for the lead poisoning victims was quite negative.

¹³⁹ Statement attributable to the Spokesman for the Secretary-General on the Human Rights Advisory Panel’s recommendations on Kosovo, 26 May 2017, <<https://www.un.org/sg/en/content/sg/statement/2017-05-26/statement-attributable-spokesman-secretary-general-human-rights>>

¹⁴⁰ Statement of Dianne Post, Attorney for the claimants in Mehmeti v. UNMIK, with others, 1 June 2017 <<http://www.errc.org/press-releases/roma-rights-organizations-condemn-lack-of-un-action-on-lead-poisoning-in-kosovo>>

¹⁴¹ Supra note 139, Statement on HRAP’s recommendations (2017)

The lack of recognition by way of a public apology is an insult to the people who have long suffered in the lead poisoned camps awaiting justice for the crimes committed by UNMIK.¹⁴²

Without mentioning of taking responsibility, the Secretary-General stated that the UN considered ‘the unique circumstances in Kosovo’ when he announced an establishment of a Trust Fund ‘as an exceptional measure’.¹⁴³ What do the terms ‘unique’ and ‘exceptional’ imply? These terms mean that the UN does not have legal responsibility for the Kosovo lead poisoning case. In other words, the UN’s intention is that the UN makes a Trust Fund plan for benevolent purpose considering ‘the unique circumstances in Kosovo’ even though the UN has no responsibility for it. It appears that the statement of the Secretary-General was skillfully drafted not to impress that the UN takes legal responsibility for the lead poisoning victims by the legal office of the UN. It seems that the UN utilized the technique, which was used in the Haiti cholera apology, to evade legal responsibility again.

6.3.2. Compensation aspects

Although he announced an establishment of a Trust Fund, this plan did not include any monetary compensation for the victims unlike the measures of the second track of ‘A New Approach’ in Haiti case. At least, ‘A New Approach’ had a plan to compensate the households of victims who had died from cholera although it had no compensation plan for the victim who suffered and recovered. According to his announcement, Trust Fund money would be only devoted to ‘community based assistance project...including with respect to health services, economic development and infrastructure.’¹⁴⁴ What is the rationale behind this? Let us hear the remarks of the Spokesman for the Secretary-General. Stéphane Dujarric stated that “we are aware that there were other people affected beyond the 138 claimants... We want to see all of the impacted communities benefit from projects.”¹⁴⁵ It appears the UN is considering raising five million dollars¹⁴⁶ as a target amount for a Trust Fund although there

¹⁴² Supra note 140, Dianne Post

¹⁴³ Supra note 139, Statement on HRAP’s recommendations (2017)

¹⁴⁴ Ibid.

¹⁴⁵ Supra note 87, NY Times

¹⁴⁶ Ibid.

was no mentioning of a specific amount of money in its official announcement of the plan.¹⁴⁷

But it seems that the lead poisoning victims desperately need the compensation because they already spent their money for the treatment of themselves or their children for lead poisoning and access to good food and treatment are essential for their recovery. Let me introduce remarks from one of the victims; “My second-born was sent to Serbia for treatment at a hospital because his lead levels were so high... Afterward we were told that he should take medicines to treat seizures. We had to pay for it from our money and it was hard. Today he is still very nervous...He is not a good student because he cannot remember things...We need to take care of him because there is no support from the school.”¹⁴⁸

In regard of Trust Fund, Baskut Tuncak, Special Rapporteur on ‘the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes,’ criticized aspects of a lack of direct compensation for victims as follows;

This statement, issued by your Spokesperson, did not mention the HRAP recommendations to provide much needed compensation to the complainants and their families... there are strong grounds to believe that the Trust Fund cannot wholly address the serious damage suffered by the victims, nor meet their pressing medical needs.

The need to provide the victims, who continue to face economic and social hardship in addition to grave health concerns, with individual compensation remains as critical as ever. In addition, recent information regarding the progress and functioning of the Trust Fund itself raises further grounds for concern. The activities of the Trust Fund have allegedly been brought to a halt due to lack of resources.¹⁴⁹

He advised the Secretary-General to follow the recommendation of the Human Rights Advisory Panel (HRAP). And then, what are the HRAP and its recommendation which Special Rapporteur advised the Secretary-General to follow? Also, could we see the HRAP as an appropriate alternative way to close a loophole in Section 29 of the General Convention? As for ‘A Trust fund’, it seems evident that it could not be an appropriate alternative to

¹⁴⁷ Supra note 139, Statement on HRAP’s recommendations (2017)

¹⁴⁸ Human Rights Watch news, ‘UN: Compensate Kosovo Lead Poisoning Victims’, 7 September 2017, <<https://www.hrw.org/news/2017/09/07/un-compensate-kosovo-lead-poisoning-victims>>

¹⁴⁹ Letter from Baskut Tuncak (Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes) to the Secretary-General, on 11 July 2018, <<https://www.ohchr.org/Documents/Issues/ToxicWastes/LetterSGAshkaliEgyptianCommunities.pdf>>

Section 29 given the lack of acknowledging responsibility and no individual compensation plan for lead poisoning sufferers.

6.4. Human Rights Advisory Panel

In June 1999, The UN Security Council Resolution 1244 authorized the Secretary-General to “establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo...which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”¹⁵⁰ Accordingly, the Secretary-General devised a concept for the United Nations Interim Administration Mission in Kosovo¹⁵¹ (hereafter ‘UNMIK’). Vast scopes of authorities such as all legislative, executive power and the administration of the judiciary were vested in the UNMIK.¹⁵² The UNMIK acted as a quasi-state power in Kosovo, but it lacked “democratic principles such as the separation of powers and those checks and balances and independent supervisory mechanisms” within its system.¹⁵³ This was the background of the birth of the Ombudsperson Institution in Kosovo. Rambouillet Accords planted seeds for the establishment of the Ombudsperson¹⁵⁴ even though there was no mentioning of Ombudsperson in the SC Resolution 1244.

On 30 June 2000, the Ombudsperson Institution in Kosovo was established by UNMIK Regulation 2000/38.¹⁵⁵ “The Ombudsperson had wide powers to investigate acts of both UNMIK and local self-governing institutions.”¹⁵⁶ But the UNMIK was not cooperative with the request of the Ombudsperson and disregarded the recommendations from the Ombudsperson. “Accordingly, this added to the concerns raised in 2003 about the human

¹⁵⁰ UN Security Council Resolution 1244, 10 June 1999, UN Doc S/RES/1244, at para 10,

<<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>>

¹⁵¹ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, UN Doc S/1999/779, at para 1, <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1999/779>

¹⁵² Ibid., at para 35

¹⁵³ Chatham House, International Law Meeting Summary: The Kosovo Human Rights Advisory Panel, 26 January 2012, at page 3, <<https://www.chathamhouse.org/publications/papers/view/182428>>

¹⁵⁴ The Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, 7 June 1999, UN Doc S/1999/648, at page 55, <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1999/648>

¹⁵⁵ UNMIK Regulation 2000/38 on the establishment of the Ombudsperson Institution in Kosovo, 30 June 2000, <<http://www.unmikonline.org/regulations/2000/reg38-00.htm>>

¹⁵⁶ C. Waters, ‘Kosovanizing’ the Ombudsperson: Implications for Kosovo and Peacekeeping, International Peacekeeping, 15:5, at page 649, <<https://doi.org/10.1080/13533310802396186>>

rights situation in Kosovo and the lack of effective mechanisms for accountability. Further, on 17 March 2004, there was a major outbreak of violence in Kosovo resulting in 19 deaths, nearly 1000 people being injured, and nearly 2000 people displaced... UNMIK had failed to contain the violence and had maintained order with considerable difficulty.”¹⁵⁷ With these backgrounds, the Venice Commission suggested the establishment of “an independent Advisory Panel which would be competent to examine any complaint lodged by any person claiming that his fundamental rights and freedoms have been breached by any laws, regulations, decisions, acts and failures to act emanating from UNMIK” as a short-term solution in 2004.¹⁵⁸

Although the Venice Commission viewed that the independent Advisory Panel could coexist with the Ombudsperson,¹⁵⁹ the UNMIK “replaced the international Ombudsperson with a national ombudsperson appointed by the Kosovo Assembly, who had jurisdiction only over the institutions of Kosovo, and not over UNMIK for some reasons in February 2006.”¹⁶⁰ Then, the Human Right Advisory Panel (HRAP) was established in March 2006 as ‘a provisional body during the term of the mandate’ of the UNMIK for the purpose of examining ‘alleged violations of human rights by UNMIK.’¹⁶¹ The HRAP was not established for the only purpose of settling the Kosovo lead poisoning case. The HRAP has received and reviewed more than 500 complaints¹⁶² and the Kosovo lead poisoning case is only one of them.

As I described in Chapter 5.3, the HRAP refused to accept the claim from the lead poisoning victims in 2010 because it viewed that substantive complaints fell within the scope of the UN Third Party Claim Process.¹⁶³ But, after the non-receivable declaration on the claim from the lead poisoning victims by the UN claim review board on 25 July 2011,¹⁶⁴ the HRAP decided

¹⁵⁷ Supra note 153, Chatham House, at page 4

¹⁵⁸ European Commission for Democracy through Law (Venice Commission), ‘Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms’, 11 October 2004, Opinion no. 280/2004, at para 112 and 115, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2004\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)033-e)>

¹⁵⁹ Ibid., at para 115

¹⁶⁰ Supra note 153, Chatham House, at page 5

¹⁶¹ Regulation no. 2006/12 on the establishment of the human rights advisory panel, 23 March 2006, UN Doc UNMIK/REG/2006/12, at preamble, <http://www.unmikonline.org/hrap/Documents%20HRAP/Regulations%20Eng/RE2006_12.pdf>

¹⁶² Supra note 139, Statement on HRAP’s recommendations (2017)

¹⁶³ Supra note 99, N.M. and Others v. UNMIK (2010), at para 40

¹⁶⁴ Supra note 88, N.M. and Others v. UNMIK (2016), at page 2, para 16

to re-examine the claim and declared it acceptable on 10 June 2012.¹⁶⁵

On 26 February 2016, the Human Rights Advisory Panel recommended that UNMIK 1) “publicly acknowledge its failure to comply with applicable human rights standards in response to the adverse health condition caused by lead contamination in the IDP and the consequent harms suffered by the complainants, and make a public apology” and 2) “take appropriate steps towards payment of adequate compensation to the complainants” not only for material damage and but also for moral damage.¹⁶⁶

As for compensation for moral damage which the Human Rights Advisory Panel recommended, it seems that a conflict between its decision and current policy of the UN would be inevitable because the General Assembly resolution on third-party liability was adopted about twenty years ago and one of its decision was that “no compensation shall be payable by the United Nations for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages.”¹⁶⁷ It is interesting to observe that the moral damage could be a compensation object in the HRAP whereas it could not in the UN third-party claim process. I think the conflict is happening due to the difference between public and private law system. From the point of view of injured parties, it seems more advantageous for them to use the human rights body system even though there is usually no option for them to choose.

But, currently, the UN did not acknowledge its responsibility and did not make compensation for material damage setting aside compensation for moral damage.¹⁶⁸ According to the regulation document of establishing the Human Right Advisory Panel, the recommendation of the HRAP itself does not have legally binding character.¹⁶⁹ So the Secretary-General could disregard almost all of the recommendations by the HRAP when he announced ‘A Trust Fund’ plan.¹⁷⁰

Why could the HRAP judge the actions of the UNMIK unlike the domestic court? I think there are three reasons. Firstly, the Human Right Advisory Panel is the UN’s internal body. It

¹⁶⁵ Ibid., at page 3, para 24

¹⁶⁶ Supra note 88, N.M. and Others v. UNMIK (2016), at pages 77-78, Paras a-d

¹⁶⁷ Third-party liability: temporal and financial limitations, GA Resolution, 17 July 1998, UN Doc A/RWS/52/247, at para 9 (b), <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/52/247>

¹⁶⁸ Supra note 139, Statement on HRAP’s recommendations (2017)

¹⁶⁹ Supra note 161, UNMIK Regulation No. 2006/12, at para 1.3.

¹⁷⁰ Supra note 139, Statement on HRAP’s recommendations (2017)

is a subsidiary body of the UN under the Special Representative of the Secretary-General.¹⁷¹ So it did not give an impression that the UN was judged by a state or a specific regional institution. Secondly, the UN allowed this special body to judge whether the actions of the UNMIK are in accordance with human rights law.¹⁷² Actually, its mandate was “examining alleged violations of human rights by UNMIK.”¹⁷³ Thirdly, it could not make any legally binding decision. It only could submit finding and recommendation to Special Representative of Secretary-General. Of course, its recommendation was of advisory nature.¹⁷⁴

Then, could we regard the HRAP as an appropriate alternative to Section 29? I think that the HRAP is an appropriate alternative to Section 29 because it gave the victims a forum to be heard and declared that the sub-organ of the UN violates the human rights laws. Although its recommendation is of an advisory character, it could put pressure on the UN to implement its recommendation. For example, as I introduced in Chapter 6.4, on 11 July 2018, Baskut Tuncak, Special Rapporteur on ‘the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes,’ advised the Secretary-General to follow the recommendation of the HRAP and required the response of the Secretary-General after the announcement of disappointing ‘Trust Fund’ plan by the UN. He also added that he would make public his letter and the response of the Secretary-General.¹⁷⁵ Also, I think that this issue could be continuously discussed in the UN Human Rights Council sessions until the UN follows the recommendation of the HRAP properly.

¹⁷¹ Supra note 161, UNMIK Regulation no. 2006/12, at preamble and para 1.3

¹⁷² Ibid., at para 1.2

¹⁷³ Ibid., at preamble

¹⁷⁴ Ibid., at para 1.3

¹⁷⁵ Supra note 149, Letter from Baskut Tuncak

Chapter 7. Contemplating on Section 29 of the CPIUN

So far, we have gone through many things. We have briefly looked into the convention which stipulates the privileges and immunities of the United Nations. Then, we have handled the relationship between the right to enjoy immunity and obligation to provide an alternative remedy. Also, we have followed the trace of previous modes of implementing Section 29 and alternative modes to the Section 29 by the UN. Also, we looked into the problem of an excessive interpretation on private law character claims by the UN. In this chapter, I will contemplate on several issues related to Section 29 based on previous contents.

7.1. Problems of the current mode of implementing Section 29

In order to implement Section 29 of the CPIUN, the UN has included a provision for establishing Standing Claims Commission in its Status-Of-Force Agreement with the counterpart governments in case of dispatching peacekeeping force in a state. The Standing Claim Commission, however, was never established until now. In practice, the local claim review boards were established in place of the role of the Standing Claim Commission and dealt with claims of private law characters.¹⁷⁶

7.1.1. A lack of Impartiality and transparency

The critical problem of the local claim review board is that it consists of only UN staff members such as Legal Advisor and Administrative Officer.¹⁷⁷ It might be efficient and expeditious, but there is criticism that UN itself judges in its own case.¹⁷⁸ For example, the Ombudsperson Institution in Kosovo criticized the system of the claim review board of the UNMIK by stating it “provides no opportunity for individuals to be heard or represented by legal counsel in their proceedings and all decisions are taken by a panel of UNMIK staff members.”¹⁷⁹

¹⁷⁶ Supra note 5, Letter from Pedro Medrano (2014), at page 26, footnote 8

¹⁷⁷ Supra note 3, Report on Administrative aspects of PKO (1996), at page 13

¹⁷⁸ Supra note 70, Report on Administrative aspects of PKO (1997), at para 10

¹⁷⁹ Ombudsperson Institution in Kosovo, Third Annual Report (2002-2003), 10 July 2003, at page 4

Also, there is a transparency problem. The local claim review board did not disclose its decision or publish its own review reports such as an annual report. This lack of transparency mechanism in local claim review board is easily likely to be led to the negligence of duty. For example, the Ombudsperson stated that “it remains impossible to obtain information from UNMIK about the status of pending claims or any statistical information about the number or type of claims resolved. It appears that even claims regarding which UNMIK has been found liable remain pending indefinitely, as the UN has apparently allocated no portion of its budget for the payment of such claims.”¹⁸⁰

According to Section 29, The UN has a legal obligation to ‘make provisions for appropriate modes of settlement.’ Could we regard the local claim review board as an appropriate mode of settlement? Given its insufficient impartiality and transparency aspects of the review board, I do not think that it is an ‘appropriate’ mode of settlement. It seems actually a misuse of power by the UN for the sake of effectiveness and against the intention of the drafters of the General Convention.

7.1.2. Too narrow interpretation on private law character claims

From 2011, the UN started to shield itself with the new barrier. The UN rejected the claims of Roma people for seeking compensation for lead poisoning damages in 2011 by stating that the claims “amounted to a review of the performance of UNMIK’s mandate.”¹⁸¹ In 2013, the UN utilized the new barrier again. The UN declared claims from the Haitian cholera victims as a non-receivable one by stating “these claims would necessarily include a review of political and policy matters.”¹⁸²

Alston, the Special Rapporteur on extreme poverty and human rights, criticized the UN’s ‘non-receivable’ argument in Haiti case as follows;

First, the claims appear to have all of the characteristics of a private law tort claim...
Second, the duties owed by the United Nations are directly analogous to those owed by a company or private property owner to ensure adequate waste management and to take

<http://www.ombudspersonkosovo.org/repository/docs/E6030630a_903570.pdf>

¹⁸⁰ Supra note 179, Ombudsperson Third Annual Report, at page 5

¹⁸¹ Supra note 5, Letter from Pedro Medrano (2014), at para 100

¹⁸² Supra note 98, Letter from Patricia O’Brien (2013), at page 2

adequate precautions to prevent spreading diseases... Third, the contention that receipt of the claims would “necessarily involve a review of political and policy matters” is self-serving and unjustified. The claims are far from being “political” in the sense defined by the Secretary-General in 1995 as those targeting actions or decisions of political organs, nor are they rambling denunciations.¹⁸³

The representatives for Haitian cholera victims requested mediation or a meeting for challenging the interpretation of the UN after receiving a non-receivable reply from the UN Legal Council on 5 July 2013.¹⁸⁴ But the head of UN legal office replied that there is no legal basis for the claimants to request mediation or a meeting as long as the claims were declared as no-receivable matters.

Similarly, in relation to your request for the engagement of a mediator, there is no basis for such engagement in connection with claims that are not receivable. . . As these claims are not receivable, I do not consider it necessary to meet and further discuss this matter.¹⁸⁵

Under the current legal systems of the MINUSTAH Status-Of-Force Agreement and the General Convention, there is no legal way for claimants to argue the validity of the UN’s non-receivable decision directly. This is absurd because the non-receivable decision was made by the UN itself¹⁸⁶ without an involvement of independent members.

In that case, the claimants should depend upon their government. There are two ways for the government to argue the validity of the UN’s interpretation. A State Party to a SOFA could “seek to resolve disputes on the interpretation or application of the SOFA through settlement provision provided for in the SOFA.”¹⁸⁷ Or the government could “seek an advisory opinion from the ICJ under Section 30 of the General Convention.”¹⁸⁸

¹⁸³ Supra note 94, Alston, at paras 34-36

¹⁸⁴ Ibid., at para 29

¹⁸⁵ Supra note 98, Letter from Patricia O’Brien (2013), at page 1

¹⁸⁶ Supra note 94, Alston, at paras 34-36

¹⁸⁷ Supra note 5, Letter from Pedro Medrano (2014), at para 94

¹⁸⁸ B. Rashkow, ‘Immunity of the United Nations: practice and challenges’, in Blokker and Schrijver (eds.)

In September 2013, The Prime Minister of Haiti argued that the UN had a moral responsibility and proposed the establishment of a joint commission in General Assembly.

While we continue to believe that the United Nations has some moral responsibility with regard to the outbreak of the epidemic, it is nonetheless true that the Organization has already supported some of the Government's efforts to combat the disease. However, those efforts are far from enough. We would therefore like to propose the establishment of a joint commission, including members of the Haitian Government and representatives of the United Nations, to consider ways and means to definitively eradicate the disease in Haiti.¹⁸⁹

But a joint commission which the Prime Minister of Haiti proposed does not seem to imply a Standing Claim Commission. Although the High-Level Committee was established by the Prime Minister of Haiti and the Secretary-General of the UN in May 2014, this Committee's main focus is to seek a solution to eliminate the cholera disease in Haiti in general ways, not to find a legal solution for the cholera victims.¹⁹⁰

The Haitian Government did not choose legal options for Haitian cholera victims. It seems to be impossible for a State, which desperately needs the assistance of the United Nations, to utilize Section 30 of the General Convention or article 54 of the Model SOFA.

So a new barrier, which was newly invented by the UN legal office in 2011, made a big loophole in Section 29 of the General Convention. It deprived victims of not only all of the legal options, but also hope.

7.2. Problems of current alternative modes to Section 29

It appears that recently the UN devised a mechanism of establishing Trust Fund with an expression of regret as a new alternative way to Section 29 of the CPIUN. Maybe the UN did

Immunity of International Organizations (Brill, 2015), at page 87

¹⁸⁹ Statement of Lamothe, Haiti Prime Minister, 14th plenary meeting of General Assembly Sixty-eighth session, 26 September 2013, UN Doc A/68/PV.14, at page 5, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/486/68/PDF/N1348668.pdf?OpenElement>>

¹⁹⁰ Note on First meeting of the High-Level Committee for the Elimination of Cholera in Haiti, 27 May 2014, at page 1, <http://static.ow.ly/docs/Information%20Note%20-ENG-27%20May%20_2cN9.pdf>

it to appease public pressure. One of the biggest problems of this mechanism is the UN's non-acknowledgment of responsibility for the cases. I interpreted that this non-acknowledgment led to the establishment of voluntary character Trust Fund which only depends on the contributions from the member states of the UN and other organizations.

One of the crucial requirements of the claimant is monetary compensation. Although Cholera has taken away 9,603 lives and infected 812,317 people in Haiti from October 2010 to July 2018,¹⁹¹ the UN is currently considering giving indemnities only to the households of those individuals who had died from cholera. But even that is not easy. As of July 2018, only 15.9 million US dollars¹⁹² were contributed to "A New Approach" Funds and it only constitutes about four percentages of the total target figures. To make matters worse, it appears that there is no preparation of establishing a separate fund for indemnities to victims due to insufficient contributions from member states.¹⁹³ According to the initial plan of "A New Approach," the UN would not commence 'consultations process with victims, their families and communities' which is preliminary work for giving indemnities to victims 'without an assurance of adequate funding for Track 2.'¹⁹⁴

In the case of Kosovo lead poisoning, the UN did not acknowledge its responsibility for the victims. Like 'A New Approach' in Haiti case, this non-acknowledgment led to an establishment of a voluntary character trust fund. But 'A Trust Fund' project does not have any compensation plan for the victims unlike 'A New Approach.' Trust Fund money would only be devoted to 'community based assistance project.'¹⁹⁵

Voluntary character trust fund implies that the UN takes no obligation for an accomplishment of the projects. Even if the aiming amount of contribution from member states is not achieved, the UN could excuse its non-achievement by simply stating that we did our best to collect money, but member states did not contribute enough money to the fund. The UN evaded the obligation to accomplish the project by delegating it to the international communities such as member states of the UN and other organizations. However, states also have no obligation because a contribution to a trust fund is of a voluntary character. There is a serious lack of accountability in this trust fund system.

¹⁹¹ Supra note 95, Pan American Health Organization data

¹⁹² Supra note 135, Time2deliver homepage

¹⁹³ Supra note 134, Deputy SG's remarks (2017)

¹⁹⁴ Supra note 133, A New Approach (2017), at para 59

¹⁹⁵ Supra note 139, Statement on HRAP's recommendations (2017)

7.3. Implication on UN's proposals of the temporary solutions

In Haiti cholera and Kosovo lead poisoning cases, the UN might not have suggested 'A New Approach' and 'A Trust Fund'. On only the legal aspect, the UN did not need to suggest such alternative plans. Once the UN declares the claim unacceptable, the game comes to be over under the current legal system because there is no legal way for the claimant to complain the validity of the 'non-receivability' interpretation by the UN. Although the claimant could lodge a claim against the UN before the domestic court, the UN usually did not worry about it because the legal office of the UN already knew that the claim would be dismissed on the grounds that the UN enjoys absolute immunity. But, in the end, the UN suggested alternative solutions for some reasons although they seemed to be insufficient and inappropriate as I stated in the previous sub-chapter. What does it imply? I think it is related to Chapter 3.5 contents. Let me introduce excerpts from the ILO preparatory document and opinion of the ICJ in *Cumaraswamy* case again.

In general such immunity confers only exemption from legal process and not exemption from the obligation to obey the law.¹⁹⁶

the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations...¹⁹⁷

Maybe does the UN's suggestion of temporary solutions demonstrate the argument of the ILO preparatory committee or the ICJ opinion? Maybe does it show The UN could not evade the responsibility to compensate to victims although it could avoid the domestic court jurisdiction? Does it mean that even the UN could not evade application of a substantial rule whereas it could avoid application of a procedural rule?

Of course, the UN did not acknowledge its responsibility in those plans. The UN did quite well at choosing the words. When announcing 'A New Approach' plan, the UN used the terms, 'moral responsibility' intentionally. When presenting 'A Trust Fund' plan, the UN stated an establishment of a fund was 'an exceptional measure' considering the 'unique

¹⁹⁶ Supra note 62, ILO Official Bulletin (1945)

¹⁹⁷ Supra note 60, *Cumaraswamy* (1999)

circumstances' in Kosovo.

On the aspect of a text-based interpretation, it appears both announcements could not be interpreted that the UN acknowledged responsibility considering the terms which the UN chose. But the suggesting the compensation plans for communities with expressing regret itself might mean that the UN acknowledges the responsibility. That is my interpretation. That is why I regarded both plans as alternatives to Section 29 although these alternative measures seem to be ineffective and unappropriated.

7.4. Contemplating on establishing a special body

Someone might say that it would be better to establish a new independent tribunal or local human rights body to resolve the current problems. My general idea is that the local-based body would be more appropriate than the central tribunal system on based on the accessibility if the UN decides to establish a new body or tribunal. This is because the peace-keeping operations were exercised all over the world. Let me give my opinions on it in a detailed way.

7.4.1. A new independent tribunal

Schrijver suggested 'setting up a new, completely independent tribunal based on the experience with the claims commissions' as one of 'alternative legal procedures for settling claims against the United Nations.'¹⁹⁸ He thought that "this new body could be set up in the same manner as the recently-established United Nations Appeals Tribunal for personnel affairs."¹⁹⁹ But the Harpignies pointed out the Secretary-General have no authority to establish such tribunal. He suggested that it would be appropriate for concerning member states to propose an agenda of establishing independent Tribunal for third-party claims in the General Assembly and support the adoption of the agenda behind the scene if the creating such Tribunal seemed to be really necessary.²⁰⁰

¹⁹⁸ N. Schrijver, 'Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nation', *International Organizations Law Review*, Vol. 10, Issue 2 (2014), at page 598, <<https://doi.org/10.1163/15723747-01002017>>

¹⁹⁹ *Ibid.*, at page 599

²⁰⁰ R.H. Harpignies, 'Settlement of Dispute of a Private Law Character to which the United Nations is a Party – a Case in Point: The Arbitral Award of 24 September 1969 In Re Starways Ltd v. The United Nations', *Revue Belge de Droit International* 7 (1971), at page 456

These days some member states of the UN, especially Nordic countries, raised a concern about current dispute settlement mechanism of the UN.

In recent years, the issue of settlement of disputes of a private character to which an international organization was a party had gained increasing importance. In the case of dispute settlement procedures in United Nations peacekeeping operations, in particular, the current system was not entirely adequate. Although the Nordic countries were not in favour of changing the general rules of immunity before domestic courts, further work could be done to ensure that private individuals who suffered harm as a consequence of peacekeeping operations were compensated.²⁰¹

But their requirement did not amount to the establishment of a new Tribunal. It seems that what they want to do is an improvement of current mechanism in order that legitimate claims of private parties would not be dismissed within the scope of not harming ‘the effective and independent functioning’ of the UN peacekeeping mission.

The Nordic countries were well aware that the risks inherent in situations of conflict and instability raised important issues, and that the effective and independent functioning of United Nations peacekeeping operations must not be jeopardized. However, consideration should be given to whether the current system and procedures were adequate for handling legitimate claims from private individuals.²⁰²

Currently, it appears there is no active impetus or movement for member states of the UN to require the establishment of an independent Tribunal for private law claims. Although the establishment of independent Tribunal seems to be the most appropriate solution to close a current loophole in Section 29 on the aspects of impartiality, there seems to be little chance of achieving it in the near future given the reluctant tendency of the UN to take responsibility in recent third-party claim cases and the lukewarm response of member states of the UN to that matter.

²⁰¹ Statement of the Representative of Denmark on Agenda item 85: Responsibility of international organizations, Summary record of the 18th meeting of the Sixth Committee, 13 January 2015, UN Doc A/C.6/69/SR.18, at para 50, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.6/69/SR.18>

²⁰² Ibid., at para 51

Also, there might be an accessibility problem in regard of an establishment of a new independent tribunal like the UN Appeals Tribunal. The UN peace-keeping forces were dispatched to all over the world. Should the local claimant people go to the UN Office at Nairobi or at Geneva in order for them to participate in public hearing procedures? Or some of the judges of the independent tribunal should visit each country to proceed a public hearing? I do not think that creating a new independent tribunal for third-party claims is not a good idea. I think a local-based institution should be established in order for the local people to be able to access it and participate in a public hearing process easily.

7.4.2. The Local Human Rights Advisory Panel

Although the Human Rights Advisory Panel (HRAP) was established to examine the alleged violations of human rights by the UN Interim Administration in Kosovo (UNMIK), Advisory Panel gives us a lot of insight. Above all, it could cover even the claim which was rejected by the UN as a non-receivable one because of its outside scope of private law characters. In case of lead poisoning, the HRAP could close a loophole in Section 29 of the CPIUN by giving lead poisoning victims a forum to be heard and declaring that the UNMIK violated human rights of the victims.

On the other hand, there is also a weak point for the HRAP. Its recommendation is not legally binding. So the UN could disregard many points of recommendations of the HRAP when the UN announced a Trust Fund plan in 2017.

Despite of this weak point, I have a view that the HRAP could close a loophole in Section 29. The HRAP is a local-based quasi-judicial body of the UN, so local people could get access to it easily. What if the HRAP was established in Haiti as a strategy for improving accountability of the MINUSTAH? If so, the Haiti Human Right Advisory Panel might have dealt with the cholera victims claims which were rejected by the local claim review board and might have recommended that the UN should compensate them on the human rights law basis. I think it would be advisable to establish the local Human Rights Advisory Panel in host state whenever the UN peace-keeping force was dispatched in the long term. The establishment of the local HRAP would not only close a loophole in Section 29, but also improve the accountability of the UN peace-keeping missions.

7.5. Suggestion

In this sub-chapter, I will suggest improvements for the current practice to be an appropriate mode of settlement. Drafters of the CPIUN did not designate a specific type of modes in order for the UN itself to decide them afterwards.²⁰³ So it would be untrue to say that there are typical requirements for an appropriate mode of settlement. But it is difficult to say that current practice such as a 'local claim review board' could be regarded as an appropriate mode.

7.5.1. Enhancing impartiality and transparency

The UN should not judge its own cases. Currently all members of the 'local claim review board' consist of only the UN staff members. Although it might be efficient, it necessarily brings about an impartiality problem. In regard of the composition of members, it would be recommendable to follow the standing claim commission rule. In the case of the composition of members of standing claim commission, two of the members would be appointed respectively by the Secretary-General and the Government and last member, a chairman of the commission, would be selected by both sides among three members.²⁰⁴

Also, the local claim review board should make public internal rules, procedures for claimant and results of its decisions as many as possible. From the UN's standpoint of view, it might be reluctant to reveal all the cases in which the UN usually caused harmed civilians because it could cause negative public opinions on peace-keeping operations in host State. But it should make efforts to improve its transparency as much as possible and at least make its annual review reports for a public.

7.5.2. A new barrier should be abolished

The UN has invented a new barrier to accessing to Section 29. Even though the victims were injured, got an illness or became to death by the actions of peace-keeping operation which

²⁰³ Article VIII, Section 29, Convention on the Privileges and Immunities of the United Nations, 1946

²⁰⁴ Supra note 67, Model SOFA (1990), at page 13, para 51

could be normally seen as negligence or tort, the UN started to reject some of the claims with the excuses that the claim involved a review of the performance or political matters from the early 2010s. Once the UN declared that the claim was non-receivable, there were actually no other ways for the victims to seek compensation for their illness and injuries because the UN enjoyed immunity. It created a big loophole in the General Convention system. It took away victims' right to a remedy and it results in a current situation in which sufferers do not get compensation until now.

A new barrier brought down the balance between Section 2 and Section 29 of the CPIUN. Also, it seems that a new barrier does not correspond to the intention of the drafter of CPIUN. Until the emergence of a new barrier, injured parties could get access to at least an insufficient remedy through the local claim review board. The legitimate claims of private parties should not be dismissed.²⁰⁵ A new barrier should be abolished.

7.5.3. The UN needs to establish a special body in order to close a loophole in Section 29 if it continues to maintain strict accessibility test

If the UN continues to maintain current admissibility interpretation position, it should establish special body such as Human Right Advisory Panel to give a remedy to those people whose claims were declared as non-receivable one because of involving a review of a performance by the UN. If the UN does not establish the special body, the sufferers or families of individuals who died of by the UN's negligent acts became helpless. If the UN rejected the claim on the ground that it is not of private law character claim, the UN should give the claimants to an alternative forum such as the 'local Human Right Advisory Panel' for their claims to be heard on the human rights basis.

7.5.4. The UN should acknowledge its responsibility in case of choosing an alternative mode to Section 29

When the UN announced 'A New Approach' and 'Trust Fund' plans, it did not acknowledge its responsibility. No responsibility naturally led to establishing a voluntary character trust fund mechanism which is dependent upon the voluntary contribution from the member states

²⁰⁵ Supra note 201, Statement of Denmark (2015), at para 51

or other organizations. As of now, families of those individuals who died of cholera did not receive indemnities because of no assurance of adequate funding. Besides, cholera and lead poisoning sufferers were totally excluded from getting indemnities even in the new plans of the UN. Even if the fund did not collect enough amount of money, the UN has no responsibility because of a voluntary character of the funding mechanism.

If the UN chose an option to take responsibility, it would not lead to establishing 'voluntary character' funds and situations would be different. Without guaranteeing of adequate funding, the most of recovering plans could not start off. Even if it is already too late for the sufferers to get benefits from the recovering projects, the urgent projects for victims could not commence until now because of insufficient funding resource.

Chapter 8. Conclusion

The UN Charter and the General Convention have a provision which grants the United Nations immunity from domestic jurisdiction. But there are also big differences between them. One of them is the UN Charter gives the UN ‘functional immunity’ whereas the General Convention grants the UN ‘absolute immunity.’ But, it seems the drafters of the General Convention already anticipated that safeguard against this powerful immunity was needed for the protection of private third-party claimants. Thus, the General Convention came to include a provision which obliges the UN to make appropriate settlement mechanisms for disputes of a private law character in its own manner whereas the UN Charter did not.

And then, what is the relationship between the right to enjoy absolute immunity and the obligation to provide an alternative remedy? In other words, even if the UN does not implement the Section 29 of the General Convention, the immunity which the UN has enjoyed in accordance with Section 2 of the General Convention could be maintained? In *Wait and Kennedy* case, the Court interpreted that availability of alternative remedies to claimants in the international organization is a ‘material factor’ in determining to grant immunity to it.²⁰⁶ However, it appears that the logic does not apply to the United Nations. In *Georges* case, the US District Court interpreted that the UN could still enjoy absolute immunity from domestic court regardless of its implementation to Section 29 of the General Convention.²⁰⁷ But an obligation for compensation is not affected by immunity from domestic court. The ICJ interpreted that obligation to compensate is different from the immunity from the domestic jurisdiction. Thus the United Nations’ obligation to implement Section 29 of the General Convention still remains regardless of enjoying immunity from all forms of domestic jurisdiction.²⁰⁸

From the early 2010s, the UN started to reject some of the claims with the excuses that the claim involved a review of the performance or political matters, even though the victims were injured, got an illness or became to death by the actions of peace-keeping operation which could be normally seen as negligence or tort. In other words, the UN added a new barrier to

²⁰⁶ Supra note 41, *Waite and Kennedy* (1999)

²⁰⁷ Supra note 48, *Georges* (2015), at page 5

²⁰⁸ Supra note 60, *Cumaraswamy* (1999)

Section 29 of the CPIUN. In that case, there is no legal way for claimants to argue the validity of the UN's non-receivable decision directly. This is absurd because the non-receivable decision was made by the UN itself²⁰⁹ without an involvement of independent members. In that case, the claimants have no choice but to depend upon their government. But it seems to be impossible for a State, which desperately needs the assistance of the United Nations, to utilize Section 30 of the CPIUN or article 54 of the Model SOFA. Also, there are actually no further ways for the victims to seek compensation for their illness and injuries because the UN enjoys immunity. It created a big loophole in the General Convention system. A new barrier brought down the balance between Section 2 and Section 29 of the CPIUN. It deprived victims of not only all of the legal options, but also hope. Was non-receivable interpretation the best choice for the UN at that time?

For some reasons such as public pressures probably, the UN started to propose temporary solutions. It appears that recently the UN devised an establishment of Trust Fund with an expression of regret as a new alternative way to Section 29 of the CPIUN. In August 2016, the Secretary-General announced so-called 'A New Approach to cholera in Haiti.'²¹⁰ In May 2017, the Secretary-General made an announcement to establish a Trust Fund for assisting community based projects for the Roma communities.²¹¹ Could we see these so-called new plans by the UN as an appropriate alternative way to Section 29 of the General Convention?

It might be too early to evaluate 'A New Approach' or 'A Trust Fund' at this moment in time. But, currently, it appears that 'A New Approach' could not become an appropriate alternative to Section 29 given its non-acknowledgment of responsibility and no guarantee of giving indemnity to victims due to its voluntary character contribution system. As for 'A Trust fund', it seems evident that it could not be an appropriate alternative to Section 29 given the lack of acknowledging responsibility and no individual compensation plan for lead poisoning sufferers. I think the UN evaded the obligation to accomplish the project by delegating it to the international communities such as member states of the UN and other organizations. However, states also have no obligation because a contribution to a trust fund is of a voluntary character. There is a serious lack of accountability in this trust funding system.

In Haiti cholera and Kosovo lead poisoning cases, the UN might not have suggested 'A New

²⁰⁹ Supra note 94, Alston, at paras 34-36

²¹⁰ Supra note 128, A New Approach (2016), at page 1

²¹¹ Supra note 139, Statement on HRAP's recommendations (2017)

Approach’ and ‘A New Fund’. On the legal aspect, the UN did not need to suggest such alternative plans. Once the UN declares the claim unacceptable, the game comes to be over under the current legal system. But the UN suggested alternative solutions for the victims although they seemed to be insufficient and inappropriate. What does it imply? Maybe does it show the UN could not evade the responsibility to compensate to victims although it could avoid the domestic court jurisdiction? On the aspect of a text-based interpretation, both announcements could not be interpreted that the UN acknowledged responsibility considering the terms which the UN chose. But the suggesting the recovery plans for communities with expressing regret itself might mean that the UN acknowledges the responsibility. That is why I regarded both plans as alternatives to Section 29 although the alternative measures are ineffective and unappropriated.

Are there any possible ways to close a loophole in Section 29? The legitimate claims of private parties should not be dismissed.²¹² Thus, I think a new barrier should be abolished. But if the UN continues to maintain a strict admissibility interpretation position on private law character claims, the UN should give the claimants to an alternative forum for their claims to be heard on the human rights basis. I have a view that the establishment of the local HRAP could close a loophole in Section 29. For example, in case of lead poisoning, the HRAP could close a loophole in the General Convention by giving lead poisoning victims a forum to be heard and declaring that the UNMIK violated human rights of the victims. I think it would be advisable to establish the local Human Rights Advisory Panel in host state whenever the UN peace-keeping force was dispatched in the long term. The establishment of the local HRAP would not only close a loophole in Section 29, but also improve the accountability of the UN peace-keeping missions.

Haiti Cholera and lead poisoning cases gave us a lot of questions to answer. I will finish this paper by introducing the remark of the Secretary-General in 1965 again. Can the current Secretary-General of the United Nations say the same remark in front of cholera sufferers and lead poisoning victims? The UN should make efforts to close a current loophole in the General Convention system which seems to be contrary to the intention of the drafters. The UN could escape from domestic jurisdiction, but it could not evade the substantial responsibility to compensate in regard of legitimate claims against the United Nations.

²¹² Supra note 201, Statement of Denmark (2015), at para 51

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.²¹³

²¹³ *Supra* note 1, Letter from SG (1965)

Abstract

This article draws on the accountability of the United Nations in view of Section 29 of the Convention on Privileges and Immunities of the UN ('CPIUN') and its current problems.

In comparison to the UN Charter, which provides for 'functional immunity', the CPIUN provides for an 'absolute immunity' in Section 2. In order to counter-balance the extended immunity granted in Section 2, Section 29 of the CPIUN imposes an obligation to provide for "appropriate modes of settlement of [...] disputes of a private law character to which the United Nations is a party". However, one amongst many examples for the malfunctioning of this mechanism is the UN Stabilization Mission in Haiti. Despite the requirement to establish "a standing claims commission" in the Status of Forces Agreement, such has not been set up until now.

Furthermore, the access to legal remedy has been denied due to the rejection of the admission of claims. This has been occurring since the early 2010s by invoking seemingly arbitrary reasons of "the performance or political matters". It leaves the injured parties with no means of legal relief to seek their damage claims. In an effort to cope with the negative public pressures, the UN has established a Trust Fund out of its – questionable – "moral responsibility". However, no more than 4 % of its aimed funds have been raised as of July 2018.

The above raises the question whether the balance between Section 2 and Section 29 as aimed by the drafters of the CIPUN has actually been struck. The UN's right to enjoy absolute immunity cannot be without limits and its obligation to give an appropriate remedy to injured persons with legitimate private claims should be properly abided by.

Abstrakt

Folgende Arbeit behandelt die Verantwortlichkeit der Vereinten Nationen in Bezug auf Abschnitt 29 der Convention on Privileges and Immunities of the UN (“CPIUN”) und einhergehende gegenwärtigen Problematiken.

Im Vergleich zu der Charta der Vereinten Nationen (“UN Charta”), welche den Vereinten Nationen „funktionale Immunität“ gewährt, verleiht Abschnitt 2 der CPIUN „absolute Immunität“. Um jene erweiterte Immunität der CPIUN auszugleichen verlangt Abschnitt 29 der CPIUN die Einrichtung „geeigneter Mechanismen zur Streitbeilegung von [...] Rechtsstreitigkeiten mit privatrechtlichem Charakter bei denen die Vereinten Nationen Partei sind“. Allerdings gibt es zahlreiche Beispiele für das Versagen solcher Mechanismen. Die im Zuge der Stabilisierungsmission der Vereinten Nationen in Haiti geforderte „Standing Claims Commission“ des Status of Forces Agreement wurde bis zum heutigen Tag nicht eingerichtet– nur um ein Beispiel zu nennen.

Darüber hinaus wurde seit den frühen 2010er Jahren die Einbringung von Klagen durch das Vorbringen von scheinbar willkürlichen Argumenten, wie zum Beispiel „the performance or political matters“, verwehrt. Aus diesen Gründen haben Geschädigte oftmals keine Möglichkeit auf rechtlchem Weg Schadenersatz zu erlangen.

Wachsender öffentlicher Druck veranlasste die Vereinten Nationen zur Gründung eines Treuhandfonds, als Alternative und angeblichen „moralischen Verantwortungsbewusstsein“. Jedoch ist die Effektivität dieser Alternative äußerst fraglich, da bisher nicht als 4 % der angestrebten Geldmittel aufgebracht wurden (Stand Juli 2018).

Aus diesen Gründen stellt sich die Frage, ob der Ausgleich, den Abschnitt 29 zu Abschnitt 2 der CPIUN hätte bringen sollen, tatsächlich gelungen ist. Das Recht auf absolute Immunität der Vereinten Nationen kann nicht grenzenlos sein. Darüber hinaus sollte der Verpflichtung angemessene Rechtsbehelfe für Individuen mit privatrechtlichen Ansprüchen zu ermöglichen ordnungsgemäß nachgegangen werden.

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