

The Liability of the UN during Peace Operations: Making a Case for Unveiling UN Immunity

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ABSTRACT

The immunities and privileges of the United Nations (UN), its officials and representatives and its specialized institutions during peace operations have always been considered as absolute and beyond responsibility no matter the level of its actions or omissions, which are in violation of international obligations. The law that however provides for the privileges and immunities of the UN, also provides for the possible scheme for the compensation of victims of UN action. However, common practice has it that there is a reliance totally on the said immunities and privileges at the detriment of the victim who has valid grounds to be compensated. As a result of this, impunity becomes an imminent danger which will affect the victim who genuinely would have to be compensated for the acts or omissions of the UN. The objective of this paper is to unveil UN immunity of the UN as provided by the law. The research method to be used in this paper will be the doctrinal research method with the use of qualitative research. The major findings are that the UN has successfully invoked and used its privileges and immunities to procure impunity for itself. One of the major recommendations is that from the provisions of the UN Charter, the General Convention of 1946, and the United Nations General Assembly (UNGA) Resolution on the Temporal and Financial Limitation of Third Party Liabilities should be analyzed to put in place a jurisdictional body to hear matters involving the UN and victims of UN peace operations in case the out of court compensation scheme has failed.



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INTRODUCTION

The UN has as key role, the maintenance of international peace and security. Apart from the pacific measures for the resolution of conflicts, it is permitted to make use of force. The use of

force is done through peace operations. The peace operations are either peacekeeping operations (Hammarskjöld, 1960),¹ or peace enforcement operations as provided for by *Art. 42* of the UN Charter. These peace operations can be carried out by the UN in person or through peace support operations whereby the UN authorizes another institution or State to carry out a peace operation on its behalf. The immunities in are immunities of jurisdiction and absolute immunities of execution. As such the UN may not be subject to legal action unless it expressly consents to that. Even if the UN consents to legal action, it has an absolute immunity of jurisdiction. Of course this has caused legal consequences, the most important being impunity of the UN during peace operations. These peace operations carry out a number of actions and or omissions that affect the lives of others in the negative. There have been a number of them. In order for these peace operations to function, the UN enjoys privileges and immunities necessary for the fulfillment of its purpose.

On the 21st of October 2010, cholera broke out in the Artibonite district of Haiti. In the initial 30 days the Haitian authorities recorded very nearly 2000 deaths from the sickness. According to studies on spread of contagious diseases, cholera was as a result of the infection of Nepalese UN peacekeepers from Nepal, (Freriches *et al*, 2012) who at that time, were on UN peace mission in Haiti under the UN Stabilization Mission in Haiti-MINUSTAH (United Nations Security Council-UNSC, 2004).² It was caused by sewage from the UN peacekeepers mission base which contaminated a major water supply (World Staff & Sneider, 2020). It was on these bases that the *George Delama case* saw the day against the UN. Instead of looking at the way in which this situation was going to be resolved, when it was taken to court, the UN instead got interested in invoking its immunity from jurisdiction.

On the 5th of December 1961, Mr. Manderlier was a Belgian who settled in the Democratic Republic of Congo. During the ONUC mission (Operations des Nations Unis en Côte d'Ivoire), his residence was damaged during fighting involving UN troops found there. In December 1962, his property was stolen and destroyed by UN forces and he was subject to physical violence by these forces. He lodged a first complaint in February 1962 against the UN for compensation of damages that he estimated at 336,710 Belgian francs (that is more than 8,000 Euros). After the second act, he lodged a complaint against the UN still through the Belgian Ministry of Foreign Affairs and sought compensation in damages to the tune of 3,799,675 Belgian francs (that's almost 100, 000 Euros).

In 1992, the United Nations Protection Force-UNPROFOR (UNSC, 1992) was tasked to establish and secure a safe haven in Srebrenica which was a refuge for the victims of the war in Bosnia Herzegovina. In 1995, the said safe haven was attacked by Bosnian Serb forces resulting in the death of between 8,000 and 10, 000 individuals (International Crimes Database, 2012).

¹ Usually called '*Chapter VI and Half*'. First used by the then UN Secretary-General, Hammarskjöld (Consulted on the 12th of September 2021). It actually connotes the use of force through peacekeeping. But it is not expressly provided for in the UN Charter.

² MINUSTAH mandate was to support the Transitional Government in ensuring peace, social cohesion and democracy through a fair electoral process.

Members of the Dutch battalion who were responsible for protecting the safe haven were outnumbered by the forces of general Mladic.

Abdi Hosh Askir owned a whole multipurpose complex of a million square meters in Mogadishu. The UN established its mission in Somalia in 1993 with the United Nations Operation in Somalia (UNOSOM) I. Claiming that the UN had wrongfully without seeking the rightful consent, occupied close to a quarter of the complex for eighteen months, he sought 190 million USD in damages, which he alleged was tantamount to the fair rental value of the compound as well as punitive damages of 750 million USD including interest. He therefore sued the then UNSG, Boutros Boutros Ghali, Joseph E. Connor and a host of other UN officials to seek reparation. Unfortunately his case was dismissed because in spite of the valid grounds of the plaintiff, the court upheld the immunity of jurisdiction of the defendants.

In April 1994, at the heart of the Rwandan genocide, the Belgian forces that were ordered to guard the Kigali school facility, the *École Technique Officielle*, which was a refuge for several Tutsis running away from Hutu genociders. The Belgian battalion, for no reason and without any formal orders from the Force Commander, decided to withdraw from the said school and the consequence was the massacre of over 2000 Tutsis there by the Hutus. Mukeshimana-Ngulinzira, one of the survivors of that tragic incident sued the Belgian government before the Brussels court of First Instance and then the Brussels Court of Appeal. The result was that the case was dismissed when the invoked its immunity.

These are the few among the many cases which have seen the UN being dragged to court by individuals who were negatively affected by UN action or omission. However, the UN just had to plead immunity without considering the compensatory part of those that actually suffered from its actions, with little or no intention to solve the problem of these victims. The problem addressed in this paper is therefore the effect the immunities of the UN peace operations have on the right of the victims of these peace operations to access justice and be compensated. This paper is geared at bringing a succinct analysis on the immunity of the UN and the possibility as provided by the legal instruments in force, that the UN actually can and should be held accountable for its actions without emitting the defense of an immunity.

The Principle of Absolute Immunity of the UN during Peace Operations

If a close look is taken when looking at UN immunities, both through legal instruments and case law, as well as doctrinal sources, it will be noticed that the protection accorded to the UN is an absolute one and this is done through the privileges and immunities which it enjoys. As a matter of fact, the Convention on the Privileges and Immunities of the United Nations 1946 still known as the General Convention, has been so cemented with immunities and privileges of the UN that it is almost impossible to contravene the latter.

Already in its *Art. 1 Section 1* of the General Convention, the UN has been endowed with legal personality and as such it has the legal right to contract, to obtain and to alienate from itself, movable and landed property and the right to launch legal action. Much intriguing is the fact that the UN can institute judicial proceedings but on the other hand it has an immunity from judicial proceedings. It is important to establish legal personality because without legal personality, it will

be impossible to establish responsibility of the UN since only a legal person can be held responsible, can sue and be sued (Harris, 2007). The UN has immunity of jurisdiction and absolute immunity of execution as per *Section 2* of the General Convention. During the peace operation, the UN still maintains this status. Therefore, such immunities and privileges are maintained. This is seen from the UNGA Resolution establishing the Model Status of Forces Agreement, (UNGA, 1990), precisely in its *Articles 24 to 31*.

The immunity of jurisdiction of the UN is absolute when it comes to national courts (Freedman, 2014). This has also been clearly established by case law such as *Brzac v. UN* (US Fed Court Southern District New York -SDNY, 2008) and *Bisson v. UN* (US Fed Court SDNY, 2008). Therefore national courts do not have the jurisdiction to hear matters involving the UN as defendant. However, there is a waiver of such immunity of legal pursuits by the UNSG. On the other hand, the absolute jurisdiction of other international organizations other than the UN from being tried in local jurisdictions is subject to the provision of an alternative dispute settlement procedure available to the claimant (Reinisch, 2008). Authors that have advanced this assertion have adopted the “*radical approach*”, probably because the courts accorded careful consideration in appraising the impact of human rights. This has also been evidenced in the case of *Siegler v. Western European Union* (International Law in Domestic Court-ILDC, 2004). The European Court of Human Rights has also made clear that it regards the EU as subjected to international human rights law. This was made clear in the cases of *Waite v. Kennedy* (ECtHR, 1999) and *Beerand Regan v. Germany* (ECtHR, 2001). The European Court of Human Rights (ECtHR) did consider that while the immunity of international organizations may pursue a legitimate aim, that will limit the right of the access to court and therefore access to justice, this should not be made absolute.

This is quite different from the UN which does not have the consideration for the human rights character of a claim. Irrespective of the claim including the claim of having an access to justice, the UN is still protected against it through the immunities accorded to it by the General Convention. As such, the UN enjoys total immunity from legal process pursuant to *Art. 2 Section 2* of the General Convention. This should, however, be read alongside the provision of *Article VIII Section 29* of the said Convention which gives the obligation to the UN to make necessary mechanisms for dispute resolution with respect to disputes resulting from a contractual relationship or other disputes with private law character to which the UN is a party and with respect to disputes concerning representatives and officials of the UN, whose rights of immunity has been waived by the UNSG. But this explicitly clear provision was interpreted differently by the United States Court South District New York (SDNY) in the case of *Bisson v. UN, World Food Program and ABC organization*, where the Court concluded that the immunity accorded to the UN was not subject to the provision a remedy (Miller, 2009). This actually shows the absolute nature of the immunity of jurisdiction of the UN. The only instance which the immunity of jurisdiction can be waived by the UN is if the UNSG expressly waives it.³ So if the UNSG has not waived it and no alternative mechanisms have been established by the UN, this is impunity, which violates the very percepts of the rule of law, an undesirable situation, which was unfortunately noticed in the case of *Stitching Mothers of Srebrenica v. Netherlands & UN* (Netherlands Supreme Court, 2012). Also, the UN is totally immune from execution. It benefits from absolute immunity of execution. In such a case

³ In the *Bisson case*, the Court noted that waiver “requires a clear and unambiguous manifestation of the intent to waive” (at 3).

therefore, even if there is a successful claim against the UN, one cannot actually forcefully execute a judgment against the UN. The only way is to resort to negotiation and alternative means of execution which are not forceful since all the resources of the UN mission and especially in peace operations are for the realization of the said mission.

The immunities and privileges of the UN have been put in place for a purpose, to permit the fulfillment of its purpose. However, this has affected the very right of access to justice which is a fundamental right owed to every human being who wishes to seek redress before the competent jurisdiction when his or her rights have been violated. As a matter of fact, *Art. 2(3)(a)* of the UN International Covenant on Civil and Political Rights 1966, provides that all signatories to the Covenant shall assume the duty to ensure that persons whose recognized rights and freedoms have been violated, shall benefit from an effective remedy irrespective of the official capacity of the nature of the violation. It further provides that for the persons who have suffered from the violations, the person claiming such a remedy has a right for such a claim to be determined by the competent judicial, administrative or legislative authorities.

From the case law that has been rendered so far on the litigations involving victims and the UN, this has not been respected and the UN has been seen violating its own covenant. This can be seen from the cases to be analyzed in the paragraphs below. Even when the matter has to be brought before a compensation commission as provided for by *Art. 29* of the general Convention, the UN will still plead immunity of jurisdiction (UN Department of Public Information, 2013). In the case of claims brought against MINUSTAH for contaminating the Haitian potable waters with cholera, the UN insisted that the claims submitted are inadmissible due to review of political and policy matters.

In *Delama Georges & Ors. v. the United Nations & Ors* (SDNY, 2015). The plaintiffs sued the defendants for damages and compensation following the bringing in, contamination and subsequent death of Haitians infected with Cholera. This was as a result of Nepalese UN peacekeepers who had come under the MINUSTAH mission in Haiti but were infected with cholera. When the case was brought before the US Federal Court, the defendants invoked *Section 2* of the General Convention and it was upheld by the said Federal Court. On appeal (USCA 2nd Circuit, 2016), the plaintiffs held that they decided to seize the courts because the UN had not provided for mechanisms of dispute settlement under *Section 29* of the General convention, even upon application for such to be established. But the US Court of Appeal held that the non-establishment of the provision of *Section 29* does not affect the immunity provided for in *Section 2* of the UN. The US Courts did not consider that there actually was damage caused. They courts did not even look at the allegations. They just ended at the level of immunities.

In the case of the *Mothers of Srebrenica v. Netherlands and UN*, when the collective of 10 women who lost their loved ones in Srebrenica decided to seize the Hague Court of first Instance and further the Court of Appeal and the Supreme Court, for lives that were lost because the Netherlands had surrendered to the Bosnian forces since they were outnumbered, the courts, including the Netherlands Supreme Court held that the Dutchbat acted under the authority of the UN since the mission was UNPROFOR, and that the UN had immunity of jurisdiction. This was without looking at the responsibility of the UN in this matter as initially in the UNSC, when the UNSG asked for 35,000 men (UNSG, 1993), the UNSC authorized just 7,500 (UNSC, 1993), a

number grossly insufficient when considering the task which was to establish a safe haven in a highly conflictuous area. The result of course was that the plaintiffs were never compensated for the acts of the UN.

This and many other cases such as *Mukeshimana-Ngulinzira and Others v Belgian State and Others*, (ILDC, 2010), *Hassan Nuhanovic v. Netherlands*, (Netherlands Supreme Court, 2013) *Askir v. UN*, *Boutros-Ghali & Others* (SDNY, 1996). The unfortunate consequence with all these cases and the many more not cited here against the UN is that the plaintiffs who usually became appellants did not get any compensation even in the face of violations by the UN through acts or omissions which it had committed during peace operations. The courts usually ended only at the level of upholding the immunity of the UN. And this has led to another problem, a problem which most international human rights instruments condemn including UN Human rights instruments, impunity.

The Exception: Possible Liability of the UN during Peace Operations

There are four main grounds that can possibly make the UN be liable to legal action as a result of its acts or omissions during peace operations. They are waiver of the UNSG, non-ratification of the General Convention by a State, reservations made on the articles granting immunities, and finally *jus cogens* acts.

Rules Governing International Treaties

Non ratification of the General Convention

Ratification is a fundamental procedure when it comes to the law of treaties. As a matter of fact, a treaty is not binding on a State which has not ratified it. The consent of the State is gotten through ratification. *Art. 14 of the Vienna Convention on the Law of Treaties, 1969* provides that the State expresses its consent to a treaty or convention only through the process of ratification. This means that in the case where the General Convention has not been ratified it will not bind the State, and therefore the State can actually carry out legal actions against the UN. At that instance, the UN does not have immunity of jurisdiction neither does it have immunity of execution. The UN has a total of 193 member States. Of this number, 162 have ratified the General Convention, meaning that there are 31 member States of the UN that have not actually ratified the Convention in question. This is supported by the Latin maxim '*res inter alios acta alteri nocere non debet*', meaning simply that the rights of a party cannot be stuck on the acts and or omissions of another. Thus, legal instruments create rights and obligations to non-parties (Fellmeth, 2009).

The only instance where the spirit and provisions of the General Convention could have been held against the non-ratifying State is if the privileges and immunities of the UN are a matter of customary law which does not need a legal instrument to make it be binding on States. The immunities and privileges of the UN have not been raised to the status of customary law and therefore, cannot be held objectionable to the non-ratifying States. If however the privileges and immunities of the UN were a matter of international customary law, then it will be binding on all States irrespective of their status on the ratification of the General Convention. Privileges and immunities of the UN is not international customary law. As a matter of fact, the English courts in

the *International Tin cases (1987-1989)* took the view that customary international law gave no such entitlement to international organizations.

Again, it is possible to raise the provisions of *Art. 105* of the UN Charter which talks of the UN enjoying from its member States such privileges and immunities necessary for the fulfillment of its duties and functions. Since almost all 193 states have ratified the UN Charter, then it is possible that reliance is made of this section to plead immunities. However, in as much as they have talked of immunities and privileges it has not been specified. Thus, the national courts of these countries can go further to look at whether in the particular context, the immunity granted to the UN was for the fulfillment of its purpose or was just a means to procure impunity.

Right of reservation

This is just a temperament to the aforementioned point on non-ratification. In this case, the State has actually ratified the convention but then emits reserves on certain provisions of the convention. In such a case, the articles or sections which the State had reserves on, will not be binding on the State. *Art. 19 of the Vienna Convention on the Law of Treaties* has given the State the discretion to emit reservations on the provisions which it wishes not to be bound to unless;

- ✚ The reservation is prohibited by the agreement in question;
- ✚ The treaty provides that only specified reservations may be made, excluding the reservation in question; and
- ✚ The reservation is incompatible with the object and purpose of the treaty.

If the first two may be possible and easy to establish, the third provision is a little complicated. If, therefore, there is a reservation on *Art. II* and *Art. VIII Section 29* of the General Convention for example, it will have to be determined whether the said reservations are incompatible with the objects of the convention. If already there is a reservation on *Art. II* of the General Convention, then it is clear that the said reservation is incompatible with the objects of the convention since the main object of the convention was to grant privileges and immunities to the UN. Posing a reservation on *Art. II of the General Convention* may make it incompatible with the Convention. However, the General Convention is not only about the immunities of jurisdiction and execution. There are other immunities and privileges such as the right to inviolability of premises, immunity from search, seizure, confiscation and expropriation of its property, exemption from tax and custom duties etc. therefore, the reserve can specifically be on *Art. 2 Section 2* of the General Convention.

Jus Cogens

Jus cogens is a Latin phrase which means ‘compelling law’. *Jus cogens* is a non-derogable, peremptory norm. *Jus cogens* norms are not subject to any derogation. This means that in the case of a violation of a *jus cogens* norm, the UN can actually be tried before a national court, since no degree of immunities will help. As a matter of fact, this remains one of the only practical ways in which the UN can be held accountable before a jurisdiction. Thus, *jus cogens* can actually lead to a successful legal action against the UN (Wouters & Schmitt, 2010). What are the different rights and duties that reflect *jus cogens*? The following reflect *jus cogens* obligations and could be

divided in to rights and prohibitions; right to life, right to humane treatment, right to legal personhood, freedom of conscience, and the right to self-determination prohibition of aggression, prohibition of genocides, war crimes, crimes against humanity, prohibition of all forms of discrimination (Francisco, 2006).

Above we did mention that in the case where a UN force military personnel is being tried in accordance with *Section 4* of the UNSG's Bulletin on the observance of international humanitarian law, it will be right for the UN to be held vicariously liable. Since international humanitarian norms are *jus cogens* norms, it is possible for the UN therefore to be brought before the national court for violation of *jus cogens* by its former agent.

A Waiver of Immunity by the UNSG

As provided for by *Article 2 Section 2*, of the General Convention, the UN will be subject to legal action if and only if its immunity from jurisdiction has been expressly waived by the United Nations Secretary General (hereafter referred to as UNSG). In such a case, the UNSG will then allow for the UN to be tried in a national court. But for the UNSG to grant this waiver, he must ascertain that the waiver is in the interest of the UN and that immunity cannot be contractually waived in advance UN Juridical Yearbook, 1976). The UN will not invoke immunity from jurisdiction but will still benefits from immunity of execution. Since the peace operation was carried out under auspices of the UN, such acts are attributed to the UN (*Section 18* General Convention). In this regard, the UNSG has the right and the duty to waive the immunity of the UN in any case where, in his opinion, the immunity would obstruct the process of justice and can be waived without the interest of the UN being prejudiced (*Section 20*). In the case where the UNSG is the defendant alongside the UN, he or she will have to prepare and grant such waiver in question. That is why the *Abdi Hosh Askir case*, the plaintiff could not prove that the then UNSG, Boutros Ghali, had waived the immunity of the UN.

The 1999 UNSG's Bulletin on the Observance by United Nations Forces of International Humanitarian Law (UNSG, 1999) has given the possibility of trying UN forces who have violated international humanitarian law. *Section 4* of the said Bulletin provides that in case of violation of international humanitarian law, the military personnel will be subject to criminal prosecution by his national court. The Bulletin has, however, not addressed the issue of the vicarious liability which every employer owes to the victims of his employee, for acts committed during the period or hours of work. What if there is a need for compensation and the military personnel is impecunious? Isn't it right for the UN to be added to the list of defendants as the employer being vicariously liable for the acts of its employee or former employee and therefore provide compensation for the civil party? In Cameroon, for example, *Section 59* of the Cameroon Criminal Procedure Code (CPC, 2005) provides for the joint prosecution of an offence with a civil claim attached. *Section 72* of the said CPC provides that. The victim of the offence may request his insurer to summon the party which is vicariously liable to appear before the competent court to be heard and jointly found liable with the accused to pay damages to the said victim for the damage caused by the offence. Therefore, it is possible that the UN be held vicariously liable for the actions of its employee and in this case, the military personnel. However in the particular case, for the UN to be prosecuted alongside the peacekeeper offender, the UNSG must waive the immunity of the UN, which manifestly will not work in the interest of the UN.

A Case of Lifting the Immunity of the UN during Peace Operations

The lifting of UN immunity can be considered in two main approaches; the approach of lifting UN immunity as a matter of human rights, and, the approach of lifting UN immunity as a result of interpretation of the law.

Lifting UN immunity as a Matter of Human rights

There is a very important case where the immunity of the UN was seen to have been set aside and in whose judgment the motivation of the courts was quite fair and just. In the very landmark case of *UNESCO v. Boulois*, The Paris High Court and Court of Appeal refused to accord immunity to UNESCO since this will inevitably deprive the respondent of the right to access to justice (CA Paris, 1998). This will have as consequence the inevitable prevention of the respondent from bringing his claim to court. There was thus the invocation of *Art. 6(1)* of the European Convention on Human Rights which vehemently prohibits the denial of justice. This happens to be the one case that came out of the norm and denied UN immunity. It is not enough to depend on the immunity of the UN to actually run away from the real thing. And that is where we are getting it wrong all together. The courts as in the *UNESCO case* should actually be more open to welcome the case and determine the issue of immunity if and only if it does not affect the victim's right of access to justice. Even though this decision when brought up by the appellants in the case of *Delama Georges & Ors v. UN* was rejected, it served as an eye opener to the UN and to victims of the UN who could see that it was possible for the immunity of the UN to be lifted for the purposes of access to justice and thus prevent the denial of justice using the various human rights jurisdictional mechanisms in place.

Interpretation of the Law

The interpretation given by the courts and different legal scholars to consider the immunity of the UN over the right of justice of the victims has been flawed because they seem to ignore the preamble of the General Convention in question. Usually the interpretations start from the different provisions and end still at the provisions. But then if a look was taken at the level of the preamble this will permit us to pierce the veil of immunity. For the UN's immunity to be lifted, one first has to determine its legal capacity. This is provided for by *Art. 104* of the UN Charter which provides, that;

'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.'

Art. 104 of the UN Charter actually sets the ground work for the attribution of immunities and privileges of the UN. Provided for in the General Convention, it is also found in the Charter in clear terms. The important part to take note here to pierce the veil of UN immunity is in this provision is *'as may be necessary for the exercise of its functions and fulfillment of its purpose'*. The legal capacity granted to the UN here is for the exercise of its function and fulfillment of its purpose. It is not because of some customary rule established for international organizations, already that immunities and privileges of international organizations is not a customary

principle⁴. It is because legal capacity is a necessity for the fulfillment of its purpose. As such, legal capacity will for example help the UN to get into contracts, procurement agreements, employment contracts, just to name these few. Note should be taken here that it has not been stated anywhere that impunity is the reason for which legal capacity has been given. Thus, in the case where responsibility can be established and it does not impede on the exercise of the functions of the UN nor does it impede on the fulfillment of its purpose, then such can be imputed on the UN.

The second aspect is *Art. 105(1) and (2)*. This article is also found in the preamble of the UN Charter. It provides;

- (1) *The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are **necessary for the fulfillment of its purposes.***
- (2) *Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are **necessary for the independent exercise of their functions in connection with the Organization.***

It actually addresses the UN and its representatives and officials of the UN. This includes officials of peace operations and its entire staff. As said above, the essence of the grant of immunity is the exercise of its function and purpose of the UN.

What does this mean? The tendency for courts has been to automatically consider the immunity for the UN without verifying whether the action or omission warranting the other party to want the imputation of responsibility of the UN actually imputes the responsibility of the latter. From the provision of these articles, the courts will first have to establish whether the acts or omissions constituted a breach of an international obligation. It will then proceed to establish whether such acts or omissions can be attributed to the UN. Then, when it has been established that there actually has been a violation and that such could be attributed to the UN, the courts will determine whether the act, omission or reason for the act or omission was for the fulfillment of its purpose. If it is in the negative then the UN immunity should be lifted. Contrarily, if the act, omission or the reason or the act or omission was for the fulfillment of the purpose of the UN then the immunity of the UN should be upheld. In the case of *Georges Delama v. UN* it is therefore clear that the contamination of the Haitians by UN peacekeepers had nothing to do with the fulfillment of the purpose of the UN, and therefore the UN had to be held accountable for the said act. Similarly, immunity is not a ground of impunity but it is for the exercise of the functions and the fulfillment of its purpose as held in *Brzak* (SDNY, 2008). Taking a comparative view in *Manderlier v. UN* it could even be argued that the UN acting in the fulfillment of its purpose and the destruction of Belgian property by UN peacekeepers was for the purpose of the UN⁵ and the defense of immunity will prevail and there will even be no need to set up a compensation scheme. It is however unfortunate that the compensation scheme was set for *Manderlier* and it was not set for *Georges Delama*. The courts actually approached the same reasoning for not holding the UN responsible, upholding the latter's immunity of jurisdiction. However the UN preferred to establish a compensation scheme for *Manderlier* which could be ignored, and ignored *Delama* which had to

⁴ See *the International Tin Cases (1987-1989)*.

⁵ For example as being part of peace operation where such destruction was necessary to attain the objectives set forth by the UN.

be paid attention to. It is important to note that with regards to the contamination case of Haiti, The UN in 2016 however acknowledged its role in the contamination of Haitians with cholera and promised to establish a compensation scheme for victims and families of victims through a 200 million USD First Trust Fund. This fund has unfortunately remained empty (Khalil, 2020).

The first and second paragraphs of the General Convention further support the above interpretation. The first paragraph restates *Art. 104* of the UN Charter and the second paragraph restates *Art. 105*. According to *Art. 31* of the 1969 Vienna Convention on the Law of Treaties, the preamble of a treaty or convention is part of the convention. This makes the preamble of the General Convention part of the General Convention itself. If that is the case, then it is necessary to read it all together with the convention in question. In this is the case, the courts can actually try and impute responsibility on the UN if it does not impede on their function and purpose. That is the basis for the grant of immunities and privileges of the UN, and not the procurement of impunity and the escape from responsibility.

All of this should be read and interpreted in consonance with *Art. 2(3)(a)(b) and (c)* of the International Covenant on Civil and Political Rights, 1966, the right to fair trial and remedy as important as the right to life and any other right. This covenant being a UN covenant is supposed to be complied with, not only by the States that ratify it, but by the institution that established it.

Possible Ways of Lifting the Veil of UN Immunities during Peace Operations

The solution to handling the issue of privileges and immunities of the UN during peace operations can be observed from two pillars. The first having to deal with those States that have actually concluded a Status of Forces Agreement (hereafter referred to as SOFA) with the UN in peacekeeping operations and the second pillar is for peace operations that do not have SOFA.

With regards to the first pillar, the UN disposes of a mechanism to put an end to the proceedings before judgment is rendered. *Art. VIII Section 29* of the General Convention obliges the UN to make provisions for the settlement of disputes for private law matters and involving officials of the UN who by reason of their official positions enjoy immunities which has not been waived by the UNSG. If this mechanism is established, this bars the injured party from suing the UN.

The UNGA *Resolution 52/247* (UNGA, 1998) has established the basis on which the UN should rely when considering the compensation of victims from UN actions or omissions during peacekeeping operations. This resolution was adopted as a result of the presentation of the UNSG's report *51/389* (UNSG, 1996). The report actually elaborates the scope of UN liability for the ordinary operations of the force and the scope of liability for combat related activities. It also provided the procedures for the handling of 3rd party claims and the financial, temporal limitations, counter claims and set offs as well as recovery of State contributing contingents through concurrent responsibility. The UNGA establishing the Model Status of Forces Agreement-SOFA (UNGA, 1990), has provided for the establishment of a claims commission charged with the examination of compensation for victims of peacekeeping operations. In case of disagreement with the commission, then the UNSG or the government can submit the dispute before an arbitral tribunal of 3 arbitrators as provided by *Section 53* of the Model SOFA. If it reaches at this level, the UN cannot, therefore, plead immunities because it has been so provided by the SOFA. This will then

act as a jurisdictional clause which the parties, the UN inclusive are supposed to be bound by. In this case, therefore, resort is made to judicial proceedings only when the claims commission process has failed.

As concerns the second pillar, we do make allusion here to operations such as peace enforcement or *Chapter VII* operations whose approval was done without the consent of the host States. In this case we can name Libya 2011, Somalia 1992 and Bosnia Herzegovina 1993, just to name these few. In such a case, the liability of the UN can be imputed on the treaty or convention basis as well as on the basis of the different resolutions of the United Nations General Assembly and United Nations Security Council. It will first go through the normal procedure of filing an application for the compensation for damages caused by the operation which of course was not part of an 'operational necessity' as per *Section 6* of the Resolution on 3rd Party Liability (UNGA, 1998). It could be argued by jurists that the resolution only deals with peacekeeping operations and not peace enforcement. Peacekeeping entails consent and the materialization of this consent is the SOFA. But the absence of SOFA makes the imputation of liability a little difficult. The only basis which should therefore, be relied on is the resolution that established such a mission, and the different conventions. But as a result of the *lacuna*, use can be made of *Resolution 52/247* to be able to handle the claims. As a matter of fact, in the aforementioned resolution, the UNGA adopted the recommendations of the United Nations Secretary General's Report *A/51/389*, which recognizes that the international responsibility of the UN for combat-related activities of UN forces is imputed if and only if the operation (be it peacekeeping or peace enforcement) is under the exclusive command and control of the UN (UNSG, 1996). Therefore, the mechanisms and procedures available under *Res. 52/247* could be used even in UN peace enforcement operations.

Apart from this path, the victims can use the judicial arm to press the UN to establish a claims commission to hear their claims in accordance with the provisions of *Art. 29* of the General Convention, which lays it as an obligation for the UNSG to establish such since the UN benefits from privileges and immunities from legal action.

CONCLUSION AND RECOMMANDATIONS

It is clear that in the face of it all, it seems as an impossibility to impute the responsibility of the UN especially in peace operations. However, from close analysis of the legal instruments in place, it is very possible to impute the responsibility of the UN. This could also be achieved through the human rights perspective of the access to justice as was established in the case of *UNESCO v. Boulois*. That notwithstanding, there are a series of UNGA resolutions which have dealt with the issue of UN liability in peace operations. In the end the issue of the liability of the UN in peace operations is a delicate matter that warrants a lot of caution. Reason for which we did recommend that the only instance where the UN can be tried, the UNDT be used in the process alongside the ICJ. This will have as result to attain justice and guarantee the respect of human rights. It is our recommendation that the Statute of the United Nations Dispute Tribunal –UNDT (UNGA, 2008) precisely *Art 2(5)* which gives the competence *ratone materiae* of the Tribunal should be modified to entertain all disputes involving the UN and victims of UN action in general and those ensuing from UN peace operations in particular. In the way, where there is a loggerhead between the UN and a victim on the establishment of a claims commission to hear the victim, the UNDT can compel the UNSG to establish a dispute resolution mechanism in accordance with

Section 29 of the General Convention. If the UNSG fails to establish the said dispute resolution mechanism, then the UNDT channels the file to the International Court of Justice (ICJ) with a ruling noticing the refusal of the UNSG to establish the said mechanism. The ICJ will then proceed to set up a panel of three arbitrators that will be tasked with arbitrating the matter between the individual or victim and the UN. The award should be binding on the parties.

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