

# *Towards an alternative interpretation of U.N. immunity: a human rights-based approach to the Haiti cholera Case*

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# **Towards An Alternative Interpretation of U.N. Immunity: A human rights-based approach to the *Haiti Cholera Case*<sup>1</sup>**

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## **Introduction**

The *Haiti Cholera* case has rightfully received significant attention from practitioners, scholars, the media, and the wider public. The facts lend themselves to a thorough examination of issues arising from U.N. immunity, not only in relation to the case but more broadly in relation to U.N. peacekeeping operations. At the outset of the case scholars provided useful and well-needed explanations of the legal issues, exposing the gaps that the U.N. has exploited in order to avoid its responsibilities to the cholera victims. Two central issues are the distinction between public and private acts for the purposes of dispute settlement, and also the discussion about whether U.N. immunity under Section 2 of the Convention on the Privileges and Immunities of the United Nations (CPIUN) is dependent upon the Organisation upholding its Section 29 obligations to provide alternative dispute resolution mechanisms. Academic writings on those matters have been crucial for practitioners, academics, and indeed the media, drawing upon cases and scholarship from various jurisdictions that had addressed similar or related questions in order to provide explanations of the law.

A central role of the academy and of scholars is to bring together a range of sources to analyse and interpret questions of international law. Indeed, many of the early materials published about the *Haiti Cholera* case have been cited in documents presented to the New York District Court, have been relied upon by journalists, and are even distilled into accessible language and made available on many websites. As such, description about the various stages of the case and discussions about the relevant sources are well-understood within and beyond the academy. It serves little purpose, therefore, simply to repeat the points made by other scholars and practitioners over recent years. Instead, it is the responsibility of academics to set out alternative approaches that may provide fresh

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<sup>1</sup> Parts of this paper and the ideas contained herein first appeared in R. Freedman, 'UN Immunity or Impunity?: A Human Rights Based Challenge' (2014) 25 *EJIL* 239; and R. Freedman and N. Lemay-Hébert, 'Jistis ak reparasyon pou tout viktim kolera MINUSTAH: The United Nations and the Right to Health in Haiti' (2015) 28 *Leiden Journal of International Law* (forthcoming).

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and nuanced interpretations of the relevant laws in order to assist those who seek to find a solution to the cholera claims.

One main reason why practitioners and judges turn to and cite the writing of academics is that scholarship ought to be, and often is, at the cutting edge of its field. The approaches outlined in early scholarship on the *Haiti Cholera* case necessarily addressed the traditional and typically conservative approaches to the issue of U.N. immunity. It is clear that the New York District Court at first instance was unwilling to go beyond those traditional interpretations. Therefore, restating and highlighting those matters does little to encourage a shift in paradigms, both in terms of the cholera claims and more broadly regarding the problems caused by outdated notions of absolute immunity operating within the contemporary and globalised world. As such, our paper will set out an alternative and viable approach to the *Haiti Cholera* case, and to the issue of U.N. absolute immunity by offering an interpretation based on international human rights law.

Our thesis is that U.N. immunity ought not only to be dealt with by reference to the CPIUN but that it needs to be interpreted within the broader context of international human rights law. It is widely-accepted that an individual's fundamental right to access a court and a remedy is enshrined not only in international human rights law treaties but also has achieved the status of customary international law.<sup>4</sup> Adopting a human rights-based approach, U.N. immunity ought not to be upheld where it precludes any individual realising his or her right to access a court and a remedy. The human rights based-approach would therefore restrict immunity in circumstances where the U.N. fails to set up alternative dispute resolution mechanisms, as has occurred in the *Haiti Cholera* case. This is not the first case to address such issues, but in many ways the *Haiti Cholera* case provides the perfect set of facts for a national court finally to recognise that the U.N. cannot avoid its human rights obligations by hiding behind the cloak of immunity. This short paper will explore how and why the *Haiti Cholera* case provides the perfect facts for a human rights-based challenge to U.N. immunity.

## **1. The Facts**

The facts of the *Haiti Cholera* case are well-known. The cholera epidemic started in the Artibonite region in October 2010. Prior to that, there had been no recorded cases of cholera in Haiti for over a

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<sup>4</sup> Cf. Freedman (n.1), Section 4

century.<sup>5</sup> The population was therefore immunologically naive and highly susceptible to infection.<sup>6</sup> Between October and December 2010, approximately 150,000 people contracted cholera and 3,500 had died; by the end of 2014, more than 8,813 people had died and over 725,608 individuals had been infected, making it one of the most deadly cholera outbreaks in recent history.

A Nepalese battalion arrived in Haiti in October 2010 and was deployed to the Mirebalais camp during October 2010.<sup>7</sup> It is important to note that Nepal suffered cholera outbreaks only weeks before the troops' deployment.<sup>8</sup> French epidemiologist Renaud Piarroux, who wrote an initial report on the cholera outbreak,<sup>9</sup> stated that all of the scientific evidence demonstrates that the cholera is attributable to the Nepalese contingent travelling from a country experiencing a cholera epidemic, and that faecal contamination of the Meille River<sup>10</sup> draining into the Artibonite River initiated the epidemic.<sup>11</sup> The Artibonite River is one of the nation's largest and most important rivers providing water to 1.5 million people.<sup>12</sup> The link with the South Asian strain has been confirmed by numerous field investigations<sup>13</sup> including the U.N.'s Independent Panel of Experts on the Cholera Outbreak in Haiti.<sup>14</sup> Despite recent scientific debates, it is now increasingly accepted that the cholera outbreak is directly attributable to Nepalese peacekeeping troops, even by the U.N. itself.<sup>15</sup>

There is still confusion about whether or not the soldiers were tested prior to their deployment.<sup>16</sup> What is clear is that the cholera screening protocols were inadequate to prevent the Haitian

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<sup>5</sup> D. A. Walton and L. C. Ivers, 'Responding to Cholera in Post-Earthquake Haiti' (2011) 364 *New England Journal of Medicine* 3, 4.

<sup>6</sup> Center for Disease Control and Prevention, 'Cholera Outbreak: Haiti, October 2010' (2010) 59 *Morbidity and Mortality Weekly Report* 1411.

<sup>7</sup> J. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (Palgrave Macmillan 2013), 230.

<sup>8</sup> L. Maharjan, 'Cholera Outbreaks Looms Over Capital' *The Himalayan Times* (Kathmandu, 23 September 2010).

<sup>9</sup> T. Daniel, 'Source of Haiti Cholera Bug Goes Under Microscope' *Associated Press* (17 July 2012).

<sup>10</sup> M. Stobbe and E. Lederer, 'UN Worries Its Troops Caused Cholera in Haiti' *Associated Press* (19 November 2010); Katz, (n. 6) 228.

<sup>11</sup> R. Piarroux *et al.*, 'Understanding the Cholera Epidemic, Haiti' (2011) 17 *Emerging Infectious Diseases* 1161.

<sup>12</sup> F. Tasker and F. Robles, 'Source of Cholera Outbreak May Never Be Known' *Miami Herald* (Miami, 20 November 2010); Katz, (n. 6) 229.

<sup>13</sup> See, for example: R. R. Frerichs *et al.*, 'Nepalese origin of cholera epidemic in Haiti' (2012) 18 *Clinical Microbiology and Infection* 158; R. S. Hendriksen *et al.*, 'Population Genetics of *Vibrio cholera* from Nepal in 2010: Evidence on the Origin of the Haitian Outbreak' (2011) 2(4) *MBio* < <http://mbio.asm.org/content/2/4/e00157-11.abstract> >; C. Chin *et al.*, 'The Origin of the Haitian Cholera Outbreak Strain' (2010) 364 *New Eng. J. Med.* 33.

<sup>14</sup> The panel found that 'the strains isolated in Haiti and Nepal during 2009 were a perfect match'. A. Cravioto *et al.*, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti* (2011), 27.

<sup>15</sup> 'Clinton: UN Soldier Brought Cholera to Haiti' *Al Jazeera* (8 March 2012).

<sup>16</sup> 'Haiti cholera outbreak: Nepal troops not tested', *BBC News* (London, 8 December 2010). UN Spokesperson, Vincenzo Pugliese, told an Associated Press journalist that none tested positive because they had never been tested: J. Katz (n. 6), 233, as compared with United Nations Department for Public Information, Press Conference by the Under-Secretary-General for Peacekeeping Operations (2010) <[http://www.un.org/News/briefings/docs/2010/101215\\_Guest.doc.htm](http://www.un.org/News/briefings/docs/2010/101215_Guest.doc.htm)>; see also: CNN Wire Staff, 'UN investigates allegations of cholera source in Haiti' *CNN* (Washington, 28 October 2010).

epidemic.<sup>17</sup> The problem was not just the lack of appropriate testing: The *Medical Support Manual for United Nations Peacekeeping Operations* does not list cholera and diarrhoea as conditions precluding peacekeeping service, and examination only has to take place within three months of deployment, leaving plenty of time for soldiers to contract the disease.<sup>18</sup>

After the outbreak the international aid machinery led by the U.N. failed to take the steps necessary to contain and eradicate cholera in Haiti. Firstly, the U.N.'s World Health Organisation (WHO) and other actors battled against mass vaccination in Haiti, citing cost, logistical challenges and limited vaccine supplies.<sup>19</sup> Secondly, the U.N. failed to invest in a large-scale improvement of Haiti's water and sanitation systems before and immediately after the cholera outbreak, despite the peacekeeping mission's mandate to capacity-build and improve national infrastructure. In January 2011, 37.6 % of peacekeeping camps lacked water and 28.5 % did not have a single toilet.<sup>20</sup> One Médecins Sans Frontières official stated that 'the inadequate cholera response in Haiti makes for a damning indictment of an international aid system',<sup>21</sup> especially the cluster system set up by the U.N.'s Office of the Coordinator of Humanitarian Affairs.

## 2. The Claims

The attribution of responsibility to the U.N. for the outbreak and spread of cholera in Haiti is clearly documented. Victims of that outbreak, however, have been denied their fundamental right to access a court and a remedy owing to the U.N. failing to set up mechanisms to hear such claims. The case brought before the New York District Court focuses on the U.N. failure not only to protect Haitians from the introduction of cholera and to prevent the spread and continued existence of the disease, but also to provide a remedy to individuals affected by the outbreak. Claims and a pending appeal filed in a New York District Court on behalf of 5,000 individuals affected by cholera in Haiti<sup>22</sup> allege negligence, gross negligence and/or recklessness by the U.N. and MINUSTAH. The lawsuit states that U.N. actions and failures to act are

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<sup>17</sup> P. S. Keim, *et al.* 'Reply to "South Asia Instead of Nepal May Be the Origin of the Haitian Cholera Outbreak Strain"' (2011) 2(6) *MBio* <http://mbio.asm.org/content/2/6/e00245-11.full#ref-5>.

<sup>18</sup> J. Katz (n. 6), 233. The UN's expert panel mentioned a 10-day free period for Nepalese soldiers to visit their families after medical examination was completed. A. Cravioto *et al.* (n. 13), 12.

<sup>19</sup> P. Santa-Olalla *et al.*, 'Implementation of an Alert and Response System In Haiti During the Early Stage of the Response to the Cholera Epidemic' (2013) 89 *American Journal of Tropical Medicine and Hygiene* 688.

<sup>20</sup> M. Schuller, *Killing With Kindness: Haiti, International Aid, and NGOs* (Rutgers University Press 2012), 173.

<sup>21</sup> U. Karunakara, 'Haiti: Where Aid Failed' *The Guardian* (London, 28 December 2010).

<sup>22</sup> See, generally: R. Freedman (n. 1).

‘the direct and proximate cause of the cholera related deaths and serious illnesses in Haiti to date, and of those certain to come. The U.N. did not adequately screen and treat personnel coming to Haiti from cholera stricken regions. It did not adequately maintain its sanitation facilities or safely manage waste disposal. It did not properly conduct water quality testing or maintain testing equipment. It did not take immediate corrective action in response to the cholera outbreak.’<sup>23</sup>

The U.N. response to the requests for compensation for the victims and to the lawsuit has been to insist on absolute immunity from the jurisdiction of national courts.<sup>24</sup> It has altogether failed to address the substance of the claims – that it was responsible for the cholera and therefore liable to the victims. Instead, the U.N. insists that the claims are ‘not receivable’<sup>25</sup> because it asserts that the claims involve review of political and policy matters.<sup>26</sup>

The attempt to bring the U.N. to court was rejected at first instance, and an appeal is currently pending. Judge Oetken in the New York District Court upheld U.N. absolute immunity. However, the main issue in terms of U.N. immunity and international human rights law, and an issue that Judge Oetken altogether failed to address, is whether U.N. immunity can be upheld if in so doing an individual’s fundamental right to access a court and a remedy is violated. It is this issue – rather than Judge Oetken’s judgment and the pending appeal – that we shall explore in this paper.

### **3. Absolute Immunity and Alternative Dispute Resolution**

The absolute immunity that the U.N. is relying upon is set out in Section 2 of CPIUN, which establishes that:

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<sup>23</sup> ‘Petition for Relief’, 3 November 2011, para. 57 <http://www.ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf>.

<sup>24</sup> E.g. Letter from Ban Ki-moon, UN Secretary-General, to Maxine Waters, U.S. Representative for California's 43rd congressional district (July 5, 2013) (available at: <<http://www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf>>).

<sup>25</sup> UN Department of Public Information (New York), Haiti Cholera Victims’ Compensation Claims “Not Receivable” under Immunities and Privileges Convention, United Nations Tells Their Representatives, UN Doc. SG/SM/14828 (21 February 2013).

<sup>26</sup> *Ibid.*

‘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.’<sup>27</sup>

Section 2 is generally interpreted as granting the U.N. absolute immunity from jurisdiction of national courts<sup>28</sup> – an approach based on the U.N. Charter and the CPIUN pre-dating the move to restrictive immunity.<sup>29</sup> That approach can be seen, for example, in the early case of *Manderlier v Organisation des Nations Unies et l’Etat Belge*<sup>30</sup> (1966) and in cases ranging from employment disputes<sup>31</sup> to damages arising from peacekeeping operations.<sup>32</sup> Traditional justification for absolute immunity is that national courts (a) would have very different interpretations to one another; and (b) may be open to prejudice or frivolous actions within some countries.<sup>33</sup>

The same Convention sets out that the U.N. must provide mechanisms to resolve claims arising out of disputes of a private law character. Section 29 of the CPIUN mandates that:

‘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;’

It is important to understand the Section 29 obligations in terms of peacekeeping operations. It is clear that UN peacekeepers require immunity in order to fulfil their functions and because countries might otherwise be reluctant to commit their troops as peacekeepers.<sup>34</sup> The functioning of judicial systems in conflict or fragile states might lead to peacekeepers’ own rights, such as to a fair trial, being violated should such immunity not exist. As a result there needs to be an appropriate means of

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<sup>27</sup> UN General Assembly Resolution 22(1), ‘Convention on the Privileges and Immunities of the United Nations’, 13 February 1946, Section 2.

<sup>28</sup> A. Reinisch, *International Organizations Before National Courts* (CUP, 2000) 332.

<sup>29</sup> G. Rios & E. Flaherty, ‘Legal Accountability of International Organization: Challenges and Reforms’ (2010) 16 *ILSA Journal of International and Comparative Law* 433, 437.

<sup>30</sup> *Manderlier v Organisation des Nations Unies et l’Etat Belge (Ministre des Affaires Etrangères)*, Brussels Civil Tribunal, 11 May 1966, (1966) *Journal des Tribunaux* 721; (1972) 45 *ILR* 446.

<sup>31</sup> For example, *Radicopoulos v United Nations Relief and Works Agency*, Egyptian Court, 1957, *Annual Report of the Director of UNWRA*, 13 UN GAOR, Supp. (No.14) 41, UN Doc. A/391 (1958); *Boimah v United Nations General Assembly*, US District Court EDNY, 24 July 1987, 664 F. Suppl. 69 (EDNY 1987).

<sup>32</sup> For example, *Abdi Hosh Askir v Boutros Boutros-Ghali*, US District Court, Southern District, New York, 29 July 1996, 933 F. Suppl. 368 (SDNY 1996).

<sup>33</sup> P. Sands & P. Klein, *Bowett’s Law of International Institutions* (5<sup>th</sup> edn, London: Sweet & Maxwell, 2001), section 15-045, at 491.

<sup>34</sup> Cf. Clark, ‘Peacekeeping Forces, Jurisdiction and Immunity: A Tribute To George Barton’ (2012) 43 *Victoria University of Wellington Law Review* 77.



dispute resolution provided for instances where peacekeepers' actions are criminal offences or give rise to private law claims.

Provision of appropriate dispute settlement is set out in the UN's 'Model Status of Forces Agreement for Peace-Keeping Operations'.<sup>35</sup> The Model SOFA sets out that where the peacekeeping operation or its members have immunity from jurisdiction of local courts in respect of a private law claim, the Model SOFA provides for alternative dispute settlement mechanisms<sup>36</sup> - namely, claims commissions.<sup>37</sup> Yet, to date the U.N. has failed to establish any mechanisms to hear cholera victims' claims in line with its Section 29 obligations either through the methods set out in Article 51 of the Model SOFA or any other alternative modes of dispute resolution available to it such as *ad hoc* negotiation, conciliation, mediation or arbitration, and lump-sum settlements.<sup>38</sup> Indeed, the attempt to bring the U.N. before the New York District Court is a direct result of the U.N. refusing to establish any alternative mechanisms for resolving the cholera victims' disputes.

One issue, and the main one focused upon in the Judge Oetken's judgment, is whether Section 29 is a counterbalance to Section 2 or whether the two operate independently of one another. If the two were interdependent then it would be clear that the U.N. failure to establish mechanisms in line with Section 29 CPIUN undermines its ability to rely on the immunity set out under Section 2 of that Convention. However, case law and treaty interpretation points towards the conclusion that U.N. immunity is not conditional on alternative dispute mechanisms being established.<sup>39</sup> Our thesis does not interrogate that oft-discussed argument, but rather looks at a separate and more holistic issue: the ability of the U.N. to rely on absolute immunity where in so doing an individual's fundamental rights are violated. This second issue receives less attention than the one focused upon by Judge Oetken.

The question is whether Section 2 CPIUN, in absentia of the U.N. implementing its obligations under Section 29, can be given effect where it violates fundamental an individual's right to access a court and a remedy. It is this issue that we shall focus upon because the human rights-based

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<sup>35</sup> *Model status of forces agreement for peace-keeping operations* UN Doc. A/45/594 (1990), Article 51.

<sup>36</sup> *Ibid.*, Articles 51-54.

<sup>37</sup> Despite Article 51 of the Model SOFA, no standing claims commissions have ever been established, although third-party claims have been settled instead by local claims review boards made up of UN officials and established for each peacekeeping mission.

<sup>38</sup> See, for example, *Manderlier v Organisation des Nations Unies et l'Etat Belge* (n. 29). Salmon insists that the UN used the lump-sum payment because it wanted to avoid the public procedure and public scrutiny that would come with having claims from that peacekeeping operation brought before the claims commission (cf 'Les Accords Spaak-U Thandt du 20 fevrier 1965', *AFDI*, Vol.11, (1965), 469-497).

<sup>39</sup> Cf. Freedman (n.1)

approach is one that is increasingly applied to other international organisations and the *Haiti Cholera* case provides the perfect facts for demonstrating that the U.N. ought also to be constrained from using its immunity to violate individuals' fundamental rights.

#### 4. The Human Rights-Based Challenge

Judge Oetken, following jurisprudence from US and European courts, determined only to address the interpretation of the CPIUN. The legal reasoning contained within the judgement, and that follows on from cases such as *Brzak*<sup>40</sup> and *Sadikoglu*,<sup>41</sup> focuses on whether immunity was intended to be contingent upon the provision of alternative dispute resolution mechanisms. That narrow approach, however, fails to take into account the violation of the fundamental right to access a court and a remedy that occurs where the U.N. uses the cloak of immunity whilst refusing to provide alternative dispute resolution mechanisms. When the CPIUN is situated within the broader context of U.N. human rights obligations, it is clear that the immunity under Section 2 may only be legally valid if there are mechanisms available to ensure that claimants have access to an alternative process to decide and remedy private law claims as otherwise Section 2 would violate individuals' fundamental rights to access a court and a remedy.

This is an argument that was presented on behalf of the Plaintiffs in the *Haiti Cholera* case, and that has been argued in European cases as well as in academic scholarship, but is one that Judge Oetken failed to mention let alone address in his judgement. It is this issue that forms the heart of our argument: U.N. immunity in absentia of an alternative dispute resolution mechanism may violate the fundamental right to access a court and a remedy,<sup>42</sup> and therefore must be overridden in respect of those private law claims where the U.N. fails to fulfil its Section 29 obligations.

There is increasing recognition that where alternative dispute resolution mechanisms are not available a claimant's fundamental rights may be violated. Individuals hold fundamental rights to access a court and to seek a remedy.<sup>43</sup> Appropriate modes of settling disputes<sup>44</sup> enable claimants to

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<sup>40</sup> *Brzak v. United Nations*, 597 F.3d 107, 111-12 (2d Cir. 2010)

<sup>41</sup> *Sadikoglu v. United Nations Dev. Programme*, No. 11 Civ. 0294 (PKC), 2011 WL 4953994,

<sup>42</sup> *Rios & Flaherty* (n. 28), 445-446.

<sup>43</sup> Those rights are found within the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Customary Human Rights Law.

<sup>44</sup> See, for example, *Groupement d'Enterprises Fougierolle v CERN* (1992), Switzerland Federal Tribunal. The court looked at alternative methods for resolving disputes owing to the distinction between *jure gestionis* and *jure imperii* not applying to international organisations (at 211-212) and noted that such mechanisms provide the counterpart to international organisations' immunity (at 212).

access a court or a remedy through alternative mechanisms. According to Reinisch, those mechanisms are ‘increasingly also seen as a legal requirement stemming from treaty obligations incumbent upon international organizations, as well as a result of human rights obligations involving access to justice.’<sup>45</sup>

Dannenbaum insists that the U.N. also is legally bound by international human rights law.<sup>46</sup> The U.N. legal personality means that it is bound by customary international law and this includes certain human rights.<sup>47</sup> U.N. Charter provisions, including Articles 1(3), 55 and 56, also require the U.N. to respect human rights.<sup>48</sup> U.N. member states arguably have a positive duty to enforce the Charter’s human rights obligations ‘over and above any other international law granting immunity’.<sup>49</sup> The position that the U.N. has immunity even where that would violate human rights has been deemed ‘counterintuitive’.<sup>50</sup> As a result, a human rights-based approach to U.N. immunity has been developing over the past four decades.<sup>51</sup>

The Appeals Court in *Manderlier v Organisation des Nations Unies et l’Etat Belge*<sup>52</sup> (1969) paves the way for a potential human rights-based challenge to UN immunity. The Appeals Court criticised ‘the present state of international institutions [being that] there is no court to which the appellant can submit his dispute with the United Nations’ as being a situation that ‘does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights’.<sup>53</sup> The case highlights the tension between absolute immunity and human rights.

*Urban v United Nations* (1985) emphasised that a ‘court must take great care not to unduly impair [a litigant’s] constitutional right of access to courts’. Although the court focused on a constitutional right, this might as easily have been an international human right. Whilst the tension was not fully explored owing to the facts, it does highlight that there is a leaning towards rights of access to a

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<sup>45</sup> A. Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’ (2008) 7 *Chinese Journal of International Law* 285, 286.

<sup>46</sup> See, generally, T. Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’ (2010) 51 *Harvard International Law Journal* 323, 323-327.

<sup>47</sup> *Ibid.*, 323.

<sup>48</sup> *Ibid.*

<sup>49</sup> See, generally, Rios and Flaherty (n. 28).

<sup>50</sup> J. J. Paust, ‘The U.N. Is Bound By Human Rights; Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity’ (2010) 51 *Harvard International Law Journal* (2010) 1, 9.

<sup>51</sup> Cf. Freedman (n. 1).

<sup>52</sup> In *Manderlier v Belgium State and United Nations* (Brussels Appeal Court) [1969] 69 ILR 139; *United Nations Juridical Yearbook* (1969), at 236-237 the Appeal Court held that failure under Section 29 had no bearing on the absolute immunity under Section 2. Therefore the plea of ‘no jurisdiction’ was upheld.

<sup>53</sup> *Ibid.*

court. Given the developments in international human rights law, this tension might now resolve in human rights taking precedence.<sup>54</sup>

The plaintiffs in *Mothers of Srebrenica v State of the Netherlands and the United Nations* (2008) claimed that the right to access a court provides an exception to the immunity principle.<sup>55</sup> While that argument was not accepted by the District Court,<sup>56</sup> the Court of Appeal in *Mothers of Srebrenica v. State of the Netherlands and United Nations* (2010)<sup>57</sup> ruled that the UN could be joined to the case, thus setting aside its immunity under Section 2 of the CPIUN. The basis for setting aside the immunity was the right of an individual to access a court. The Court of Appeal held that the UN Charter and the CPIUN could not be used by states to avoid their ECHR obligations and it insisted that it was not precluded from *testing* the UN's immunity against these provisions. After testing the UN's immunity, and on the findings within that case, the Court of Appeal concluded that there would be no violation of the ECHR or ICCPR if a Dutch court upheld UN immunity within that particular case. While this case does not provide an example of when UN immunity may violate an individual's right to access a court, based on its specific facts, it does demonstrate that courts have the jurisdiction to determine whether such a violation has occurred within the context of a specific case.

These cases demonstrate that the door is now ajar for a human rights-based challenge to the UN's immunity.<sup>58</sup> Although in each case the courts found that alternative modes of settlement were available to the claimants, the seeds have been sown for a human rights-based challenge to succeed if such mechanisms are not in place.

## 5. A Case for Change

The U.N. cannot be viewed in a vacuum. A human rights-based challenge to immunity must be understood in the context of developments regarding other international organisations. Reinisch insists that international organisations 'may be under a duty to provide' access to courts or to a

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<sup>54</sup> *Urban v United Nations* [1985] US Court of Appeals DC Cir, 768 F. 2d 1497, 248 US App. DC 64 (DC Cir 1985) – the court considered the litigant to be 'frivolous' and seeking to 'flood' the court with 'meritless, fanciful claims.'

<sup>55</sup> *Mothers of Srebrenica et al. v State of the Netherlands and the UN* [2008] District Court in The Hague, 295247/HA ZA 07-2973.

<sup>56</sup> See, generally, G. den Dekker, 'Immunity of the United Nations before the Dutch courts' (2008) 3 *The Hague Justice Journal* < <http://www.haguejusticeportal.net/index.php?id=11748> >.

<sup>57</sup> *Mothers of Srebrenica v. Netherlands & United Nations* [2010] Case No. 200.20.151/01, Judgment (Appeal Ct. Hague).

<sup>58</sup> Freedman (n. 1).

remedy for potential claimants, without which ‘they may encounter difficulties in insisting on their immunity from suit in national courts’,<sup>59</sup> and his view is reflected in judicial statements and decisions.

The European Court of Human Rights has made clear that it regards the EU as bound by international human rights law. In *Beer and Regan v Germany* (1999)<sup>60</sup> the Court considered that while immunities of international organisations might pursue a legitimate aim that would result in access to a court being restrained, this should not be absolute. Although the Court did not state that alternative dispute resolution mechanisms are a ‘strict prerequisite’ for immunity,<sup>61</sup> it did stress that ‘reasonable alternative means’ available to claimants<sup>62</sup> are ‘a material factor’<sup>63</sup> when assessing the proportionality of the restriction to the right of access to a court.<sup>64</sup> The need for alternative mechanisms was developed further in *Siegler v Western European Union*, (2003),<sup>65</sup> where the Court held that immunity is conditional on the existence of alternative dispute settlement mechanisms, and that it must meet certain standards of due process.

Other international tribunals have adopted similar positions to the ECtHR. The ILOAT in *Chadsey v Universal Postal Union* (1968) emphasised ‘the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure’.<sup>66</sup> In a later case, the same tribunal extended that principle to ‘the safeguard of an impartial ruling by an international tribunal’.<sup>67</sup> UNAT has relied upon the *Chadsey* ruling,<sup>68</sup> both explicitly<sup>69</sup> and implicitly by broadly interpreting its jurisdiction.<sup>70</sup>

Courts seemingly approach international organisations as obligated to provide a reasonable legal remedy if there is no alternative and effective dispute settlement mechanism. Praust insists that this approach ‘must be approved’ because ‘it is justified by the human rights principle of access to

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<sup>59</sup> Reinisch (n. 41), 291

<sup>60</sup> *Beer and Reagan v Germany* [2001] Application No. 28934/95, 33 EHRR 54 para. 58; *Waite and Kennedy v Germany* [2000] Application No. 26083/94, 30 EHRR 261 para.73.

<sup>61</sup> Reinisch (n. 41) 292.

<sup>62</sup> *Waite and Kennedy* (n. 56) para.73.

<sup>63</sup> *Waite and Kennedy* (n. 56) para.68.

<sup>64</sup> Reinisch, (n. 41) 292.

<sup>65</sup> *Siegler v Western European Union* [2004] Brussels Labor Court of Appeal, Journal des Tribunaux 2004, 617, ILDC 53 (BE 2003).

<sup>66</sup> *Chadsey v Universal Postal Union* [1969] ILO Administrative Tribunal, Judgement No. 122.

<sup>67</sup> *Rubio v Universal Postal Union* [1997] ILO Administrative Tribunal, Judgement No. 1644, para.12.

<sup>68</sup> For a discussion of these cases, see Reinisch (n. 41), 292-293.

<sup>69</sup> *Teixera v Secretary-General of the United Nations* [1977] UN Administrative Tribunal, Judgement No. 230.

<sup>70</sup> *Irani v Secretary-General of the United Nations* [1971] UN Administrative Tribunal, Judgement No. 150; *Zafari v UNWRA* [1990] UN Administrative Tribunal, Judgement No. 461; *Salaymeh v UNWRA* [1990] UN Administrative Tribunal, Judgement No. 469.

courts.<sup>71</sup> The *Haiti Cholera* case provides the perfect facts for such an approach to be applied to the U.N.

The outcome of a rights-based approach to U.N. would not be to remove immunity but to make it contingent on individuals being able to access a court and a remedy through the provision of alternative dispute resolution mechanisms. Indeed, that is simply a case of the U.N. adhering to its own framework for redressing injury outside of national courts. Implementing a rights-based approach to immunity would not result in cases being brought against the U.N. unless it fails to adhere to its obligations to provide appropriate mechanisms for victims to make claims. What a rights-based approach would do is to ensure that the U.N. foregrounds its human rights obligations and ensures that it does not violate the rights of individuals that it is supposed to protect.

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<sup>71</sup> J. Wouters & P. Schmitt, 'Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials', *Leuven Centre for Global Governance Studies*, Working Paper No.49 (April 2010), 26.