Jam Tomorrow?

Implications for the UN's Human Rights Liability of the US Supreme Court's Judgment on Immunity

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'Jam to-morrow and jam yesterday – but never jam to-day' (Lewis Carroll, *Through the Looking Glass*, 1871)

1. Introduction

The promise of something pleasant that is unlikely to materialise so neatly encapsulated by the White Queen in Lewis Carroll's *Through the Looking Glass* seems, at first sight, to be the import of the US Supreme Court's judgment in *Jam v. IFC* delivered on 27 February 2019.[1] While the Court's judgment has been cautiously welcomed as the beginning of a long overdue reconceptualisation of the immunity of international organisations,[2] it seems unlikely on its own terms of being capable of delivering access to justice to those claiming to be victims of violations of human rights attributable to international organisations. The judgment may, however, lead to such claims, which are often formulated in domestic tort law or something similar, being made with renewed vigour before national courts. Moreover, given

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[1] *Jam v International Finance Corporation*, 586 U.S._(2019).

[2] For example see Desierto, 'SCOTUS Decision in Jam et al v. International Finance Corporation (IFC) Denies Absolute Immunity to IFC … With Caveats', *EJIL Talk*, 28 February 2019; Arato, 'Equivalence and Translation: Further Thoughts on IO Immunities in Jam v. IFC', *EJIL Talk*, 11 March 2019.

the distinct possibilities of divergence in national jurisprudence, the judgment may finally be seen as a pivotal moment when the type of mass claims, which have failed in the past in the face of the UN's immunity, finally succeed before a domestic court. This is speculation, however, as none of this is guaranteed. In other words, we *may* be witnessing the beginning of the end for the absolute immunity of the UN.

The purpose of this commentary is initially to examine the Supreme Court's judgment in the broader context of organisational accountability and immunity in order to explore its import and its limitations. This is followed by an outline of judicial developments that might follow from it; and more broadly to explore whether a combination of domestic civil (tort) law and international law can provide national courts with a sufficient legal basis to find the UN liable for human rights abuse. The judgment in *Jam v IFC* may mark the beginning of a welcome move towards a more restrictive approach to the immunity of organisations but the legal basis of claims made against organisations, both in terms of the primary and secondary rules of international law and their adjudication before national courts, remains both underdeveloped and disputed. Immunity is only one hurdle that victims have to overcome if they are to succeed in a claim against the UN alleging human rights violations.

2. Organisational Accountability and Immunity

There are considerable difficulties in holding international organisations to account before judicial bodies, whether international, regional or national, even when compared to states as the original international legal persons. This has produced not only incongruity in the international legal order but injustices. In the peacekeeping context, the Courts of the Netherlands have found that the state bore some responsibility for some of the loss of life in Srebrenica as a result of the conduct of Dutch troops operating under UN mandate and operational authority,[3] but upheld the claim to immunity from suit by the UN.[4] Although other cases have found the troop sending state within a UN mandated operation not

[3] In a claim based on Dutch liability law, 'namely the tort-based duty of care codified in Article 6:162 BW (Dutch Civil Code) … The Supreme Court … gave particular shape to this duty of care by assessing Dutchbat's conduct in the light of positive obligations under Articles 2 and 3 of the European Convention on Human Rights (ECHR), which concern the protection of the right to life and the right to physical integrity, considering these standards to be inherent in the duty of care laid down in Article 6:162' – Ryngaert and Spijkers, 'The End of the Road: State Liability for Acts of UN Peacekeeping Contingents After the Dutch Supreme Court's Judgment in *Mothers of Srebrenica*' (2019) 66 *Netherlands International Law Review* 537 at 546.

[4] Ultimately upheld by the European Court of Human Rights in *Stichting Mothers of Srebrenica and Others v The Netherlands* Decision, Application No 65541/12, 11 June 2013.

responsible for conduct that led to loss of life in Kosovo and Rwanda,[5] those courts did not have jurisdiction over the UN and, therefore, could not provide remedies for the victims. Furthermore, at the highest judicial level the contentious jurisdiction of the International Court of Justice (ICJ) is limited to disputes between states and there seems little chance of the Court being asked by a competent UN organ for an advisory opinion about the organisation's immunity or the conduct of its peacekeeping or other operations.

The absence of judicial scrutiny of UN decisions and actions partly explains why the UN has been able to maintain an approach to immunity that looks more like the absolute form of sovereign immunity maintained by states and upheld by the courts before the emergence of a more restrictive form in the mid-20th century. Although the UN Charter's provisions on immunity look less than absolute, creating what appears to be a type of functional immunity,[6] the adoption of the Convention on Privileges and Immunities of the UN in 1946 contained a much stronger version,[7] so that it is accurate to state that 'the prevailing concept of functional immunity often leads *de facto* to absolute immunity'.[8] One reason is that the Courts tend to rely on the more precise rules contained in the Convention rather than to try to understand the concept of functional immunity as embodied in the Charter, which would lead them into the unexplored but vast terrain of determining the extent of the UN's functions.[9]

The UN invoked its immunity in response to a mass claim in tort brought against it by the victims of a cholera epidemic in Haiti introduced into the country in 2010 by unscreened UN peacekeepers from Nepal, and allowed into the Haitian water supply by shoddy sanitary facilities constructed by a private contractor working for the UN. This has caused consternation and condemnation,[10] but such outrage has not yet led to alternative remedies for

[5] *Behrami v France and Saramati v France, Germany and Norway* Decision, Application No 70412/01, 2 May 2007 (European Court of Human Rights); *Kontic v Ministry of Defence* [2016] EWHC 2034 (QB High Court of Justice of England and Wales); *Mukeshimana-Ngulinzira et al v Belgium State*, Case Nos 2011/AR/292 and 2011/AR/294, 8 June 2018 (Court of Appeal of Brussels, Belgium).
[6] Article 105(1) United Nations Charter 1945: 'The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'.
[7] Section 2 Convention on the Privileges and Immunities of the United Nations 1946: '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'.
[8] Reinisch, 'Privileges and Immunities' in Klabbers and Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Elgar, 2011) 138
[9] Ibid. at 139.
[10] Daugirdas, 'Reputation and Accountability: Another Look at the United Nations' Response to the Cholera Epidemic in Haiti' (2019) 16 *International Organizations Law Review* 26. For a discussion of the reasons for failure in mass claims against the UN see Ferstman, 'Reparations for Mass Torts Involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations' (2019) 16 *International Organizations Law Review* 42.

the victims or their families as seemingly required under the 1946 Convention itself,[11] as well as the Status of Forces Agreement between the UN and Haiti.[12] The absence of judicial scrutiny also explains the continuing uncertainty about the nature, indeed existence, of the obligations of the UN under domestic or international law, apart from the occasional general statement from the ICJ,[13] or Bulletin from the UN Secretary-General.[14] Thus with little judicial challenge to the UN's claims to immunity or scrutiny of the legal obligations it has alleged to have breached, the UN appears unaccountable for its decisions and conduct that increasingly affects the lives of individuals under its protection. The pent up frustration at the UN hiding behind a cloak of immunity has found limited release in the unexpected shape of the US Supreme Court's judgment in *Jam v IFC*. However, as the title to this article suggests, the judgment may be holding out a promise that will remain unfulfilled.

3. The Supreme Court's Judgment on Immunity

In 2015, a group of farmers and fishermen who lived near a coal-fired power station in Gujurat, India sued the International Finance Corporation (IFC), an international organisation headquartered in Washington DC in the United States and the source of a $450 million loan that helped finance the building of the power station. The claimants sued the IFC, inter alia, on the basis of negligence alleging that pollution from the power station had contaminated or destroyed much of the surrounding air, land and water, pointing to the failure of the IFC to ensure compliance by the operators with an environmental and social plan in constructing and operating the power station. The IFC argued that it was immune to suit under a US statute - the International Organizations Immunities Act (IOIA) 1945 - and moved to dismiss the claim for lack of subject matter jurisdiction.[15] The IFC argued that the IOIA was properly interpreted to grant organisations the absolute immunity enjoyed by states when it was enacted, and not the more limited form of immunity enjoyed by states today. The case was not decided solely by reference to domestic statute with the judgment making it clear that international law was crucial in determining the nature of immunity and, furthermore, that an

[11] Section 29 Convention on the Privileges and Immunities of the United Nations 1946.
[12] Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti, 9 July 2006, Article VII.54.
[13] *Interpretation of the Agreement of March 1951 between the WHO and Egypt* Advisory Opinion, ICJ Reports 1980, 73 at 90.
[14] UN Secretary-General's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law', UN Doc ST/SGB/1999/13 (1999).
[15] *Jam v IFC* supra n 1, 6 (majority opinion).

international organisation's own provisions on immunity would prevail if stronger than those provided by the IOIA, which contained only 'default rules'.[16] The latter restricts the import of the judgment, especially for the UN, where the Court recognised the stronger form of immunity encapsulated in the 1946 Convention.[17] In the case before it, however, the absolute immunity claimed by the IFC could not prevail on this basis. The Court stated that 'notably, the IFC's own charter does not state that the IFC is absolutely immune from suit'.[18]

Crucially the IOIA did not grant immunity to organisations based on international rules applicable to organisations per se, but by reference to the rules of immunity applicable to foreign states when declaring that organisations had the 'same immunity from suit … as is enjoyed by foreign governments'. It was because of this provision that the IFC claimed a stronger form of immunity than provided by its own charter, arguing that it enjoyed absolute immunity because that was the standard enjoyed by foreign states when the IOIA was enacted in 1945. The Supreme Court, by a majority of 7-1 (with Chief Justice Roberts delivering the majority opinion, Justice Breyer dissenting, and Justice Kavanaugh taking no part), rejected this claim, by deciding that the IOIA was properly interpreted as incorporating the standard of immunity as enjoyed by states at the time of any claim brought against an organisation. Since the change towards restrictive state immunity in international law, based on a distinction between sovereign acts for which a foreign state enjoyed immunity and commercial acts for which it did not, had been embodied in US legislation in the Foreign Sovereign Immunities Act (FSIA) 1976, the IFC enjoyed only restrictive immunity in the claim brought against it.

By these means the Supreme Court adopted a restrictive approach to immunity for organisations before US courts not because international law on the immunity of organisations had necessarily changed but because the law on the immunity of foreign states had, thereby limiting the value of this judgment as reflecting a general change in the law governing organisations. Indeed, the IFC had argued that it was precisely because the 'purpose of international organization immunity is entirely distinct from the purpose of foreign sovereign immunity' that the IOIA 'should not be read to tether international organization immunity to changing foreign sovereign immunity'. In particular, while foreign sovereign immunity 'is grounded in the mutual respect of sovereigns and serves the ends of

[16] Ibid. at 14
[17] Ibid.
[18] Ibid.

international comity and reciprocity', the purpose of organisational immunity is to 'allow organizations to freely pursue the collective goals of member countries without undue interference from the courts of one member country'.[19] The prospect of undermining the fragile autonomy and finances of international organisations by opening them up to a stream of litigation, frivolous or otherwise, was not the main concern of the Supreme Court. The Court stated that '[w]hatever the ultimate purpose of international organizational immunity may be', the IOIA did not address that question – it simply linked the standard of organisational immunity to that of sovereign immunity, 'so that the one develops in tandem with the other'.[20]

In contrast, the dissenting opinion of Justice Breyer eschewed the 'linguistic analysis' of the IOIA pursued by the majority in favour of an analysis of its 'basic statutory purposes',[21] where the aim of Congress was to grant organisations 'full immunity' covering commercial and non-commercial acts. At the time the IOIA was enacted this was readily achieved by granting the same immunities to organisations as granted to foreign governments, and the change in the immunities of the latter should not affect that. Further, Justice Breyer surmised that 'Congress likely recognized that immunity in the commercial area was even more important for many organizations than it was for most foreign governments', given that they are not 'sovereign entities engaged in a host of different activities'.[22] Indeed, a number of organisations, particularly those 'engaged in development finance, refugee assistance' and other tasks,[23] have to engage in 'what U.S. law may well consider to be commercial activities' in order to fulfil their purposes.[24] The effect of the majority's judgment, according to Justice Breyer, is that the 'multilateral nature' of international organisations 'is threatened if one nation alone, through the application of its own liability rules (by nonexpert judges), can shape the policy choices or actions that an international organization believes it must take or refrain from taking'.[25] The judgment may also jeopardise the practice of organisations to recognise 'their moral (if not legal) obligations

[19] Ibid. at 8.
[20] Ibid. at 9-10.
[21] Ibid. at 17 (dissenting opinion).
[22] Ibid. at 7.
[23] Ibid. at 11.
[24] Ibid. at 7.
[25] Ibid. at 4.

to prevent harm to others and to compensate individuals when they do cause harm … without compromising their ability to operate effectively'.[26]

In terms of understanding the nature and purpose or organisational immunity Justice Breyer's opinion is more convincing than the majority's which, in the end, is based on a dynamic interpretation of the IOIA with reference to the changing nature of state rather than organisational immunity.[27] Nevertheless, while the majority opinion could have benefited from some discussion of the nature and purpose of organisational immunity, it raises the prospect bringing hitherto largely unaccountable organisations before US Courts,[28] given that a number of organisations including the World Bank, the IMF and the UN have their headquarters in the US. However, the fulfilment of this promise is tempered by several caveats outlined by the Court, which were partly responses to the IFC's concerns over whether organisational autonomy and functionality could be preserved in the face of a restrictive approach to immunity. While these restrictions will significantly limit access to remedies for litigants, it will not prevent increased judicial scrutiny regarding their application to the facts of the case in front of the court where previously such claims would have simply been dismissed in the face of a claim to organisational immunity.

As mentioned above the first caveat is that the immunity provided by the IOIA is only a 'default' rule, so that if the organisation's own charter or rules specify a stronger form of immunity, then according to the Court that will prevail.[29] As stated by the Court, Section 2 of the Convention on Privileges and Immunities of the United Nations 1946 grants the UN absolute immunity by declaring that the organisation 'shall enjoy immunity from every form of legal process' unless it expressly waives its immunity. However, as has been stated, the UN Charter of 1945 embodied a more restrictive approach by granting the organisation such immunities 'as are necessary for the fulfilment of its purposes'.[30] This could lead to the possibility of litigants shaping their claims with reference to the Charter arguing that, although under treaty law the later treaty normally prevails,[31] the UN Charter is an exception to this due to its 'higher' status in international law.[32] Whether such arguments are

[26] Ibid. at 14.
[27] But see Reinisch, supra n 8 at 140.
[28] There are limited-judicial means of accountability in the UN system itself, principally the World Bank Inspection Panel. See Fourie, 'The World Bank's Inspection Panel's Normative Potential: A Critical Assessment, and a Restatement' (2012) 59 *Netherlands International Law Review* 199.
[29] *Jam v IFC* supra n 1, 14 (majority opinion).
[30] Article 105(1) United Nations Charter 1945.
[31] Article 30 Vienna Convention on the Law of Treaties 1969.
[32] Article 103 United Nations Charter 1945.

convincing will not stop litigants making them and challenging the UN's 'unconstitutional' reliance on absolute immunity to defeat human rights based claims.[33] Furthermore, the 'default' approach of the Supreme Court may not be as reassuring to organisations such as the IFC as it suggested. Justice Breyer in his dissent pointed out that 'unless the treaty provision granting immunity is "self-executing" i.e. automatically applicable, the immunity will not be effective in U.S. courts until Congress enacts additional legislation to implement it'. Justice Breyer further pointed out that while the UN's 'comprehensive immunity' had been incorporated into US law in 1970 this had not been the case with other organisations.[34]

This leads to the second caveat identified by the Court when it addressed the IFC's concern that many of its core lending activities were 'commercial' in nature and therefore would not be protected by restrictive immunity. The Court suggested that 'the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as "commercial"',[35] which seems to invite speculative litigation and certainly was not the view of Justice Breyer in his dissent.[36] Furthermore, it also raises the question as to whether the distinction between sovereign and commercial acts, which has become the basis of restrictive sovereign immunity, can or should be applied to international organisations, which generally do not exercise sovereign powers.

Exceptionally the UN did exercise general sovereign powers when administering Kosovo and, more specifically, it could be argued that in the case of modern peace operations it increasingly exercises at least limited public powers to maintain order and security such as the power of arrest, detention and the use of potentially lethal force. Drawing a distinction between the sovereign/public acts of organisations and commercial acts would potentially significantly restrict their immunity as sovereign acts are very much the exception. However, if the right balance could be struck, in some ways the Supreme Court's approach, albeit one not based on an understanding of organisational immunity, might have advantages over the prevailing argument that organisations have wide functional often *de facto* absolute immunity. This is contrary to the orthodoxy depicted in *Oppenheim* where the authors state that it is 'inappropriate to apply the principle of state immunity, that jurisdictional immunity

[33] See Reinisch supra n 8 at 144, noting the 'shift from functionalist to constitutionalist paradigms' in some domestic court judgments on organisational immunities, e.g. in France.
[34] *Jam v IFC* supra n 1, 8 (dissenting opinion).
[35] Ibid. at 14 (majority opinion), where the Supreme Court stated that to qualify as 'commercial' under the FSIA the activity must be of 'the type … by which a private party engages in' trade or commerce.
[36] Ibid. at 11-12 (dissenting opinion).

exists only in relation to acts *jure imperii* (in the exercise of sovereign authority) but not with respect to acts *jure gestionis* (done privately)', since the basis of the UN's immunity is functional necessity rather than notions of sovereign authority'.[37] However, as Klabbers points out functionalism in general does not provide for real normative limitations, as organisations expand their functions in order to achieve their often very broad purposes.[38] The UN's immunity simply expands in line with its expanding functions, which are aimed at fulfilling its broad purposes to achieve peace, security and international cooperation in economic, social, cultural and humanitarian matters.[39] Inevitably almost, functional immunity heads towards absolute immunity, and it no coincidence that *Oppenheim* describes the UN's immunity as 'absolute'.[40]

The third caveat is possibly the most limiting for potential litigants, including the claimants in the *Jam v IFC* case in further proceedings remanded by the Supreme Court. The Court stated that even if an organisation's activity qualifies as commercial this 'does not mean the organization is automatically subject to suit' since under the FSIA the 'commercial activity must have a sufficient nexus to the United States'. It stated further that any lawsuit 'must be "based upon" either the commercial activity itself or acts performed in connection with the commercial activity'. The Court noted the US government's contention that it has 'serious doubts' whether the suit before it, 'which largely concerns allegedly tortious conduct in India, would satisfy the "based upon" requirement'. The Court states that '[i]n short, restrictive immunity hardly means unlimited exposure to suit for international organizations'.[41] The cautious lifting of immunity for certain 'commercial' acts undertaken by organisations does not directly help litigants making claims in tort based on the failure to exercise due diligence to protect life and health. Furthermore, given that development loans would be for activities outside of the US, it is difficult to speculate on a commercial activity that would satisfy the 'based upon' requirement in this context. Nonetheless, this will not stop litigants exploring the extent of these limitations including those claimants in the *Jam v IFC* case itself.

[37] Higgins *et al, Oppenheim's International Law: United Nations* (Oxford University Press, 2017) 565-6.
[38] Klabbers, 'Contending approaches to international organizations: Between functionalism and constitutionalism' in Klabbers and Wallendahl supra n 8 at 3-30.
[39] Article 1 United Nations Charter 1945.
[40] Higgins, supra n 37 at 565.
[41] *Jam v IFC* supra n 1 at 15 (majority opinion).

4. The Evolution of the Immunity of the UN

The evolution of organisational immunity, largely ignored by the Supreme Court in *Jam v IFC*, is depicted by Bradlow who makes the point that, unlike states, organisations do not generally control territory or population and 'so always operate within the jurisdiction of one of their member states' rendering them 'vulnerable to interference by these states'.[42] 'In order to mitigate this risk' organisations 'have been granted qualified immunity, usually referred to as functional immunity, from the jurisdiction of member states', meaning that the UN and its officials 'are immune from domestic judicial oversight as long as they are performing the functions that the member states have delegated to them in their founding treaties'.[43] For many decades in the UN's life this made sense as it generally only performed limited functions on the host state's territory, all clearly with the consent of that state. Any citizens affected by the UN's activities could seek redress through their government or through bodies with limited competence set up by the UN for that purpose. However, as Bradlow notes, the UN's functions and operations have expanded dramatically after the end of the Cold War to include exercising sovereign-type powers in a state, thereby putting the organisation in a direct relationship with the population, but without granting individuals an increased and direct access to remedies in the event of wrongful acts committed by the organisation.[44] This lacuna in accountability is even starker when considering the emergence of a right to a remedy as a human right recognised in customary international law (and, therefore, binding on the UN).[45] It has become increasingly 'hard to see why' organisations 'should be less accountable to affected people than governments when acting in comparable circumstances'.[46]

In a review of UN practice on immunity, Rashkow, a former UN legal adviser, concludes that over the years the UN has not generally used its immunity to hide from responsibility, rather it has largely responded 'like a good citizen to credible claims, although two recent situations [Srebrenica and Haiti] have raised questions about whether it continues to do so'.[47] Rashkow demonstrates that the UN successfully settles most genuine claims made

[42] Bradlow, 'Using a Shield as a Sword: Are International Organizations Abusing their Immunity?' (2017) 31 *Temple International and Comparative Law Journal* 45 at 45.
[43] Ibid. at 45-6.
[44] Ibid. at 47.
[45] As found, for instance, in Article 8 of the Universal Declaration of Human Rights 1948. See generally Francioni, 'The Right to Access to Justice under Customary International Law' in Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, 2007) 1.
[46] Bradlow, supra n 42 at 57.
[47] Rashkow, 'Immunity of the United Nations' (2013) 10 *International Organizations Law Review* 332 at 333.

against it and that it has developed a number of processes to enable it to do this. In the case of peacekeeping missions the UN has 'internal administrative processes in place' to deal with claims, including internal review boards, as an alternative to the standing claims commissions envisaged in the model SOFA.[48] With the development of more active mandates for peacekeepers this regime was supplemented by the limitations on liability set by the General Assembly in 1998.[49] Given this system, Rashkow questions the UN's decision not to receive any claims from cholera victims and their families in Haiti given the UN's past practice of addressing claims of a private law character within the limitations upon liability established by the Assembly.[50]

According to Okada, the 'difficulty is that while the vast majority of international lawyers share the same starting point of the principle of functional necessity, their conclusions on the scope of immunity are far from convergent'. He observes that '[s]ome regard absolute immunity as the corollary of the principle, while others deny its absolute character, and justify a restrictive approach'.[51] However, section 2 of the 1946 Convention seems to imply that judgements about the functional necessity of claiming immunity are for the UN to make not national courts. It follows that the UN 'may invoke its jurisdictional immunity in any case, regardless of the character of the conduct or act over which a dispute has arisen', and therefore 'domestic courts have no authority to take the immunity away unless the UN considers that it should be removed'.[52] This amounts, de facto at least, to absolute immunity, and was the approach to immunity taken by the UN in Haiti. Furthermore, the UN does not accept that there is a normative relationship between the strong form of immunity from suit found in Section 2 of the 1946 Convention and Section 29, which obliges the UN to provide alternative forms of remedy for claims under private law. The UN's approach was upheld by the US Court of Appeals in 2016 when the Court dismissed the Haitian claimants argument that the UN's immunity under Section 2 depended upon its fulfilling its obligation under Section 29.[53]

[48] Ibid. at 339.
[49] GA Res 52/247, Third-Party Liability: Temporal and Financial Limitations, 26 June 1998, A/RES/52/247.
[50] Rashkow, supra n 47 at 344.
[51] Okada, 'Interpretation of Article VIII, Section 29 of the Convention on the Privileges and Immunities of the UN' (2018) 15 *International Organizations Law Review* 39 at 44.
[52] Ibid. at 45.
[53] *Georges v United Nations*, Case No 15-455-cv, 12, 18 August 2016 (US Court of Appeals for the Second Circuit).

5. Access to Justice in the Case of Mass Claims

In February 2013 the UN rejected claims to compensation by Haitian victims of the cholera epidemic stating that claims for damages totalling millions of dollars were 'not receivable' pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations 1946, to which Haiti is a party. The reason given by the UN was that such claims 'would necessarily include a review of political and policy matters' and, therefore, were 'not receivable' pursuant to Section 29.[54] Section 29 provides that that UN 'shall make provisions for appropriate modes of settlement of … disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party…'. The UN did not view the claims as being of a private law character since it argued that they raised broader policy and political matters, and therefore this meant it did not have to set up appropriate means of settlement. There are undoubted problems in analysing the dispute as solely being one grounded in private law; arguably this was a dispute involving aspects of public law, possibly public international law in the shape of human rights to health and life. However, none of this explains why the UN did not address those aspects of the claim grounded in private law as required by Section 29. Furthermore, there is a clear injustice in making distinctions between violations of private law (which would include contractual and property disputes as well as tortious claims) which should receive alternative redress from the UN, and human rights-based claims which should not.

The 1946 Convention seems to be drafted on the basis that the UN can claim immunity from all actions against it, but that it should make available alternative redress for breakdowns in everyday legal relationships concerning property, contracts, and personal injuries. The scheme, finalised in 1946, did not envisage major suits against the UN that might lead to crippling liability, and so the cloak of immunity has been thrown over these by claiming that they raise 'political and policy matters' and so are not of a private law character. Such a strategy was adopted by the UN in relation to claims made against it for its failure to prevent a cholera outbreak in Haiti in 2010, and earlier for its failures to prevent genocide in Rwanda in 1994 and Srebrenica in 1995.[55] While not denying that the UN should continue to settle its minor private law liabilities, its major concern regarding accountability should be to provide avenues to redress following the commission of any internationally

[54] Letter from Patricia O'Brien, UN Under Secretary-General for Legal Affairs to Mr Concannon, 21 February 2013 in Okada, supra n 51 at 56.
[55] Okada, supra n 51 at 68.

wrongful acts or omissions attributable to the UN. The 1946 Convention signifies that any such claimants should not expect justice from their national courts, but they should expect justice from claims commissions or other similar bodies set up by agreement between the UN and the host state. Section 29 of the 1946 Convention does not mean that the UN should only be concerned with the provision of alternative forms of redress for private law liabilities. Nothing prohibits the UN from establishing alternative forms of redress for human rights violations. If the UN wishes to avoid forcing national courts into piercing the veil of immunity and reviewing 'political' decisions of UN organs, it should start consistently to provide alternative means of redress for victims within the limits of liability set by the General Assembly.[56]

The UN has pledged to eliminate cholera and to help provide infrastructure to ensure clean water supplies in Haiti.[57] Whether this form of payment-in-kind can be viewed as settling the issue is unclear, although relevant rules on responsibility indicate that if the UN is responsible for an internationally wrongful act in these circumstances it is under an 'obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation'.[58] This would suggest that the UN still has an obligation to compensate those suffering loss. The UN's subsequent actions have fallen short of accepting its legal responsibility, or at least a share of it, for the deadly cholera outbreak in Haiti.[59] In 2016 the General Assembly accepted only moral responsibility for the outbreak,[60] and the Secretary-General has adopted a 'charity-based model to combat cholera in asking for financial support from the membership of the United Nations for a new Multi-Donor Trust Fund'.[61] Boon relates that 'as of 2019, the Fund had under 9 million USD, and while some of those funds had been transferred to partner organizations for work in Haiti, no compensation to victims had taken place'.[62]

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[56] Ibid. at 75.
[57] See 'Collective Efforts in Haiti will be Overwhelmed without Massive, Immediate Response, Secretary-General Warns in Remarks to the General Assembly', 3 December 2010, available at http://www.un.org/press/en/2010/sgsm13294.doc.htm (last accessed 14 February 2020).
[58] Article 37 Articles on the Responsibility of International Organizations 2011.
[59] UNSG's 'New Approach to Cholera in Haiti', 25 November 2016, A/71/620: 'the development of a package of material assistance and support to those Haitians most directly affected by cholera, centred on the victims and their families and communities'.
[60] GA Res 71/161, 16 December 2016, A/RES/71/161: '*Recognizing* that the United Nations has a moral responsibility to the victims of the cholera epidemic in Haiti, as well as to support Haiti in overcoming the epidemic and building sound water, sanitation and health systems'.
[61] Boon, 'Rethinking the Accountability-Immunity Axis through Remedies' (2019) 16 *International Organizations Law Review* 137 at 139.
[62] Ibid. at 140.

As Boon states: 'the lack of clarity between public and private law categories infuse the UN's approach to third party claims'.[63] Under the 1946 Convention 'the UN is internally immune from "public" claims but has an obligation to provide a forum for private ones'.[64] Boon's analysis makes sense of the UN's terse response to the claims against it in Haiti: 'the UN attempted to enlarge the category of public claims by asserting that mass private law claims' hade a 'public dimension deeming the case "not receivable"'.[65] Despite the absolute form of immunity that seems to prevail, the UN has not truly established alternative remedies for individual victims and their families in the case of Haiti, and so could itself be denying the most basic human right to a remedy. Given that human rights obligations apply to the UN as a matter of customary law,[66] the UN is bound to provide a remedy when the rights to health and life, both regarded as core human rights,[67] have been violated even though it may continue to claim immunity from national courts.

The failure to take measures to prevent cholera in Haiti seems to be a breach of a duty of care by the UN. The failure to screen or to ensure the screening of the contingent from Nepal and, further, to ensure that proper sanitation was installed in the camp by private contractors engaged by MINUSTAH,[68] prima facie indicate that the UN did not achieve the requisite level of care in fulfilling its obligations to respect and protect the life and health of the people of Haiti.

The potential impact of the US Supreme Court's judgment in *Jam v IFC* in 2019 on the UN's reliance on absolute immunity in such cases is unclear.[69] Disregarding for moment the caveats in the Court's judgment, adapting a form of restrictive immunity to the UN would suggest that, if the Supreme Court's approach takes hold, the UN's claim to immunity in a case like Haiti might not be accepted by domestic courts as it will depend on a court judging whether such acts were characterised as 'commercial'. The difficulties in applying the sovereign/commercial acts distinction drawn in state immunity to the UN's immunity may

[63] Ibid. at 147.
[64] Ibid.
[65] Ibid. at 47.
[66] Quenivet, 'Binding the United Nations to Customary (Human Rights) Law' (2019) *International Organizations Law Review* 1 at 21.
[67] See, for example, Articles 3 (life), 8 (remedy) and 25 (health) Universal Declaration of Human Rights 1948, GA Res 217 A, 10 December 1948, A/RES/217A.
[68] See Alejando Cravioto, 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti', 4 May 2011 available at http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=02ADC910A0E58619E6F0ED330B71F840?doi=10.1.1.367.5727&rep=rep1&type=pdf (last accessed 2 March 2020).
[69] *Jam v* IFC, supra n 1.

not be insurmountable.[70] One possible adaptation would be to accept that when the UN acts to fulfil its peace and security functions, specifically when it exercises public powers in the performance of its peacekeeping tasks, such 'public' acts should be covered by the organisation's immunity, although the UN is bound to provide alternative routes for redress for any violations of domestic or international law when carrying out these acts. In this respect the European Court of Human Rights' judgment in the *Mothers of Srebrenica* case should be read. The Court upheld the UN's claim to immunity before Dutch courts, stating that bringing such matters before domestic courts would interfere with the UN's mission to achieve peace and security.[71] The controversy caused by this judgment concerned the Court's rejection of the argument that the UN's immunity could not prevail in the face of civil claims based on a violation of a norm of *jus cogens*, namely the act of genocide committed in Srebrenica.[72] A successful claim to immunity should not, however, have led to the UN avoiding liability. The UN should have set up a mechanism to remedy those families, discussing with the Netherlands, as the troop contributing nation, the apportionment of responsibility. Furthermore, for commercial acts such as engaging private contractors to construct sanitation facilities for peacekeepers, the arguments for immunity in the face of claims that it failed to exercise due care do not appear convincing. Indeed, the justification for invoking immunity in these circumstances seems to be to prevent potentially crippling damages being awarded against the UN by national courts, which are not bound by the General Assembly's limits on liability. To avoid this problem the UN should set up alternative methods of redress to victims, otherwise national courts may intervene.

Applying the public/commercial distinction to Haiti would prima facie suggest that the failure to ensure a contractor's work on the camp is a commercial matter, but that the decision to deploy a contingent from Nepal, albeit one with an attendant disease risk, was a public act. If absolute immunity is replaced with restricted immunity for public and not commercial acts then the UN could only claim immunity for any violations arising out of the deployment of the contingent but not for the engagement of shoddy contractors. However, while this opens up the UN to liability in domestic law for commercial acts, the UN remains

[70] Arato, supra n 2.
[71] *Stichting Mothers of Srebrenica*, supra n 4 at paras 154-6.
[72] Ibid. at para 158. It is worth noting in the context of state immunity that the European Court of Human Rights has accepted (for example in *Jones v The United Kingdom* Merits and Just Satisfaction, Application Nos 34356/06 and 40528/06, 14 January 2014, para 195) that human rights obligations (in that case to refrain from torture, a *jus cogens* norm) have to be read consistently with international law and the rules of state immunity in particular.

legally responsible for any violations of international law caused by its public acts. It may continue to claim immunity before national courts for its public acts but its obligation to compensate for internationally wrongful acts under the rules of organisational responsibility have to be fulfilled by alternative means. The UN could settle both types of claims, public and private, by alternative non-judicial means such as claims commissions. While the UN would be under an obligation to provide compensation for the damage it has caused or contributed to, this may provide the organisation with some control over the extent of its liability.

6. The UN, Human Rights and Due Diligence

The UN's claims to immunity for its conduct in Haiti and Srebrenica have obscured the issue of whether it has violated any primary rules of international law rendering it responsible under the secondary rules. Although there is a growing jurisprudence on secondary rules, especially whether conduct should be attributed to the troop sending state or the UN in the context of peacekeeping,[73] there has been little focus on the primary rules applicable to the UN. In other words there has been little clarification of whether conduct attributable to the UN is actually a violation of international law. In part, this reflects the ongoing debate about whether the UN is bound by the 'external' norms of international law, as opposed to the 'internal' rules deriving from the UN Charter.[74] The UN, unlike states, does 'not possess a general competence',[75] meaning that 'the precise catalogue of rights and duties' applicable to the UN is 'impossible to list in advance'.[76]

According to Quenivet: 'customary human rights only applies to those UN activities that are related to its purposes and functions and have an impact on human rights'.[77] In human rights terms, this requires a deepening of an understanding of due diligence as a standard against which to judge UN's actions, and as a potential basis of liability when the

[73] Essentially whether the UN is responsible for the acts of peacekeeping operations as subsidiary organs (Article 6 of the Articles on the Responsibility of Organisations 2011) or whether the UN is only responsible for the acts of peacekeepers drawn from troop contributing nations when in effective control of the conduct in question (Article 7). See discussion in Okada, 'Effective control test at the interface between the law of international responsibility and the law of international organizations: Managing concerns over the attribution of UN peacekeepers' conduct to troop-contributing nations' (2019) 32 *Leiden Journal of International Law* 275.
[74] Zwanenberg, 'Compromise of Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces' (1998) 11 *Leiden Journal of International Law* 229 at 232
[75] Quenivet, supra n 66 at 21.
[76] Shaw, *International Law* (Cambridge University Press, 7th edn, 2014) 192.
[77] Quenivet, supra n 66 at 22.

organisation has 'manifestly failed to take all measures' that were 'within its power' to take' to protect fundamental human rights.[78] Given the nature of peacekeeping, whereby the UN essentially sub-contracts the military function to troop contributing states meaning that peacekeepers remain state agents subject to national military law albeit under UN 'operational authority',[79] it can be argued that the UN's human rights obligations under customary international law 'are best operationalized … through the prism of due diligence'.[80] This would require the UN to take measures to ensure that peacekeepers acting in its name do not violate the human rights of individuals within the host state. Moreover, where the UN exercises sufficient control in a host state wider due diligence obligations should be engaged, for example if a peacekeeping force fails to take reasonable measures to prevent or stop violence by third parties against civilians sheltered in its compounds or camps.

As is well known, the Human Rights Committee's view is that human rights obligations under the International Covenant on Civil and Political Rights 1966 extend to Troop Contributing Nations (TCNs) in a peacekeeping mission to ensure the human rights of persons within their power or effective control.[81] It is therefore arguable that the customary equivalents should apply to the UN. The jurisprudence of the European Court of Human Rights extends the extraterritorial application of the Convention to state parties not only in situations of 'effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation', but also to situations where the outside state 'exercises all or some of the public powers normally exercised' by the host government on the basis of

[78] ILA Study Group on Due Diligence in International Law, 'Second Report', 12 July 2016, 8, citing, inter alia, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment, ICJ Reports 2007, 43 at para 430.

[79] 'Operational authority' has been defined by the UN as '[t]he authority transferred by the member states to the United Nations to use the operational capabilities of their national military contingents … to undertake mandated missions and tasks', which in peacekeeping operations 'is vested in the Secretary-General, under the authority of the Security Council' involving 'the full authority to issue operational directives' – UNDPKO and DFS, 'Authority, Command and Control in United Nations Peacekeeping Operations', 15 February 2008, para 7.

[80] Campbell el at, 'Due Diligence Obligations of International Organizations under International Law', (2018) 50 *New York University Journal of International Law and Politics* 561 at 558; Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 151

[81] United Nations, Human Rights Committee, General Comment 31, 'Nature of the General Legal Obligation on States Parties to the Covenant', 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 10. See also United Nations, Human Rights Committee, General Comment 36, 'Article 6 of the International Covenant on Civil and Political Rights, on the right to life', 20 October 2018, CCPR/C/GC/36, para 63, where the Committee expressed the obligation differently: 'to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control'.

'consent, invitation or acquiescence' by that government.[82] A UN peacekeeping force may be in effective control over parts of the host state territory, moreover it may exercise public powers more broadly as a consequence of the extensive expansion of the functions of peacekeeping. In this light, and given the flexible nature of due diligence obligations, it might be argued that the extent of those obligations should be commensurate with the level of control exerted by the UN and the nature of the public powers it exercises with the consent of the host state. In other words, the UN has, in principle, obligations to take reasonable measures to prevent human rights abuse by peacekeepers or contractors operating under its mandate or control, and it may have such obligations to prevent human rights abuse by third parties if it is within its power to do so.

In developing an accountability framework to match its responsibility it will be necessary to understand the role of secondary rules in engaging liability for failing to exercise due diligence. Article 4 of the ILC's Articles on the Responsibility of International Organisations of 2011 specifies that there is an internationally wrongful act when 'conduct consisting of an act or omission' is attributable to the organisation and constitutes a breach of an obligation owed by the organisation. In one sense, the inclusion of 'omission' is the secondary rule which supports primary rules of due diligence. In other words if there are primary rules of due diligence incumbent on the UN, for example to take measures through its peacekeeping operations within its power and within the limits of its control to prevent human rights abuses, then its failure to act i.e. its failure to take such measures, is an omission that can give rise to responsibility under the secondary rules laid out in the Articles of 2011. In terms of attribution, while there may well not be sufficient control exerted by the UN over peacekeeping acts to engage Article 7 of the Articles,[83] the failure to take measures is an omission of one of the organs of the UN, either the Security Council, the Secretary-General, or the UN peacekeeping operation as a subsidiary organ, and therefore engages Article 6.[84]

7. Final Thoughts on the Implications of *Jam v IFC* for the Human Rights Liability of the UN

[82] *Bankovic v Belgium and others*, Application No 52207/99 Admissibility, 12 December 2001, para 80. See further *Al-Skeini v The United Kingdom*, Application No 55721/07 Merits and Just Satisfaction, 7 July 2011, paras 133-42.
[83] Supra n 73.
[84] Ibid.

The above analysis of the judgment in *Jam v IFC* shows that foreign litigants making private law claims against the UN or other organisations for 'commercial acts' before US courts may be closer to success, although they still have to overcome several significant hurdles including the apparent entrenchment of the UN's absolute immunity in section 2 of the Convention on Privileges and Immunities 1946 in US law, and the burden of proving a sufficient connection to the US. Other potential litigants seeking redress before US courts from the UN through mass claims framed in private law for violation of their human rights - essentially that the UN had failed in its duty of care to them leading to damage to health, loss of livelihood, injury, or loss of life, remain several steps away from succeeding. The US Supreme Court stated in *Jam v IFC that* 'if the "gravamen" of a lawsuit is tortious activity abroad, the suit is not "based upon" commercial activity' within the meaning of the commercial activity exception.[85]

Claimants have been forced to try their luck before domestic courts because the UN has not provided alternative remedies in such circumstances. In essence, the litigants in Haiti framed their claims against the UN for death and injury resulting from cholera in the private law of tort in order to try to benefit from section 29 of the Convention on Privileges and Immunities. The UN, however, responded that they were not receivable pursuant to section 29 as they raised issues of policy. The resulting litigation before US Courts, in which the claimants argued that the UN could only rely on its immunity under section 2 of the 1946 Convention if it fulfilled its obligations to provide alternative forms of remedy for claims under private law under section 29, failed.[86] In some ways if the US courts had agreed with the claimants in *Georges v UN* this would have opened up UN accountability in a much more significant way than the Supreme Court's judgment in *Jam v IFC.* The UN would have been obliged to provide alternative redress, through the establishment of a claims commission, although a Court may still have to potentially judge on the truly private law nature of the claims if the UN continued to deny this. If this had been the case the Supreme Court's judgment in *Jam v IFC* would have added to the domestic court's competence by removing the UN's immunity for commercial acts, meaning that if the UN did not provide effective remedies then it was open to domestic suit.

By itself, the Supreme Court's judgment holds out the promise of jam tomorrow but even if the hurdles identified by the Court could be overcome by claimants, they would still

[85] *Jam v IFC* supra n 1 at 15.
[86] *Georges v United Nations* supra n 53.

have to establish the private law nature of the claim, and then the in some ways narrower 'commercial' nature of the act, in the face UN arguments for immunity on the basis that mass claims raise broader policy issues about its functions. This perhaps points to a public/private distinction rather than a sovereign/commercial distinction being a clearer and more appropriate basis for restricting the immunity of organisations, but this is not the result of the Supreme Court's judgment. Furthermore, the debate about the extent of the UN's immunity also acts as a shield to liability in a wider sense, because it detracts from a clear understanding of the UN's primary and secondary obligations under international law, especially regarding human rights due diligence. Converting this form of responsibility into actionable liability before any courts, whether national or international, is some distance away. The judgment in *Jam v IFC* is a step in the right direction but it only restricts immunity as one of the hurdles facing litigants from bringing successful actions before US courts against the UN. A genuine remedy for human rights violations by the UN before national or international courts or, indeed, through claims processes created by the UN, thus remains a long way off.