***Reparations for Mass Torts involving the United Nations: Misguided Exceptionalism in Peacekeeping Operations***[1]

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## I. Introduction

Persons who suffer harm as a result of the negligence or malfeasance of the United Nations (UN) have nowhere to go to seek redress. There is no competent court to hear their complaints due to a combination of institutional immunities and individuals' lack of standing to bring a dispute to the attention of an adjudicative body independent of the organization.[2] At the same time, individuals affected by the wrongful conduct of the UN have not usually been able to rely on their States of nationality to pursue claims on their behalf nor have adequate administrative mechanisms internal to the organization been established to ensure a modicum of justice.[3]

The absence of appropriate fora to pursue claims impedes injured individuals from securing meaningful reparations. But it also results in a wider problem; it dis-incentivizes the UN from putting in place internal rules and policies that pass adequate legal muster. There is no independent judicial scrutiny of these rules and policies which are largely created in the organization's self-interest. This absence of scrutiny can and has resulted in a denial of justice – taken here to mean an absence of a minimum standard of process by which a claim is independently and fairly adjudicated.[4] It also creates an environment in which the policies that resulted in negligent or otherwise wrongful conduct are allowed to continue. There is insufficient learning from mistakes or meaningful steps taken to prevent recurrence.

This article focuses on one part of this conundrum: the (mis)use of the principle of *lex specialis* to exempt the UN from its general obligation to account for and address fully the harms it causes. That the UN has such a general obligation to so account is a topic canvassed

[1] I am extremely grateful to the editors Kristen Boon and Frédéric Mégret for their helpful comments on an earlier version of this article. All errors and omissions are my own.

[2] There are local claims review boards which have been established in most peacekeeping missions to adjudicate "private" claims, however, as will be discussed in this article, these are not independent of the UN nor do they deal with the most problematic mass tort situations, such as allegations concerning negligence attributable to the UN resulting in violations of the right to health and claims against the organization for sexual exploitation and abuse in which the organization bears some responsibility.

[3] This article builds on some of the arguments set out in: Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford: OUP, 2017)

[4] See generally, Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005). The phrase "denial of justice" has a specific meaning in international law which itself has been subject to transformation and debate, but is generally understood as being linked to the failure or absence of local remedies. Francioni connects the phrase with the wider notion of access to justice, explaining that 'only when "justice" is not delivered, either because judicial remedies are not available or the administration of justice is so inadequate, deficient, or deceptively manipulated so as to deprive the injured alien of effective remedial process, can the alien invoke "denial of justice": a wrongful act for which international responsibility may arise and in relation to which an interstate claim and diplomatic protection may be presented by the national state of the victim.' [Francesco Francioni, 'Access to Justice, Denial of Justice, and International Investment Law', in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009), 64]. In the context of international organizations, the concept of local remedies does not apply in the same sense but the closest equivalent can be understood as the internal adjudication mechanisms of the organization; there is a "denial of justice" when those mechanisms are either non-existent or fail to adjudicate the matter adequately or at all.

elsewhere by a variety of scholars[5] and those arguments will not be repeated here; this general obligation is also a *sine qua non* of the International Law Commission's [ILC] framework relating to the responsibility of international organizations [DARIO],[6] Article 3 of which specifies that '[e]very internationally wrongful act of an international organization entails the international responsibility of that organization', and Articles 30 and 31 make clear that a responsible international organization is obligated to cease those acts that are continuing and afford appropriate assurances and guarantees or non-repetition if the circumstances so require, as well as make full reparation for the injury caused by the internationally wrongful act.

The ILC framework focuses on the internationally wrongful acts of international organizations where the resultant obligations are 'owed to one or more States, to one or more other organizations, or to the international community as a whole'.[7] The text does not cover and is without prejudice to 'any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.'[8] Nonetheless, the Official Commentaries to the ILC DARIO text identify peacekeeping – which is the focus of this article - as one of two significant areas in which rights accrue to persons other than States or organizations;[9] the other being employment claims. The Official Commentaries do not explain the matter in any detail, however elsewhere in the same text, the Commentaries make reference to the UN's liability towards third parties under the model contribution agreement relating to military contingents placed at the UN's disposal.[10] Here, it is noted that under the model contribution agreement, the UN would be liable but has a right of recovery against the contributing state under certain circumstances. It is noted, however, having particular regard to the inability for a contract to impinge on the rights of third parties, that 'this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.'[11]

This failure to address directly those obligations owed to individuals unconnected to the organization is consistent with the approach taken in the ILC's Articles on the Responsibility of States, which the DARIO largely mirror.[12] Nevertheless, this limitation is unfortunate as it

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[5] Ferstman, *International Organizations and the Fight for Accountability* (n. 3). See also, Frédéric Mégret, 'The Vicarious Responsibility of the United Nations for "Unintended Consequences" of Peacekeeping Operations' in Chiyuki Aoi, Cedric de Cooning and Ramesh Thakur (eds), *The "Unintended" Consequences of Peace Operations* (UN University Press 2007) 250-267; August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131

[6] ILC, Draft articles on the responsibility of international organizations, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10 [DARIO]

[7] ibid, Art 33(1)

[8] ibid, Art 33(2)

[9] ibid, Official Commentaries to Art 33, para 5. These indicate: 'With regard to the international responsibility of international organizations, one signifcant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals. The consequences of these breaches with regard to individuals, as stated in paragraph (1), are not covered by the present draft articles.'

[10] ibid, Official Commentaries to Art 7, para 3.

[11] ibid

[12] ibid, Official Commentaries to Art 33, paras 1-2.

has left open a window of uncertainty which has been seized upon by the UN as a rationale for derogating from the standards set out in the ILC text and elsewhere. This has been done in large part through the (mis)use of the principle of *lex specialis*. The Secretariat of the UN has underscored its view that 'the obligation to make reparation, as well as the scope of such reparation, must be subject, in the case of the United Nations, to the rules of the organization, and more particularly, to the lex specialis rule within the meaning of draft article 63.'[13]

As is described later in this article, the *lex specialis* principle maintains that the general law is inapplicable when there are more precise or 'special' rules that apply in a given situation. However, whether it can be said that there is any special rule governing the procedures and standards applicable to reparation for injury caused by the actions or omissions of the UN, and how far that 'specialness' extends, is subject to debate. It is posited that the general law on reparations for injury remains applicable to the wrongful conduct attributable to the UN at least for the purposes of filling any gaps or deficiencies in any special rules the organization chooses to put in place.

The justifications for the UN's *lex specialis* approach to reparations for harms associated with peacekeeping tend to stem from the special status accorded to the 'rules of the organization'.[14] It is well recognized that international organizations should be capable of setting internal rules to regulate their operations – the internal *lex specialis* of the organization - and that these rules should be subject to only minimal outside scrutiny.[15] The rationale is to preserve the independence of the organization, especially where the application of domestic law by national courts where the organizations operate would be inconsistent with the organizations' international status. However, there is a marked difference between setting internal rules to govern issues such as the employment of international personnel – an area which has an impact on persons who agree to contract with the organization and who have an understanding of the terms for so doing in advance, and in contrast, when an organization sets rules which determine the extent of its liability for internationally wrongful conduct and responsibility to afford reparations to individuals unconnected with the organization and who the organization is mandated to protect, that are negatively affected by such conduct.

It is not unusual for a party to a legal claim to advance interpretations of the law that reflect that party's interests and serve to minimize its responsibility. In a domestic context, this is the daily fodder of judges and courts; flawed arguments put forward by one side in a legal case would simply be dismissed or overruled in the ordinary course of proceedings. Indeed it is the job of the judge to see beyond self-interested embellishments or (mis)framings of the law. However, where there is no independent court with the mandate to adjudicate claims, the UN's (mis)framings of the law are incapable of challenge. The more these (mis)framings are asserted without challenge, the more credence they receive – in this sense the 'fake' law progressively becomes 'real'. But, this does not make those framings legally correct, just or appropriate.

## II. Resort to *Lex Specialis* in the UN's Handling of Mass Tort Cases

[13] ILC, 'Comments and observations received from international organizations' (17 February 2011) UN Doc A/CN.4/637/Add.1, 30, para 8.
[14] UNGA, 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping' (21 May 1997) UN Doc A/51/903, para 12
[15] DARIO (n. 6) Art 64

## II.1 The principle of *lex specialis*

The Latin maxim *lex specialis derogat legi generali* sets out the principle that when two norms apply to the same subject matter, the rule which is more specific should prevail and be given priority over that which is more general.[16] The maxim has been used both as a tool of interpretation to give clarity to a specific provision which might operate against a more general legal framework, and in other circumstances, the more specific exception is privileged to resolve a conflict or inconsistency between two legal norms which may be equally valid but are impossible to construe compatibly. The latter usage is premised on the understanding that parties (to a treaty, contract or agreement) are entitled to make special arrangements to regulate their relationship; in certain circumstances they may contract out of general rules of international law by subscribing to more specific rules to cover their situation.[17]

In order for the *lex specialis* maxim to apply, it must be possible to construe a rule as 'special', or 'more special' than another, and the two rules must both cover the same subject matter. This will not always be easy to determine, particularly when there is an incompatibility between two special regimes which may apply equally to a set of facts. Typically, treaties which bind specific parties would be considered more 'special' than general or customary international law.[18] As the International Court of Justice (ICJ) held in its *Nicaragua* judgment, '[i]n general, treaty rules being lex specialis, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim'.[19] But following on from this, if the special regime has gaps – for instance, if the special regime was not intended to be exhaustive or complete, or it nevertheless fails to adequately tackle all relevant issues such as for example, not providing 'means for settlement of such a claim', resort can be had to the general applicable law to fill the gaps. Simma and Pulkowski refer to this as 'a sliding scale of specialness',

> one could conceive a rule at one end that is only designed to replace a single provision of the set of rules on state responsibility, while leaving the application of this framework otherwise untouched. At the other end of the scale, a strong form of lex specialis could exclude the application of the general regime of state responsibility altogether, either by explicit provision or by implication, that is, by virtue of a regime's particular structure or its object and purpose. This latter concept of a strong lex specialis designed to exclude completely the general international law of state responsibility is what we denote as a 'self-contained regime'. [20]

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[16] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'. Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi (A/CN.4/L.682) 13 April 2006; Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis', (2005) 74 Nordic J Intl L 27

[17] '[I]t is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties' *North Sea Continental Shelf cases* (Germany v Denmark; Germany v. the Netherlands) [1969] ICJ Rep 42, para 72

[18] Aside from peremptory norms of international law, from which there can be no derogation or exemption; in such circumstances a special regime would simply fail.

[19] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) (Merits) [1986] ICJ Rep 137, para. 274.

[20] Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) European J Intl L 483, 490

The principle has been included in the ILC's DARIO text,[21] providing that special rules of international law, including the rules of the organization, displace the general ones.[22] In other words, the 'rules of the organization' are considered special laws which regulate the affairs of the organization, which are potentially capable of displacing any general rules of international law which might otherwise apply. The DARIO principle makes clear however, that it is not any 'rule of the organization' that may displace a general rule of international law. The rules must be ones 'applicable to the relations between an international organization and its members;'[23] 'they may affect the consequences of a breach of international law that an international organization may commit when the injured party is a member State or international organization',[24] and may even 'for instance, modify the rules on the forms of reparation that a responsible organization may have to make towards its members',[25] 'but 'they cannot have a similar effect in relation to non-members.'[26] This is, of course, because non-members have not agreed to be bound.

The DARIO and its official commentary are silent as to the position of the 'rules of the organization' when the injured party is not a member State or international organization but an individual who is a national of a member State. Under classical international law, States of nationality can contract on behalf of their nationals on the international plane and take up the injuries of their nationals through diplomatic protection. But they are not obliged to do so, and in the case of nationals injured by the conduct of international organizations, they have rarely done so.[27] The current position in respect of injured individuals not assisted by their States of nationality, and who have not voluntarily agreed to the special regime[28] is not altogether clear.

Koskenniemi notes that '[i]n regard to conflicts between human rights norms, for instance, the one that is more favourable to the protected interest is usually held overriding. At least derogation to the detriment of the beneficiaries would seem precluded.'[29] Elsewhere he lists among several 'concerns that may seem pertinent', 'prohibition to deviate from law benefiting third-parties, including individuals or non-State entities'.[30] Arguably applying the UN's *lex specialis* would frustrate the purpose of the general law, which is to ensure that victims receive adequate reparations. Injured individuals would be affected by the operation of the *lex specialis*[31] and failure of the special regime could be inferred as a result of it having

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[21] DARIO, above n 6

[22] DARIO, ibid, Art 64. See also, Kristen Boon, 'The Role of Lex Specialis in the Articles on the Responsibility of International Organizations', in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff (Brill), 2013) 135

[23] DARIO, ibid, Art 64

[24] ibid, Commentary to Art 64, para 8

[25] ibid, para 3 of the Commentary to Art 32

[26] ibid, Commentary to Art 5, para 3

[27] Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harv Intl LJ 113, 127-8. Dannenbaum notes that 'International diplomatic power is not a characteristic typical of a state hosting peacekeepers' [127].

[28] ILC, 'Fragmentation of International Law' (above n 16), para 61

[29] ILC, 'Fragmentation of International Law' (above n 16), para 108

[30] ibid, para 109

[31] ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the International Law Commission on the Work of its 58th Session (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, paras 251(8)-(10)

'no reasonable prospect of appropriately addressing the objectives for which [it was] enacted'.[32]

There are several principles which may be drawn from the above. If there is no real inconsistency, the special regime will be interpreted in a manner consistent with the general law. If there is an inconsistency, a special rule or regime applicable between the parties may displace the general law. However, a special regime will not be capable of displacing the general law in respect of non-parties – persons or entities who have not consented to the special regime and are outside its purview. Furthermore, the general rule may continue to apply as between consenting parties to the extent that the special rule leaves gaps or inadequacies, such as the failure of the special regime to identify a remedial framework.

### II.2 The Reference to *lex specialis* in the practice and statements of the UN concerning reparations in mass tort cases

As will be described, *lex specialis* has been referred to and applied by the UN in a number of contexts relevant to mass tort cases and is reflected in the responses of the UN's Office of Legal Affairs and of several UN specialized agencies to the ILC Special Rapporteur on the DARIO text, in the lead up to the text's adoption. These responses underscore the institutional commitment to 'speciality' to govern the relationship between DARIO and the respective 'rules of the organization.'

In the context of peacekeeping, *lex specialis* has been used to limit the types of conduct or scenarios which may give rise to a claim; restrict the categories of eligible beneficiaries; limit the timeframe during which claims may be filed; justify abridged administrative procedures for the handling of claims as well as limit the scale of recoverable damages. A scheme on third-party liability with significant restrictions on recovery was proposed by the Secretary-General in 1997.[33] It was adopted by the UN General Assembly in 1998[34] and has been incorporated into status of forces agreements and the terms of reference of local claims review boards established by the UN, ever since. Even when there is no direct reference to the *lex specialis* maxim, as will be described, there seems to be a general view within the UN that the only rules that apply to it are the ones created by it.

#### II.2.1 Restriction on the types of conduct over which the UN can be deemed responsible

*Lex specialis* – type arguments have been used to restrict the types of conduct over which the UN can be deemed responsible: only acts carried out in an official capacity and not for acts which were carried out because of operational necessity.

An international organization incurs responsibility, so long as the organ or agent of the organization acts in an official capacity and within its overall functions.[35] Consequently, narrow framings of what constitute official acts of the organization would limit the scope of acts for which an organization is responsible. The Office of Legal Affairs (OLA) has clarified that official acts are 'acts [carried out] in an official capacity and within the overall functions

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[32] ibid, para 251(16)
[33] UNGA, Report of the Secretary-General, 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping' (n. 14)
[34] UNGA, 'Third-party liability: temporal and financial limitations', GA Res 52/247 (17 July 1998)
[35] DARIO (n. 6), Art 8

of the organization.[36] But, even if a particular act is not carried out pursuant to official functions, often the position of power *vis-à-vis* the local community engendered by the individual's role in the international organization, particularly in a peacekeeping context, and in certain instances, access to weapons, funds, equipment or other means put at the individual's disposal, might have made the commission of the unlawful act possible. A notorious example is sexual exploitation and abuse by peacekeepers in poverty stricken, vulnerable and conflict-ridden environments where food and money are bartered for sexual favours.[37] A wider framing of official acts would be consistent with codes of conduct issued by international organizations, all of which make clear that proper comportment is not limited to particular contexts when an agent or employee is said to be 'on duty'.[38] It would also be more consistent with parts of international humanitarian law, which do not condition the obligation to afford reparations on whether the impugned acts causing the harm were 'official' acts.[39]

*Lex specialis* – type arguments have also been used to exclude liability in relation to third-party claims resulting from or attributable to the activities of members of peacekeeping operations arising from 'operational necessity.'[40] Conduct which can be justified on the basis of 'operational necessity' – damage that occurs as a result of necessary actions taken by peacekeepers in fulfillment of their mandate – has been determined not to be capable of being adjudicated through a claims process, because, according to the UN, its 'liability is not engaged.'[41] This assertion of an exception to liability in the case of 'operational necessity' – a concept somewhat similar to the principle of military necessity under international humanitarian law – but which has been used loosely by the UN in an array of additional contexts,[42] has also been justified in respect of peacekeeping on the basis that the peacekeeping mission is in situ to assist the host population who should bear the risk.[43]

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[36] ILC, 'Comments and observations received from international organizations' (17 February 2011) A/CN.4/637/Add.1, 15

[37] Marie Deschamps, Hassan Jallow and Yasmin Sooka, 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (17 December 2015) <http://www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf> accessed November 2018, pp. 17-21.

[38] See, in particular, UN Secretariat, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (9 October 2003) UN Doc ST/SGB/2003/13, whose provisions apply at all times; UN Secretariat, 'Staff Regulations' (7 February 2003) UN Doc ST/SGB/2003/5, reg 1.2(f); UN DPKO, Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers (2003) UN Doc DPKO/CPD/DDCPO/2003/001 and DPKO/MD/03/00994, section 4

[39] Article 3 of the Fourth Hague Convention of 1907 [*Hague Convention No IV Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910) 36 Stat 2227, TS No 539] provides that a belligerent party will be liable to pay compensation for '*all* acts committed by persons forming part of its armed forces', and thereby not exempting from attribution to the State acts committed by individuals in their private capacity. A similar provision is found in Article 91 of Protocol I [*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3].

[40] UNGA, 'Third-party liability: temporal and financial limitations' (n. 34), para 6

[41] UNGA, 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping' (n. 14), para 14. See also, Daphna Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage' (2000) 94(2) AJIL 450, 453

[42] For instance, the UN Secretary-General has justified his meeting with indicted war criminal President al-Bashir of Sudan on the basis of 'operational necessity' [Edith M. Lederer, 'UN chief met Sudan's president who is accused of genocide', Associated Press, 30 January 2018]; the UN Executive Director of UN Women, and the Special Representative of the Secretary-General on Sexual Violence in Conflict have justified their call to increase the number of women in peacekeeping on the basis of 'operational necessity' [Joint Statement by

Similar to claims of military necessity, claims of 'operational necessity' should be assessed on the basis of proportionality. This is set out in a report of the UN Secretary-General, who specifies that whether "operational necessity" is engaged

> 'must remain within the discretionary power of the force commander, who must attempt to strike a balance between the operational necessity of the force and the respect for private property. In deciding upon the operational necessity of any given measure the following must be taken into account: (a) There must be a good-faith conviction on the part of the force commander that an "operational necessity" exists; (b) The operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option; (c) The act must be executed in pursuance of an operational plan and not the result of a rash individual action; (d) The damage caused should be proportional to what is strictly necessary in order to achieve the operational goal.'[44]

The Secretary-General goes on to recommend that claims resulting from the 'operational necessity' of a peacekeeping operation should be excluded from the scope of competence of standing claims commissions.[45] However, there is no independent process to determine whether the above-referenced criteria or any other criteria for determining operational necessity are met. Instead, a claim is simply taken out of consideration (by the UN) when the force commander on the basis of the exercise of his or her discretion determines that there was an 'operational necessity'.[46]

Beyond the above-noted limitations on the types of conduct that can result in liability which have been incorporated into General Assembly resolutions, status of forces agreements and the terms of reference of local claims review boards, there are additional *de facto* restrictions or barriers to liability. These are scenarios or contexts in which the UN simply decides not to submit itself to any form of internal claims process. Given the absence of an alternative forum to which injured third-party individuals can address themselves, these *de facto* restrictions constitute additional, virtually absolute, barriers to the resolution of claims.

The first of these stems from the UN's practice of distinguishing between claims of a 'private' and 'public' nature, and deeming the latter category of claims to be 'non-receivable'. The UN has stated publicly:

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Phumzile Mlambo Ngcuka and Pramila Patten on the launch of the Elsie Initiative, 16 November 2017, available at http://www.unwomen.org/en/news/stories/2017/11/joint-statement-by-phumzile-mlambo-ngcuka-and-pramila-patten-on-the-launch-of-the-elsie-initiative]

[43] UNGA, 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping' (n. 14), para 12

[44] UNGA, 'Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters' (20 September 1996) UN Doc A/51/389, para 14. See also, Daphna Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage' (2000) 94(2) AJIL 406, 411.

[45] UNGA, ibid, para 15.

[46] Boris Kondoch, 'The responsibility of peacekeepers, their sending states and international organizations', in TD Gill and D Fleck (eds) *The handbook of the international law of military operations* (Oxford: Oxford University Press, 2010) 515 - 534

> The Organization does not agree to engage in litigation or arbitration with the numerous third parties that submit claims (often seeking substantial monetary compensation) based on political or policy-related grievances against the United Nations, usually related to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters. Such claims, in many instances, consist of rambling statements denouncing the policies of the Organization and alleging that specific actions of the General Assembly or the Security Council have caused the claimant to sustain financial losses. The Secretary-General considers that it would be inappropriate to utilize public funds to submit to any form of litigation with the claimants to address such issues.[47]

This statement in support of its own impunity underlies the organization's approach to the 'private' 'public' divide which has in practice foreclosed all major claims brought to the attention of the UN by third-party individuals.

The non-receivability of claims deemed to fall outside the UN's narrow conception of private claims was used to dismiss without consideration of the merits, Haitian claims that they contracted cholera as a result of the negligence of the UN mission in the country.[48] Hovell refers to this as 'little more than a formalist brush-off, with no firm foundation'.[49] Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights has gone further, calling the UN response 'morally unconscionable, legally indefensible and politically self-defeating', … and one which 'upholds a double standard according to which the UN insists that member states respect human rights, while rejecting any such responsibility itself.' He notes that the UN's OLA advice 'has been permitted to override all the other considerations that militate so powerfully in favor of seeking a constructive and just solution. Its interpretations have trumped the rule of the law.'[50] This decision to dismiss was taken by the UN without having submitted the matter to an independent claims commission as per the status of forces agreement that was in force for Haiti, and without agreeing to have the claim submitted to any other form of adjudication.[51]

A similar approach was taken by the UN in response to claims from 138 members of the Roma, Ashkali and Egyptian communities in Kosovo who used to reside in the camps for internally displaced persons in northern Mitrovica. They alleged that they suffered lead poisoning and other health problems on account of the soil contamination in the camp sites, and that the contamination was known to the UN mission who did not take adequate steps to relocate them. Unlike the cholera example, however, in Kosovo there was a special chamber that had been established precisely with the mandate to assess claims concerning alleged violations of rights committed by or attributable to the UN Interim Administration Mission in

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[47] UNSG, 'Procedures in Place for the Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations', Adopted by the General Assembly on February 13, 1946, 3-7, U.N. Doc. A/C.5/49/65 (24 April 1995), para 23

[48] Letter from Patricia O'Brien, Under Secretary-General for Legal Affairs, to Brian Concannon, Director, Institute for Justice and Democracy in Haiti (5 July 2013), available at http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf

[49] Devika Hovell, 'Due Process in the United Nations' (2016) 110(1) AJIL 9, 35

[50] UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights', UN Doc A/71/367, 26 August 2016, paras 3, 70, 72

[51] See, Kristen Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility,' (2016) 16(2) Chicago J Intl L 341, 358-362, who discusses the UN's rationale for characterizing the Haiti claims as 'public' set out in a series of letters.

Kosovo.[52] That body – the Human Rights Advisory Panel (HRAP) – had a wide mandate over human rights claims, though formally it was not competent to assess complaints that could be the subject of a UN third-party claims process,[53] to the extent that such a claims process was capable of addressing the claim.[54] HRAP determined the merits of the claim once the UN, through its third-party claims process, decided that the claim was non-receivable.[55] However, when it came time for the UN to comply with HRAP's ruling finding the UN liable and recommending reparations, the UN declined to do so, basing its argument on its obligation to comply with the UN General Assembly resolution on third-party liability;[56] acts it deemed not to be of a private law character were 'non-receivable'.[57]

In its final Annual Report, HRAP wrote 'Due to UNMIK's failure to follow the Panel's recommendations, the HRAP process has obtained no compensation for the complainants. As such, they have been victimized twice by UNMIK: by the original human rights violations committed against them and by not receiving compensation through this process.[58]

Following the issuance of this advisory opinion, Mr Zahir Tanin, the Special Representative of the Secretary-General and head of UNMIK issued a decision in which *inter alia*, he expressed regret regarding the adverse health conditions suffered by the complainants and noted the opinion issued by HRAP concerning the violation of human rights of the complainants and the recommendation to pay adequate compensation. He indicated that '… as the Panel is aware, the complainants' claims for material damages have been assessed through the existing United Nations third party claims process. I have nevertheless brought these issues to the attention of United Nations Headquarters. I will also continue to draw the attention of competent United Nations bodies to these issues.'[59] In May 2017 it was announced that the UN would establish simply a voluntary trust fund for projects to help the affected Roma, Ashkali and Egyptian communities in Kosovo.[60]

This flawed 'private'/'public' framing stems from Article VIII(29)(a) of the Convention on the Privileges and Immunities of the UN (CPIUN) which requires the UN to make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which it is a party, when immunities would otherwise bar a claim before a competent court. The CPIUN deals with a number of limited scenarios and the UN is reading in to those limitations an absence of an obligation to address tortious conduct which it says falls outside those limited scenarios. But, *responsibility* is not limited to the few circumstances set out in the CPIUN; immunity does not impact on responsibility and the concomitant obligations that stem from such responsibility to afford reparation.[61] Immunity is

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[52] UNMIK, 'Regulation 2007/3 amending Regulation 2006/12 on the Establishment of the Human Rights Advisory Panel' (12 January 2007)
[53] UNMIK, 'Administrative Direction 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel' (17 October 2009), s 2, para 2.2
[54] *NM and others v UNMIK*, Case No 26/08 (HRAP, 31 March 2010 and final decision 26 February 2016)
[55] *NM and others v UNMIK* (HRAP, 26 February 2016) No 26/08
[56] UNGA, 'Resolution on Third-party liability: temporal and financial limitations' (n 34)
[57] *NM and Others v UNMIK*, Human Rights Advisory Panel, Opinion, 26 February 2016, Case no 26/08, para 94
[58] HRAP, 'Annual Report' (2016) para 255
[59] *NM and others v UNMIK*, Case No 26/08, SRSG's decision, 22 April 2016
[60] Statement attributable to the Spokesman for the Secretary-General on the Human Rights Advisory Panel's recommendations on Kosovo, 26 May 2017 [available at: https://www.un.org/sg/en/content/sg/statement/2017-05-26/statement-attributable-spokesman-secretary-general-human-rights]
[61] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 (Cumaraswamy case) [66]; see also See, August Reinisch and Ulf Andreas Weber, 'In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International

simply a procedural issue about a particular court's competence to hear a claim, it says nothing about the substantive liability of a subject, the right of individuals to access justice 'somewhere' and the obligation on competent bodies to ensure that a venue to determine responsibility and reparations exists. Nor does it say anything about the responsibility of a would-be defendant. As the UN Special Rapporteur for Haiti has put it, 'The United Nations should be the first to honour these principles.'[62]

**'It's not our fault' – fault lies exclusively elsewhere: Sexual Exploitation and Abuse**

The second of these *de facto* restrictions is the insistence that some other entity is solely liable for the alleged wrongful conduct, even when the conduct arguably gives rise to multiple attribution of responsibility, a possibility recognized by the ILC Rapporteur on the DARIO text.[63] Multiple internationally wrongful acts may arise out of a single act, with different elements being appropriately attributed to an international organization, a State or other entities.[64]

Sexual exploitation and abuse during peacekeeping is a case in point and a pervasive issue that successive Secretary-Generals have committed themselves to addressing.[65] These acts arguably entail both individual responsibility (individual criminal and civil responsibility) and institutional responsibility (to the extent that it can be said that the institution or body to whom the individual reports was negligent or otherwise failed to exercise due diligence to protect the local population from the foreseeable acts of those under its charge).[66]

Whether the negligence or lack of due diligence is sufficient to qualify as an internationally wrongful act in accordance with DARIO framings, is not obvious. Nevertheless, wrongful conduct which takes place where the UN exercises effective control is attributable to the UN for the purposes of assessing institutional responsibility and the concomitant obligation to afford reparations. This is not a new or novel concept; it is underscored by numerous national and international courts,[67] by the ILC[68] and in the past was somewhat uncontroversial to the UN itself.[69] If the mission is UN mandated, as opposed to simply endorsed or authorized by

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Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement' (2004) 1 Intl Org LR 59, 72

[62] UN Human Rights Council, 'Report of the Independent Expert on the Situation of Human Rights in Haiti, Gustavo Gallón' (7 February 2014) UN Doc A/HRC/25/71

[63] DARIO commentaries: Commentary to Chapter II, para 4: 'Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization.'

[64] See Frédéric Mégret, 'The Vicarious Responsibility of the United Nations for "Unintended Consequences" of Peacekeeping Operations' (n. 5) who refers to a 'simultaneous responsibility'. See generally, André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016).

[65] UNSG, 'Special measures for protection from sexual exploitation and abuse' (15 February 2018) UN Doc A/72/751

[66] See, e.g., Ruth Rubio-Martin and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment', (2011) 33 Hum Rts Q 1062

[67] *Behrami and Behrami v France*; *Saramati v France, Germany and Norway* (GC) App nos 71412/01, 78166/01 (ECtHR, 2 May 2007).

[68] DARIO (n. 6) Art 7

[69] The UN sets out its own view on attribution in peacekeeping contexts in UNGA, 'Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters' (n 44). See also, ILC,

the UN, then at least according to the UN, it would constitute a subsidiary body of the UN and any actions which occur in the course of the conduct of the mission would constitute acts of the organization.

Status of forces agreements focus on the criminal and civil liability of the formed military contingents and set out whether it is the host state or the troop contributing country that has jurisdiction to conduct investigations and which courts are competent to adjudicate civil claims.[70] These rules have developed largely on the basis of applicable privileges and immunities. However, they do not fully capture the individual responsibility of UN employees and experts on mission who would only benefit from functional immunity and for abuses over which the organization's joint and several liability is arguably engaged.

In regards to institutional liability, as set out earlier in this section, these agreements identify a narrow subset of private claims which can be adjudicated against the UN mission itself through a standing claims commission;[71] and the due diligence failings of the UN regarding sexual exploitation and abuse allegations or violations – just as is the case with the negligence of a mission for jeopardizing the local population's right to health - do not feature among this subset. But unlike the right to health claims, the UN's main argument has not been that the claims are non-receivable (though presumably it would use this argument here as well though it would be difficult to conceive of the UN mounting the argument that sexual exploitation and abuse by peacekeepers constitutes a political or policy matter of the organization and thereby exempt by virtue of being 'public' claims); instead its focus has been to argue that others (and not it) are responsible for the various harms connected to sexual exploitation and abuse. What is clear is that the UN does not see itself as having any obligation to entertain claims concerning its own liability for sexual exploitation and abuse allegations which occur under its watch; instead, it has carved out a much more limited role for itself – supporting efforts of troop contributing countries to investigate and prosecute criminal allegations and encouraging states to address paternity and child support claims, and to 'explore the possible use of ex gratia payments to victims'.[72]

This position has been underscored by Jane Holl Lute, UN Under-Secretary General and Special Coordinator on Improving the United Nations Response to Sexual Exploitation and Abuse. In response to a question posed to her about whether local claims review boards were being used in any peacekeeping mission to address claims emanating from the local population concerning sexual exploitation and abuse, she made clear that the 'policy' of the UN is that the individual abusers and the troop contributing countries are responsible to compensate; the UN's 'policy' is that it is not responsible.

> the responsibility for acts of SEA rests with the perpetrators (A/RES/62/214). In line with this strategy, the UN endeavours to effectively prevent and respond to acts of SEA. A key element of these efforts is to provide assistance and support to victims of such acts. … Local Claims Boards are established in UN peacekeeping missions to

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'Comments and observations received from international organizations' (17 February 2011) UN Doc A/CN.4/637/Add.1, p. 13

[70] See, e.g., 'The Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan ("SOFA")', (8 August 2011) available at: http://www.un.org/en/peacekeeping/missions/unmiss/documents/unmiss_sofa_08082011.pdf, paras 44-47, 50-51 (on criminal jurisdiction), 52 (civil liability).

[71] Ibid, para 55

[72] See, UNSG, 'Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach', (28 February 2017) A/71/818, para 35

> review third-party claims for compensation against the United Nations for personal injury, illness or death, and for property loss or damage arising in connection with activities of members of peacekeeping missions in the performance of their official duties. It is noted that in his report (A/70/729), the Secretary-General urged Member States to receive claims from victims and consider the required mechanisms for doing so, and advise the Secretariat on this process.[73]

How can an organization have a policy that it is not responsible? Even the most repressive of states tends to recognize the potential for itself to be sued for harms attributable to its conduct. This 'policy' ignores the potential attribution of responsibility to the UN *qua* institution in the context of the missions it leads. As elsewhere, it is impossible to subject the policy to independent challenge.

### II.2.2 Limitations on the ability to claim reparations

A time limit of six months applies to claims for personal injury, illness or death, and for property loss or damage (including non-consensual use of premises) resulting from or attributable to the activities of members of peacekeeping operations in the performance of their official duties.[74] The time limit runs 'from the time the damage was sustained, or if the claimant did not know or could not have reasonably known of the injury or loss, from the time when he discovered it, but in any event not later than one year after the termination of the mandate of the operation.'[75] The UN Secretary-General has justified the time limit, having regard to the national practice on statutes of limitation in tort cases, the procedures in place for claims submitted by military observers and civilian police monitors and others in connection with injury attributable to service with the United Nations and also taking into account the limited duration of peacekeeping operations.[76] The Secretary-General has underscored: 'the period of limitation established should be reasonable, practicable and fair to both potential claimants and the United Nations. It should be simple to administer, allow the United Nations to deal expeditiously with claims and be consistent with any relevant existing practices of the Organization in this regard.'[77]

While it is natural that a time-limit should be set for most third-party claims, those claims which relate to issues other than the mundane, arguably require a differentiated approach. For instance, it has been recognized in jurisprudence that time limits for claims involving violations of human rights, trauma and victimization should be interpreted flexibly and capable of being extended, particularly where potential applicants' vulnerability and feelings of powerlessness undermine victims' capacity to complain without delay.[78] Third-parties' situations and potential vulnerability in light of the spectre of the conflict or post-conflict environment and the abuse of power inherent in the misconduct should therefore be taken into account. It has been recognized that for certain human rights and international

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[73] Letter from Jane Holl Lutte, UN Under Secretary-General and Special Coordinator on Improving UN Response to Sexual Exploitation and Abuse, to Carla Ferstman (6 January 2017) (on file with the author)
[74] UNGA, 'Third-party liability: temporal and financial limitations', (n 34), para 5; 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping' (n. 14), para 20
[75] UNGA, 'Administrative and budgetary aspects of the financing of the United Nations peacekeeping', ibid, para 20
[76] ibid, paras 15-20
[77] ibid, para 18
[78] *Mocanu and others v Romania* (GC), European Court of Human Rights, Appl nos. 10865/09, 45886/07, 32431/08, 17 September 2014, paras 474, 475

humanitarian law violations there should be no limitation period, and for others, the limitation period should not be unduly restrictive so as to inhibit claims.[79]

Furthermore, the comparison with the procedures in place for claims submitted by military observers and civilian police monitors and others in connection with injury attributable to service with the UN [a four month limitation period] seems ill-judged. Third-party claims are different from claims emanating from staff and experts on mission, the terms of which are agreed by contract in which employees, and by extension their family members, are put on notice as to applicable procedures. Instead, prescription periods should be considered against the information the claimants receive about where and how to file a claim. Third-party claimants may have had no prior dealings with the UN and will inevitably experience some challenge in navigating the bureaucracy and administrative procedures of the organization. This is especially so given that a local claims review board may not have been established until well after the alleged incidents took place, and possibly only after significant pressure was placed on the mission by claimants or their advocates.

### II.2.3 Deviation from the DARIO standards relating to reparations for injury

DARIO makes clear that the obligation to afford reparation arises automatically from a finding of responsibility and is an obligation of result. There is no contingency to this obligation; it exists by virtue of the breach of the primary obligation.[80] In addition, the right to reparation does not depend on the type of violation – any internationally wrongful act gives rise to an obligation to afford reparation.[81]

The standard of reparations first articulated by the Permanent Court of International Justice (PCIJ) and which has thereafter framed the quantum and quality of inter-State claims is 'full,' as needing to wipe out all the consequences of the illegal act and reestablish the *status quo ante.*[82] The DARIO standards relating to reparations for injury replicate this approach; they make clear that reparation needs to be 'full',[83] to wipe out all the consequences of the illegal act and re-establish the status quo ante. The type of reparation that would be understood as adequate and effective will depend on the violation and the harm caused and may consist of restitution, compensation, and/or satisfaction.[84]

In human rights law, reparation entails two aspects: the right to a remedy and the right to adequate and effective forms of reparation. Jurisprudence and standard-setting texts also recognise the need to consider the quality of victims' access to and experience of justice

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[79] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?' (2010) 8 J Intl Crim J 79, 107-8; Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 [Impunity Principles] Principle 23, para (c)

[80] However, the text is limited by virtue of its focus on reparations owed to states and international organizations; the text does not cover reparations to individuals affected by the conduct of international organizations.

[81] DARIO (n. 6)

[82] *Chorzów Factory (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136, [152]

[83] DARIO (n 6), Arts 31(1), 34. See also, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) [Basic Principles and Guidelines], 18, which describes 'full and effective' reparation for gross human rights and serious international humanitarian law violations.

[84] DARIO (n 6) Arts 30(a), 30(b), 31

processes, including their access to adequate information,[85] dignified treatment[86] and respect for privacy and safety, both physical and psychological.[87] This has been incorporated to a certain extent, into international institutional law – particularly when the only route to reparations is through an internal claims process (because domestic and international courts are largely foreclosed by immunities). There is some jurisprudence which has considered the adequacy of organizations' internal dispute processes,[88] and commentators have emphasized the importance for the alternate remedy to be capable of addressing the dispute, to be judicial in nature and that the adjudicators must be sufficiently qualified and independent.[89]

DARIO makes clear that the 'rules of the organization' are capable of impacting the relations between the organization and its Member States and organizations,[90] and indeed that such 'rules' may 'modify the rules on the forms of reparation that a responsible organization may have to make towards its members.'[91] However, is the international organization capable of agreeing with its Member States on rules modifying its obligations on reparation, when injured individuals (as opposed to Member States) are the ultimate beneficiaries?

Principles of fullness, adequacy and effectiveness have not framed the UN's approach to reparations, despite the DARIO requirement of 'full' reparation for internationally wrongful acts.[92] The General Assembly resolution on third-party claims sets out several financial limitations applicable to third-party claims against the UN for personal injury, illness, or death.[93] These limitations specify that compensation is restricted to economic injury or loss (and not recovery for emotional or moral losses such as pain and suffering and mental anguish or for punitive damages) which are to be determined having regard to 'local standards' and the amount of compensation payable is not to exceed $50,000 USD. The resolution also provides limitations for property loss or damage resulting from, or attributable to, the activities of members of peacekeeping operations in the performance of their official duties.

The limitations on claimant recoverability do not align with the overall purpose of reparations (which is designed to address the harm) and seem ill-judged for those claimants who had no choice about their engagement with the organization, unlike commercial contactors or employees. As Koskenniemi remarked in his ILC report on fragmentation, '[i]n regard to conflicts between human rights norms, for instance, the one that is more favourable to the protected interest is usually held overriding. At least derogation to the detriment of the beneficiaries would seem precluded.'[94]

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[85] *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002); *Zontul v Greece* App no 12294/07 (ECtHR, 17 January 2012) [115]; Recommended Principles and Guidelines on Human Rights and Trafficking, (20 May 2002) UN Doc E/2002/68/Add.1, 9.2

[86] *AT v Hungary*, UN Doc CEDAW/C/32/D/2/2003 (CEDAW Committee, 26 January 2005) para 9.6(II)(vi); HRC, 'General Comment 31' Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 15

[87] *Basic Principles and Guidelines* (n. 83) 10, 12(b)

[88] *Waite and Kennedy v Germany* (GC) App no 26083/94 (ECtHR, 18 February 1999); Case T-85/09 *Yassin Abdullah Kadi v Commission* [2010] ECR II-05177. See also, Mizushima Tornonori, 'Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means' (2008) 71 Modern LR 734, 743

[89] Matthias Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Court of Human Rights* (Martinus Nijhoff 2010) 148-9

[90] DARIO, Art 32(2)

[91] ibid, Commentary to Art 32, para 3

[92] ibid, Art 31(1)

[93] UNGA, 'Resolution on Third-party liability: temporal and financial limitations' (n 34)

[94] Koskenniemi, A/CN.4/L.682 (n 16) para 108

The reason for these limitations, as with other limitations applicable to the claims process, is to reduce the financial and reputational risk to the organization associated with a potential large number of claims involving significant harm to individuals, and to simplify the claims process. But it is the principle of *lex specialis* that underpins the legal justification for these deviations. As the OLA set out in its submission to the ILC on the DARIO text, its view is that both the process and the result of claims against the organization form part of its *lex specialis*, and as such, the special rules it has created should exempt it from having to follow any general ones.[95] The range of limitations it has introduced 'prevails over the duty to provide full reparation under draft article 33 [of DARIO].'[96]

Some of the limitations concerning the quantum and quality of reparations are possibly justifiable on the basis of the limited subset of circumstances that the resolution covers – the very narrow iteration of claims of a private nature described and criticized earlier in this article. In other words, an argument can be made that ordinary claims relating to property or personal injury disputes could be resolved in an expedited, abridged fashion. This would only be the case, however, if there was some independent adjudicative body which was capable of addressing the claims which might fall outside the mold or where the claimants prefer or the circumstances require a more judicial process because of the particularity of the claim.

Victims should have the possibility to opt out of a limited administrative process that does not take into account the full spectrum of their needs or rights. Some transitional justice or administrative claims commissions as well as mass claim settlement procedures afford this two-tiered possibility – go to the quick fix administrative system for the resolution of ordinary matters and use the courts for those matters which, because of their nature or scale, require a more precise, differentiated approach. The General Assembly resolution on third-party claims provides no scope for a more individualized and independent adjudication process, even if it were to allow for a wider understanding of 'private' claims.

In practice, any 'reparations' provided for harms falling outside of this limited subset have consisted of ad hoc *ex gratia* payments in which liability is not fully acknowledged, or by the establishment of humanitarian trust funds for the general benefit of victims and funded by voluntary contributions which take the form of charity – not reparations. For instance, in March 2016, a Trust Fund in Support of Victims of Sexual Exploitation and Abuse was established, to provide greater support to victims of sexual exploitation and abuse by UN and related personnel. In the case of the cholera epidemic in Haiti, on 1 December 2016 the UN issued a qualified apology and outlined a two-track strategy: Track 1 focuses on intensified efforts to treat, control and eradicate cholera, and Track 2 promises to deliver "a package of material assistance and support to those Haitians most directly affected by cholera" to be developed in a victim-centered manner, including through consultations with victims. The UN Haiti Cholera Response Multi-Partner Trust Fund was established to generate and manage its resources.[97] As part of Track 2, direct payments to victims were contemplated, though this aspect of the plan never came to fruition and the remediation plan, while ongoing never received the required injection of funds. Neither of these trust funds are intended to satisfy victims' claims for reparation; instead, the funds support humanitarian projects

[95] ILC, 'Comments and observations received from international organizations' (17 February 2011) A/CN.4/637/Add.1, para 16(8). See also, paras 17(2), 20(3), 25(2)
[96] ibid, comments to draft art 63, para 2
[97] UN news centre, 'UN's Ban apologizes to people of Haiti, outlines new plan to fight cholera epidemic and help communities' (1 December 2016)

developed in some of the affected countries. Furthermore, these initiatives are not reflected in the regular budget of the UN. Consequently they rely on voluntary contributions from states and have been severely underfunded and as a result they have been unable to accomplish even their humanitarian mandates.

Some might argue that the limited funding available to the UN militates against it having to fulfil its obligations to afford reparations when it is responsible for negligent or tortious conduct. The possibility that a large damages award could bankrupt it or further alienate its donors is real.

The ILC introduced some elements of equity and reasonableness into its approach to reparations. For instance, restitution is only required if it 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.'[98] Similarly, satisfaction 'shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.'[99] However, the text never strays from the principle of 'full' reparation. Flexibility is introduced in how it may be achieved however there is no license to restrict the quantum or quality of reparation that is owed should the amount prove difficult on the wrongdoer.

Article 25 of DARIO focuses on the use of the principle of necessity as a circumstance to preclude wrongfulness, not to preclude reparation in response to behaviour determined to be wrongful. To the extent that the failure to afford reparation constitutes its own separate internationally wrongful act, the principle of necessity is applicable.[100] The commentaries to the ILC's Articles on the Responsibility of States indicate that necessity may enable a State 'for the time being, not to perform some other international obligation',[101] and thus it would not be a license to avoid reparation, at most to delay its implementation. However, in DARIO, the commentaries maintain that as a matter of policy, necessity should not be capable of being invoked by international organizations as widely as by States.[102] In order to ensure that an international organization is able to fulfil its financial obligations, Article 40(1) of DARIO specifies that 'the responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations.' This is complemented by Article 40(2), which specifies that '[t]he members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfill its obligations'. Thus, an international organization should ensure that there are sufficient funds in its general budget to ensure that it can afford reparations to persons or entities who suffer harm as a result of wrongful acts attributable to it, or alternatively put in place adequate insurance schemes to cover such clearly foreseeable instances.

## III. Conclusions

[98] DARIO (n 6) Art 35(b)
[99] ibid, Art 37(3)
[100] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, 'Report of the International Law Commission on the work of its 53rd session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 [ARS], Commentary to Art 25, para 7
[101] ibid, Commentary to Art 25, para 1
[102] DARIO (n 6) Commentary to Art 25, para 4

In the few instances in which wide scale victimization has been alleged, the institutional response has been to refrain from accepting liability and opt for humanitarian assistance – as in the case of the Haiti cholera claims or the Kosovo lead poisoning, or to argue that liability lies exclusively with others – as in the case of sexual exploitation and abuse by peacekeepers. But the UN's own understanding of its obligations to afford reparations for harm caused by internationally wrongful acts attributed to it provides only a limited and inadequate lens through which to understand and assess the adequacy of those obligations.

It is questionable whether UN practice has crystallized sufficiently to ground a *lex specialis* rule.[103] While it might be possible for the organization and its members to agree rules to govern specific scenarios, and they have done so regularly, is it less legitimate and arguably *ultra vires* for it to develop abridged frameworks when the responsible organization owes reparation not to its members, but to injured individuals. The injured individuals have not voluntarily agreed to the special regime, even though their States of nationality may have done so. Arguably applying the UN's *lex specialis* would frustrate the purpose of the general law, which is to ensure that victims of violations receive adequate and effective reparation. The 'special' law would prevent this from happening; failure of the special regime could be inferred as a result of it having 'no reasonable prospect of appropriately addressing the objectives for which [it was] enacted'.[104]

Even if it were possible to ground a *lex specialis* rule, arguably the rule has been misapplied by the UN in the present circumstances. The *lex specialis* principle is at its heart a tool of interpretation, designed first and foremost to aid in interpreting different rules compatibly. It is not intended to be a brusque tool to justify an approach in which 'only our rules' apply. The general law on reparations should continue to apply to the extent that the goals of reparations are not fulfilled by the 'special' rules. At its heart, the UN's approach to mass claims has been to deny the possibility for reparations to the vast majority of cases – this is not an example of a special, more precise rule relating to reparations, it is an example of the absence of a rule. The general rule remains very much in place.

It is time for the UN to develop more robust internal systems capable of addressing this lacunae. This could be done by introducing a two-tiered system: allowing local claims review boards to decide on a wider array of claims up to a certain financial threshold and established a centralized, independent claims mechanism to deal with more complex or costly claims. In the alternative, the UN should waive its immunity for claims to proceed before otherwise competent courts. The current standstill is contrary to victims' rights and interests, but also – and equally important – contrary to the founding principles of the UN.

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[103] Art 64 DARIO (n 6). See also, Art 32 DARIO

[104] ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the International Law Commission on the Work of its 58th Session (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, para 251(16)