The UN talks the talk but doesn't walk the walk

Double standard and fairness issue of the UN in processing third-party claims

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The United Nations (UN) makes considerable effort to address non-contractual third-party claims arising from harmful acts attributable to its peacekeeping missions. While the UN outrightly rejects third-party claims which are considered mandate-related and thus "political" in nature, private law tort claims are admissible for alternative dispute settlement under Sec 29 of the UN Immunity Convention. That said, the UN's internal liability rules, on the basis of which the merits of these third-party claims are assessed, are by and large inaccessible,[1] making external evaluations almost impossible. This, of course, assumes that such internal liability rules do exist. Equally unclear are the standards the UN applies when making ex-gratia payments.[2] These observations raise two issues: rule of law- and fairness-standards, both of which are called into question by the foregoing. Although unwritten liability rules are not uncommon in some domestic legal systems, their transparency through judicial decisions and academic processing ensures their conformity to a rule of law-framework. The UN, in contrast, is increasingly secretive about its own third-party claims settlement practice, which is regularly not subject to (quasi-)judicial review, even if this was requested in exceptional cases by a host state or an aggrieved party.[3]

This is exactly what – in practice – leads to severe problems for individuals affected by the actions of the UN peacekeeping forces in the host states. Their precariousness is even acknowledged by the director of the UN Office of Internal Oversight Services (OIOS), with him asking rhetorically in an interview: "*How does a 16 year old in the Central African Republic make a complaint?*".[4] This notion, of course, referred to the OIOS' own complaint system in cases of sexual abuse and exploitation during peacekeeping missions, but a struggling sixteen-year-old girl, who has suffered damage at the hands of a UN peacekeeper, can be taken as an example to showcase the problems arising from the UN third-party claims settlement practice. Why and how does this girl make a complaint and assess whether the offer of compensation the UN makes in accordance with its opaque practice does not discriminate against her? It can be assumed that she aims for fairness,

[1] The key document on third-party liability produced by the GA is mainly about temporal and financial limitations, GA Res A/RES/52/247 (1998).

[2] Rule 105/12 of the Financial Regulations and Rules of the UN, ST/SGB/2013/4 of 1 July 2013.

[3] A. Liebermann: Haiti Cholera Case Raises Questions About U.N. Accountability, World Politics Review (2011) 3: "*even in the face of affirmative claims and demands for the establishment*"; Petition for Relief, MINUSTAH Claims 4.

[4] Interview conducted by and published in N. Kinchin, Administrative Justice in the UN – Procedural Protections, Gaps and Proposals for Reform (2018) 127.

which for her would mean to be heard, even-handedly treated and adequately compensated for the harm done.

What the girl and all the other claimants are striving for can be seen as describing two components of fairness, a procedural and a substantive one.[5] According to *Franck*, fairness in international law depends on the degree to which the rules of international law (1) satisfy the participants' expectations of justifiable distribution of costs and benefits and (2) are made and applied in accordance with what is perceived by the participants as right process. Building onto this approach, the components of fairness in the context of international law are distributive justice (substantive component) and legitimacy (procedural component).[6] Following this distinction, one could argue that the sixteen-year-old girl is treated fair when she receives the financial compensation she can legitimately expect, in comparison to other similar cases, through a process she perceives as just.

In addition, for rules to be recognised as fair, they must be, for once, "*rooted in a framework of formal requirements about how rules are made, interpreted, and applied*".[7] Procedural fairness encompasses various procedural issues.[8] It is commonly associated with the impartiality of a tribunal and the "equality of arms" of the parties.[9] But not only these aspects are of central importance to our topic of UN third-party claims settlement practice, also the question whether a rule-based practice exists is at the heart of fairness. Our main points of critique are, as pointed out above, the opaqueness of the UN's claims settlement and the possible rules applied in this context, which shields past and present practice from external scrutiny, plus the fact that there is no adequate and impartial accountability mechanism available outside of the UN administration to address wrongs committed by peacekeepers. This last point is based on the special circumstances surrounding the designated mechanism to fulfil the UN's obligations deriving from Art 29 Immunity Convention. All UN-host state SOFAs call for the establishment of a standing claims commission to counterbalance the UN's jurisdictional immunity before domestic courts. Para 51 of the 1990 model SOFA obliges the UN to establish a standing claims commission in certain circumstances,[10] however the UN has treated the establishment as optional and avoidable. It even refrained from setting up a commission after receiving

[5] See T. Franck: Fairness in International Law and Institutions, Clarendon, Oxford (1995) 7; Y. Kryvoi: Procedural Fairness as a Precondition for Immunity of International Organizations, International Organizations Law Review (2016) 255, 257.

[6] T. Franck: Fairness in International Law and Institutions (1995) 7. See also Y. Kryvoi, Procedural Fairness as a Precondition for Immunity of International Organizations, International Organizations Law Review (2016) 255, 257f.

[7] T. Franck: Fairness in International Law and Institutions (1995) 7f.

[8] Y. Kryvoi: Procedural Fairness as a Precondition for Immunity of International Organizations, International Organizations Law Review (2016) 255, 263.

[9] Y. Kryvoi: Procedural Fairness as a Precondition for Immunity of International Organizations, International Organizations Law Review (2016) 255, 257; C. F. Amerasinghe: Evidence in International Litigation (2005) 14.

[10] Model status-of-forces agreement for peace-keeping operations, UN Doc A/45/594, 9 October 1990.

explicit requests from the respective host state, as was the case with Haiti in the aftermath of the Cholera disaster.[11] Unsurprisingly, the UN's approach to the Haiti cholera victims' claims[12] and the organisation's duty to provide access to justice[13] triggered an intensive rule of law-discussion not only in academia. Because the claims settlement practice remains in the hands of the UN Secretariat, most importantly its local claims review boards at mission level, it is highly unlikely that the UN's offer of compensation, or the rejection thereof, is perceived by the claimants as impartial and unbiased.[14] In practice, the UN's offers of compensation payments are almost always accepted, but certainly not because the UN administration, its processes and undisclosed liability rules are considered "just" by claimants.

Despite there being disagreement about what "justice" exactly is, there is broad consensus that "*institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties […]*".[15] Arbitrariness is a point of grave concern constantly addressed by international institutions since it can be viewed as antithetical to the order of the law otherwise guaranteed by the rule of law.[16] Therefore, the prohibition of arbitrariness is generally accepted as forming a part of the minimum standard of the treatment of aliens under customary international law.[17] The standard definition of arbitrariness for international law is based on the ICJ, which sees arbitrariness as something opposed to the rule of law and as a "*wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*".[18] While we do not claim that the UN acts arbitrarily through its institutions, actual arbitrariness in the settlement of claims against the UN is not the core of the issue at hand. The core issue is that the UN, through its claims practice, prevents third parties from assessing the UN's juridical propriety so that the assertion of a rule-based and thus fair compensation practice cannot be verified.

[11] A. Liebermann: Haiti Cholera Case Raises Questions About U.N. Accountability, World Politics Review (2011) 3: "*even in the face of affirmative claims and demands for the establishment*"; Petition for Relief, MINUSTAH Claims 4.

[12] J. E. Alvarez: International Organisations and the Rule of Law, (2016) 44.

[13] See R. Gulati, Access to Justice and International Organizations (2022).

[14] K. Schmalenbach: Dispute Settlement (Article VIII Sections 29-30 Immunity Convention) in A. Reinisch: The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies (2016) 556ff.

[15] J. Rawls: A Theory of Justice (1971) 5.

[16] J. Stone: Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment, Leiden Journal of International Law (2012) 77, 86. See also Elettronica Sicula S.p.A. (ELSI), Judgement of 20 July 1989, I.C.J. Reports, 1989, para 128.

[17] J. Stone: Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment, Leiden Journal of International Law (2012) 77, 92 referring to R. Dolzer and C. Schreuer: Principles of International Investment Law (2008) 176.

[18] Elettronica Sicula S.p.A. (ELSI), Judgement of 20 July 1989, I.C.J. Reports, 1989, para 128.

Official UN documents containing information about the claims settlement procedure play an essential role in guaranteeing the transparency of the third-party claims settlement practice. Obtaining these documents, however, is not without its challenges, seeing as it is custom that unpublished UN records (regardless of their security level) are not available to the public for an embargo period of 20 years after their creation. After this embargo period, records of past UN claims settlement practice used to be publicly accessible in the UN Archives but were recently reclassified as strictly confidential without the prospect of special access permit, further thwarting external scrutiny. Retroactively changing the classification of documents and by that restricting the flow of information is directly opposed to making the UN claims settlement practice a transparent and reviewable procedure where the principle-guided legal framework employed is apparent to all.

Whereas fairness and justice are important demands of claimants who are confronted with the UN's claims procedures, the UN should have vital reasons of its own to pursue a rule-based and transparent third-party claims practice, i.e., the Organisation's functionality and legitimacy in the mission's host state. We claim that both suffers if the UN leads the host population to believe that "UN exceptionalism", being the main and often only guarantor for peace and security in the region, entails double standards.

The double standard that is raised here is rooted in one the UN's core tasks: The UN promotes in its member states *inter alia* procedural and legal transparency as part of its rule of law-agenda.[19] Despite its rule of law-agenda for member states,[20] which also covers public liability and accountability, the opaqueness of the UN's claims settlement practice makes manifest a double standard as the UN is not following the rules whose adherence it demands from its member states. By way of example, in the context of state building efforts, the UN promotes the rule of law in South Sudan through UNMISS (since 2011) and in Haiti through MINUSTAH (2004-2017). In South Sudan, the UN placed its rule of law-agenda in the peace agreements, thereby obligating the fragile state to maintain transparency under the rule of law.[21] This massive contradiction between the UN's pivotal

[19] Guidance Note of the Secretary-General, UN Approach to Rule of law Assistance, 2008.

[20] As part of the UN's task to promote the rule of law in its member states, the organisation defines the rule of law as "*a principle of governance in which all persons, institutions, and entities, public and private, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards*." See Guidance Note of the Secretary-General, UN Approach to Rule of law Assistance (2008).

[21] Intergovernmental Authority on Development: Revitalised Agreement on the Resolution of the conflict in the Republic of South Sudan, Addis Ababa, Ethiopia, 12 September 2018; SC Res 1542 (2004) 7 (1) (d): promise to "*assist with the restoration and maintenance of the rule of law"; South Sudan Peace Agreement: "The Judiciary of South Sudan shall be independent and subscribe to the principle of separation of powers and the supremacy of the rule of law*.".

rule of law-agenda for its member states and its refusal to adhere to the same principles, casts doubt on the organisation's legitimacy as a promoter of these values.[22]

Then again, one might be tempted to justify the UN's approach with the absence of an international rule of law that obliges the UN to exercise the transparency it preaches. The rule of law in its original form not only sets boundaries for excessive state power but also protects the individual by safeguarding its equal and fair treatment under the law.[23] This is reflected by the requirements for the rule of law identified by *Bingham*, which are: "*1 Legality, including a transparent, accountable and democratic process for enacting law; 2 Legal certainty;*[24] *3 Prohibition of arbitrariness; 4 Access to justice before independent and impartial courts, including judicial review of administrative acts; 5 Respect for human rights; 6 Non-discrimination and equality before the law*".[25] While the domestic rule of law is generally recognised, the international rule of law is not yet as well-founded in its existence and justification.[26] Moving towards an international rule of law, it still remains unclear how the state-centric concept of the rule of law translates to international actors and whether the latter's different legal nature might even be a hindrance to the development of an international rule of law.[27] However, *Barber* rightly argues that the rule of law is "*a set of qualities that ought to be present in all legal orders*",[28] referring to General Principles foro domestico that are recognised by states and applied based on Art 38 (1) (c) ICJ Statute.

All UN member states agreeing to an "*universal adherence to and implementation of the rule of law at both the national and the international levels*" at the UN World Summit in 2005[29] set a milestone towards an international rule of law. Several General Assembly Resolutions on "*The rule of law at the national and international levels*"[30] refer to the outcome of the Summit and further define the rule of law for the UN and its member states. Most importantly, with the "*Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*" in 2012 (GA Res 67/1) the UN declared itself bound by the rule of law.[31] This was significant for the development of an international rule of law, as the UN's self-binding can in any case be seen as proof of its

[22] B. Lindstrom, G. S. Leatherberry, S. Johnsson: Access to Justice for Victims of Cholera in Haiti: Accountability for U.N. Torts in U.S. Court (2014) 2.
[23] R. H. Wagstaff: Terror Detentions and the Rule of Law (2014) 115f.
[24] With its value being rooted in substantive fairness; J. Jowell: The Rule of Law and its underlying Values, in: J. Jowell/D. Oliver (eds.): The Changing Constitution (9th edition) 11.
[25] T. Bingham: The Rule of Law (2010) 4.
[26] W. W. Bishop: The International Rule of Law, Michigan Law Review 59 (1961) 553, 553.
[27] D. Wohlwend: The International Rule of Law, Edward Elgar, Cheltenham (2021) 10ff.
[28] N. Barber: The Rechtsstaat and the Rule of Law, University of Toronto Law Journal 53 (2003) 443, 452.
[29] 2005 World Summit Outcome Document, UN Doc A/RES/60/1, 16 September 2005, 134 (available at http://www.un.org/summit2005).
[30] For example, GA Res A/RES/67/97 (2012) or GA Res. A/RES/68/116 (2013).
[31] GA Res A/RES/67/1 (2012).

existence. Through the GA Res 67/1, elements of the national rule of law are elevated to the international level, which is made clear by the UN: "*We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law*."[32]

Considering the UN's commitment to respect the rule of law, the opaqueness of its compensation practice seems even more questionable. After all, due to its budgetary powers, the General Assembly is the competent organ for approving the UN's internal third-party liability rules, as it has done in 1998 with regards to the limitation of the UN's liability.[33] As of today, however, it has refrained from addressing substantive rules on third-party liability. The General Assembly thus failed to provide *fair and equitable laws* in accordance with the rule of law approach taken in the GA Res 67/1.

From the perspective of the UN, there may be a nexus of factors that precludes the UN's liability rules established by practice to be more openly accessible to the broader public. One such factor that springs to mind is the concern that greater clarity in this area may lead to the UN being constantly flooded with claims that, irrespective of individual outcomes, could stretch already scarce organisational resources to breaking point. However, this could of course be a concern of any public authority. Therefore, if the UN does not want to undermine its legitimacy and ability to effectively fulfil its many tasks by resorting to UN exceptionalism, a change in thinking is in order. The UN does not act in a legal vacuum and committed itself to the rule of law and the associated obligation to transparency in its legal system. When balancing the UN's financial concerns against the individual's interests, there can be no doubt that the rule of law- and fairness-standards must be given more weight in the future UN claims settlement practice.

[32] GA Res A/RES/67/1 (2012) para 2.
[33] GA Res A/RES/52/247 (1998).