

## Article

# **Binding the United Nations: Compulsory Review of Disputes Involving UN International Responsibility before the International Court of Justice**

**Anastasia Telesetsky\***

### ABSTRACT

One of the gaps in the International Law Commission's Draft Articles on the Responsibility of International Organizations is a discussion of mechanisms for judicially reviewing the possibility of international responsibility of international organizations such as the United Nations (UN). This article explores the judicial mechanisms that exist to review actions or omissions that might implicate international legal responsibility of the UN and its specialized agencies. The analysis that follows explores two options under the International Court of Justice (ICJ) Statute for enhancing UN judicial accountability: (1) amending Article 34 of the ICJ Statute, and (2) providing for an international agreement requiring the UN to submit disputes implicating responsibility to the advisory jurisdiction of the ICJ. Since States would be unlikely to agree to amend Article 34 because of existing controversies over UN reform, this option is ultimately discounted. The article concludes that States should instead enlarge the ICJ's practice of issuing advisory opinions that "bind" parties to guarantee that the doctrine of international organization responsibility is coherently applied to the UN.

### I. INTRODUCTION

As an intergovernmental organization, the United Nations (UN) has recently tarnished its record in Haiti. In April 2004, after President Aristide's departure from Haiti, the United Nations Stabilization Mission

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\* Anastasia Telesetsky is an Associate Professor of International Law at the University of Idaho. The author would like to thank Julia Norsetter and the other members of the Minnesota Journal of International Law for all of their helpful comments in preparing this article for publication.

in Haiti (MINUSTAH) arrived as a peacekeeping force.<sup>1</sup> While conducting missions within neighborhoods to target rebel leaders, the UN peacekeeping forces were accused of killing civilian bystanders,<sup>2</sup> including children.<sup>3</sup> There has been no formal judicial review regarding the UN's decision of whether to provide compensation to the families of the victims or to the State of Haiti for the actions of the UN affiliated peacekeepers.

More recently, the UN in Haiti has been accused of being a vector for cholera after the organization deployed a unit of Nepalese peacekeepers to Haiti without testing all individuals in the unit for cholera.<sup>4</sup> At least one epidemiologist has suggested that the specific cholera outbreak that killed 2000 and hospitalized 100,000 others was probably imported.<sup>5</sup> As with the civilians caught in the crossfire of the peacekeepers, there has been no judicial review of the UN's actions. Rather, the UN will analyze internally whether it proceeded with due care in its humanitarian deployment and it will decide unilaterally whether it will compensate victims for their losses.

In the wake of these two incidents involving peacekeepers operating under the control of the UN, a question of UN responsibility arises: Does the State of Haiti, on behalf of its citizens, have a cause of action against the UN for violating basic international human rights law? After all, the UN may have been responsible for depriving life to civilians by exacerbating existing dangerous conditions and creating unnecessary risk. If we accept the principle that international subjects that have rights should also have responsibilities, Haiti may have an actionable claim against the UN for breaching customary international legal obligations to protect the fundamental human rights of civilians.

This raises a number of fascinating international legal questions. If Haiti were to attempt to bring a case within its own courts, would the UN be protected from domestic prosecution by claims of absolute privileges and immunities? Could the UN even be prosecuted for violating fundamental international rights when the constitutive documents of the

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1. See *Restoring a Secure and Stable Environment*, UNITED NATIONS STABILIZATION MISSION IN HAITI, <http://www.un.org/en/peacekeeping/missions/minustah/> (last visited Sept. 19, 2011).

2. See U.N. Secretary-General, *Rep. of the Secretary-General on the U.N. Stabilization Mission in Haiti*, ¶¶ 11–15, U.N. Doc. S/2006/1003 (Dec. 19, 2006).

3. See Sandra Jordan, *World: Haiti Deaths Blamed on UN Troops: Mourning Parents Accuse Peacekeepers of 'Collateral' Deaths in Battle to Rid Slums of Gangs*, THE OBSERVER, Apr. 1, 2007, at 36, available at ProQuest, Doc. No. 1248229141 (referencing a man claiming his son was killed by the peacekeepers from the UN Stabilization Mission in Haiti).

4. See *Haiti Cholera Outbreak: Nepal Troops Not Tested*, BRIT. BROADCASTING CORP. (Dec. 8, 2010), <http://www.bbc.co.uk/news/world-south-asia-11949181>.

5. See *id.*

organization provide no explicit language assigning responsibility to the UN to protect these rights?<sup>6</sup> Because the UN is not a State, this paper will not directly address whether the UN has obligations under international treaty law, but will instead start its analysis from the assumption that the UN, like other international legal actors, can be held responsible and accountable for breaches of international law. Assuming that the UN should be held legally responsible for breaches of customary international law, one is left to wonder, practically speaking, *how* Haiti might be able to bring an international legal claim against the UN.

What are Haiti's options for seeking a binding judicial review? Under the current international legal framework, Haiti's options are limited. For example, it could potentially bring a judicial action against the UN agencies responsible for deploying the peacekeeping forces seeking damages in its own court system.<sup>7</sup> The UN, however, would likely invoke privileges and immunities available under both the UN Charter and the two conventions on privileges and immunities. Using a different tactic, Haiti could entreat the UN Secretary-General to pay reparations to its damaged citizens as *ex gratia* payments.<sup>8</sup> Finally, Haiti could appeal to the good conscience of the Member States of the UN agency to see that its citizens have some remedy supplied by the UN.<sup>9</sup> However, none of these options has the certainty of systematized judicial review, and all of them have the potential for widely varying recoveries under disparate remedy theories.

#### PROPOSED ARGUMENT

This paper begins with the premise that every UN Member State is entitled to neutral legal review of UN actions by a court of law. This is needed because the existing internal review by UN administrators alone will not suffice.<sup>10</sup> Given a State's uncertain options for formally seeking

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6. UN responsibility is not mentioned in the UN Charter. Rather, the UN is expected to help "achieve international cooperation . . . in promoting and encouraging respect for human rights." U.N. Charter art. 1, para. 3. This language makes historical sense. The UN was considered post-World War II to be collaborative club of nations. The current powerful reach of the UN, as a policymaker and deliverer of public goods (e.g. security, development services), was not envisioned in 1945.

7. *See generally* August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE 131 (2001) (referring to recurring problems in addressing UN accountability and lack of certainty about where to bring cases identifying potential UN responsibility under international law).

8. *See generally id.* (referring to the recurring problems in addressing UN accountability and the lack of certainty about where to bring cases identifying potential UN responsibility under international law).

9. *Id.*

10. For the purposes of this paper, the term "UN" is used to encompass all UN institutions including all organizations, agencies, and missions that derive authority under the UN Charter or the constitutive documents for UN specialized agencies.

UN liability, this paper argues that a mechanism is needed for resolving international legal disputes between Member States and the UN. Due to the fifty plus years of inertia in attempting to amend Article 34 of the International Court of Justice (ICJ) Statute<sup>11</sup> to include international organizations within the ICJ's contentious jurisdiction, this article argues for a less obvious but equally viable approach to binding the UN. This would be an agreement that would require the ICJ to issue a "binding advisory opinion" for all cases involving an unsettled controversy between a State and the UN concerning UN responsibility.

This article's analysis begins with an overview of the International Law Commission's Draft Articles on the Responsibility of International Organizations as a codification of UN legal responsibility. This overview examines the existing challenges of practically assessing UN responsibility and liability. The second part of the paper explores two proposals that would provide meaningful judicial review of UN responsibility and liability: 1) reviving historical efforts to amend Article 34 of the ICJ Statute to give the ICJ compulsory jurisdiction over contentious matters involving the UN as a party, and 2) expanding the realm of ICJ "binding advisory opinions" through a treaty designed to provide a legal mechanism to ensure UN accountability. While both proposals would result in the ability of the ICJ to issue binding opinions in cases where the UN is a party, the paper concludes that a draft treaty, rather than an amendment, is politically more viable because it would not trigger the expansive amendment process of the ICJ Statute. This paper argues for the need to ensure that the ICJ, as the principal judicial organ of the UN, has the functional capacity to review UN actions and make public findings on responsibility and liability.

In order for this proposal to be effectuated, States must identify a mutually agreeable and reliable judicial review mechanism. This mechanism is absent in our current international legal system. As Geoff Gilbert suggests in his work on the United Nations High Commission for Refugees (UNHCR), the UN is largely judgment-proof.<sup>12</sup> Gilbert uses the example of repatriated refugees who were brutally persecuted on their return to their home country after the UNHCR ordered the closure of a refugee camp.<sup>13</sup> Reflecting on the options of the refugees to seek justice, he observes that "[t]here is no obvious mechanism by which UNHCR might be held accountable . . . ."<sup>14</sup> As such, the refugees have no means for legal recourse. This paper argues for the formulation of an "obvious

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11. Statute of the International Court of Justice art. 34, June 26, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute].

12. See Geoff Gilbert, *Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order*, 10 INT'L J. REFUGEE L. 349, 380–81 (1998).

13. See *id.*

14. *Id.* at 382.

mechanism” to address potential grievances, using approaches that are already available under the ICJ statute.

## II. DRAFT ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: SETTING THE STAGE FOR INTERNATIONAL JUDICIAL REVIEW

A number of influential players in international law have questioned the lack of legal redressability where UN actions are concerned. For example, in 2009 the International Law Commission (ILC) finished its draft of 66 articles on the Responsibility of International Organizations, and requested that States and international organizations submit their comments to the UN Secretary-General.<sup>15</sup> In many ways, the ILC draft articles were a continuation of the previous ILC project on the responsibility of the States. However, the ILC draft articles are distinguishable from the previous project because they extend legal responsibility to a broad number of new actors. These are defined in the articles as “international organizations.”<sup>16</sup> This new category of actors includes the UN Secretary-General, the World Trade Organization, and the World Bank.<sup>17</sup> Notably, within its adopted articles, the drafters did not define the relationship between responsibility and accountability. They also did not attempt to articulate precisely how responsibility, for a body such as the UN, would translate into accountability. The connection is left ambiguous, although we learn from the commentary that the “articles only take the perspective of international law and consider whether an international organization is responsible under that law. Thus, issues of responsibility or liability under municipal law are not as such covered by the draft articles.”<sup>18</sup> The ILC draft articles identify no international judicial mechanisms for reviewing responsibility against the UN for alleged violations of public international law, nor do they acknowledge that under the current legal framework, the UN is largely judgment-proof.

While there is legitimate concern that the application of the ILC draft articles to *any* international organization may be too broad to be a useful legal tool, the articles in their current form still offer an unprecedented opportunity for States to register their legal concerns

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15. Rep. of the Int’l Law Comm’n, 61st Sess., May 4–June 6, July 6–Aug. 7, 2009, ¶ 14, U.N. Doc. A/64/10; GAOR, 64th Sess., Supp. No. 10 (2009) [hereinafter ILC 2009 Report].

16. *See id.* (referencing the new actors in the International Law Commission project as “international organizations”).

17. *See id.* (mentioning three of the “international organizations” in the International Law Commission as the UN Secretary-General, the World Trade Organization, and the World Bank).

18. *Id.* ¶ 51, art. 1, cmt. 3.

regarding assigning responsibility to the UN for violations of international law. A proliferation of UN-sponsored activities within States, such as deployments of peacekeeping missions, delivery of infrastructure loans from international economic institutions, implementation of economic sanctions, and provision of disaster relief, raise issues about what responsibilities exist when the UN exercises its powers as an international organization in the context of international law.<sup>19</sup> Article 4 of the ILC's draft articles suggest that international organizations should be held responsible for wrongs where actions can be attributed to the organization under international law and the action constitutes a breach of international law.<sup>20</sup> Exactly how can the UN be held responsible for these alleged breaches? Which international actor or actors should decide whether an action can be attributed to the UN and whether the action amounts to a breach? The draft articles are silent on this point.

While there are references in the articles to an international organization having an *obligation* to provide reparation, compensation, or satisfaction in the case of a wrongful act,<sup>21</sup> the text of the articles is not complete. What is missing from the current articles is a *vehicle* for applying the draft articles to actual legal scenarios involving the UN. Such vehicles could include the coordinator of international disaster services, the command body behind a peacekeeping mission, or the purveyor of development aid. Article 39 of the draft articles provides that “[t]he members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.”<sup>22</sup> Yet, no mention is made as to whether members of an international organization need to provide judicial review of the organization's decision regarding whether to provide compensation for a wrongful act.

This article argues that the UN should be subject to formal judicial review for matters that implicate the rights of States under public international law. The General Assembly and the Security Council are inappropriate for reviewing such UN actions since they are largely political institutions rather than expert judicial bodies. Municipal courts cannot review issues of UN organization responsibility unless the UN waives its immunity from lawsuits as provided for under the Convention on the Privileges and Immunities of the United Nations.<sup>23</sup> Therefore,

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19. *See id.* (referencing several activities that the UN sponsors within States).

20. *See id.* ¶ 51, art. 4.

21. *See* ILC 2009 Report, *supra* note 15, ¶ 51, arts. 34–36.

22. *See id.* ¶ 51, art. 39.

23. *See* Convention on the Privileges and Immunities of the United Nations, Feb. 13,

there exists only one body, the ICJ, which is currently well-positioned to judicially review UN compliance with public international law.

If the ILC draft articles are to have immediate applicability to the UN, what is needed is an explicit linkage in the text between the principles of responsibility and mechanisms of responsibility. The content of the draft articles already provides guidance to the ICJ in understanding attribution of actions to the UN. In order to access the ICJ's binding jurisdiction, States need a legal mechanism that will address existing gaps between the practice of international law in the 21st century and the content of the 1945 ICJ statute. In 1945, international organizations did not play nearly as pivotal a role in international processes as they do today. As will be suggested in Part III below, a mechanism for addressing UN responsibility can be provided either through a revival of the efforts to amend Article 34 of the ICJ statute, or by obtaining a supplementary agreement by UN Member States. This supplemental agreement would respond to the UN's obligation, under Article 39 of the ILC draft articles, to provide some neutral judicial review mechanism to publicly adjudicate the international responsibility and liability of UN agencies. The remainder of Part II will discuss existing barriers to judicial review of UN responsibility and liability.

#### A. CURRENT OBSTACLES IN HOLDING THE UN RESPONSIBLE

The UN has the potential to commit numerous violations of fundamental rights, including the unlawful destruction or confiscation of civilian property, the violation of due process rights, and the unlawful application of economic sanctions to injure vulnerable groups.<sup>24</sup> If States attempt to hold the UN responsible and demand compensation, reparation or satisfaction on behalf of their citizens, they may find themselves blocked by treaties such as the 1946 Convention on the Privileges and Immunities of the United Nations that largely shield the UN from domestic or international judicial review.<sup>25</sup> The practice of "absolute immunity" resulting in discretionary justice has interfered with efforts to hold the UN publicly responsible for violations of either national or international law.

#### B. ABSOLUTE IMMUNITY

Since the UN Charter was drafted at a time when it was uncertain whether the UN would be able to provide any effective international governance, the drafters were highly protective of its infant institutions. As a result, Article 105(1) of the Charter provides that the UN shall enjoy

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1946, 1 U.N.T.S. 15 [hereinafter Privileges and Immunities Convention].

24. See Reinisch, *supra* note 7, at 132.

25. See Privileges and Immunities Convention, *supra* note 23.

in the territory of each of its Members those privileges and immunities that are necessary for the fulfillment of its purposes.<sup>26</sup> Article II(2) of the 1946 Convention on the Privileges and Immunities of the United Nations and Article III(4) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies<sup>27</sup> both reflect the post-war sentiment that the UN needed robust immunities to separate its institutions from any national judicial review.

The problem was that no one contemplated in the UN's early history that the responsibility of the UN might be the appropriate subject of formal adjudicatory review. When the 1949 "Reparation for Injuries Suffered in the Service of the United Nations" advisory opinion articulated the evolution of the UN into an institution endowed with international legal personality,<sup>28</sup> no one envisioned that the UN itself might engage in behavior that violated international legal standards. Subsequent judicial review of UN actions by the ICJ has been limited to advisory opinions requested by UN agencies who may have been concerned about future relationships with a State.<sup>29</sup> For example, in *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, the World Health Organization (WHO) requested that the ICJ review the legality of the process the WHO was proposing to use to transfer regional offices from Egypt to Jordan.<sup>30</sup> The ICJ's advisory opinion did not bind the parties since Egypt was not involved in the proceedings.<sup>31</sup> While the WHO unilaterally decided to bring the request for an advisory opinion in this matter, there is no guarantee that other UN institutions will request opinions in matters that potentially implicate responsibility of an international organization.

While judges have generally criticized the idea of absolute immunity as an "anachronistic doctrine incompatible with the demands

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26. See U.N. Charter art. 105, para. 1.

27. See Convention on the Privileges and Immunities of the Specialized Agencies art. III, § 4, Nov. 21, 1947, 33 U.N.T.S. 261 [hereinafter Privileges and Immunities of the UN] ("The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."); Privileges and Immunities Convention, *supra* note 23.

28. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) [hereinafter *Reparation for Injuries*].

29. See *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 67 (June 6).

30. See *id.*

31. See generally Pieter H.F. Bekker, *The UN General Assembly Requests a World Court Advisory Opinion on Israel's Separation Barrier*, AM. SOC'Y OF INT'L L. (Dec. 2003), <http://www.asil.org/insigh121.cfm> (stating that under the ICJ Statute, advisory opinions rendered by the Court are non-binding).

of justice and the rule of law,<sup>32</sup> such immunity persists in practice since municipal courts continue to refuse to find that the UN has waived its immunities.<sup>33</sup> In fact, the UN has invoked its absolute immunity even when doing so may injure a third party. For example, in *Shamsee v. Shamsee*,<sup>34</sup> the New York appellate court dismissed a sequestration order from an estranged wife because the order was directed at the UN as the employer of her former husband. Previously, the New York Court Special Term<sup>35</sup> had granted the plaintiff a sequestration order requiring the UN to pay her spousal support payment from his pension benefits.<sup>36</sup> On principle, the UN refused to comply and requested the U.S. Department of State to “issue a suggestion of immunity from legal process . . . to the appropriate officials of the Queens County Court.”<sup>37</sup> The legally entrenched reality of absolute immunity has led to the unsatisfactory judicial result of ad hoc discretionary justice, described in the next sub-section, rather than through processes of external justice.

The pervasiveness of absolute jurisdictional immunity is illustrated well by the ongoing dispute in the Netherlands involving the Mothers of Srebrenica. There, a group of families who lost 6,000 family members in the Srebrenica Massacre of Bosniak men and boys, filed a civil law suit against the Netherlands and the UN because of an alleged failure to act effectively to protect civilians in a region that had been declared a safe area by the UN.<sup>38</sup> The UN never made an appearance in the court case or issued any statement. Even in light of the UN’s absence, the Dutch court still ruled on immunity and found that Article 105 of the UN Charter, in conjunction with the Convention on the Privileges and Immunities of the United Nations, ensured that the UN enjoys immunity from legal process.<sup>39</sup> The Dutch court found no indication that the UN had waived

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32. *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37, 55 (Loucaides, J., dissenting).

33. For example, in the United States, courts have found that the UN has complete immunity unless the immunity has been waived. *See, e.g., Van Aggelen v. United Nations*, 311 F. App’x. 407 (2d Cir. 2009); *Emmanuel v. United States*, 253 F.3d 755 (1st Cir. 2001); *Bisson v. United Nations*, No. 06 Civ. 6352(PAC)(AJP), 2008 WL 375094 (S.D.N.Y. Feb. 11, 2008).

34. *Shamsee v. Shamsee*, 428 N.Y.S.2d 33 (App. Div. 1980).

35. “Special term” refers to a practice in some court systems of assigning specific types of cases to a particular part of the court. *See* Glossary of Legal Terms, NEW YORK STATE UNIFIED COURT SYSTEM, <http://www.nycourts.gov/lawlibraries/glossary.shtml>.

36. *See Shamsee*, 428 N.Y.S.2d 33.

37. *Letter to the Permanent Mission of the United States to the United Nations*, 1978 U.N. Jurid. Y.B. 186, U.N. Sales No. E.80.V.1.

38. *See* Rb.’s-Gravenhage 10 juli 2008, JOR 2008 (Mothers of Srebrenica/The State of the Netherlands and the United Nations) (Neth.), available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u\\_ljn=BD6796](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u_ljn=BD6796).

39. U.N. Charter art. 105, para. 1. (“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of

this immunity.<sup>40</sup> As a result, the Dutch District Court found that it had no jurisdiction to hear the civil case.<sup>41</sup> In 2010, the appellate court agreed with the District Court's conclusion, adding a concern that anything less than absolute immunity could lead to excessive litigation which would jeopardize the ability of the UN to function in maintaining peace and security.<sup>42</sup> Attorneys for the Plaintiffs have appealed the decision to the Dutch Supreme Court and are arguing that the UN may not prove judgment-proof if it does not provide some international legal settlement mechanism for claimants.<sup>43</sup> In September 2010, the Dutch public prosecutor agreed to open a criminal investigation of the peacekeeping mission.<sup>44</sup> However, because of the UN's absolute immunity against prosecution, the plaintiffs remain unable to access any judicial forum which will hear its claims of violations of international law by the UN.<sup>45</sup>

Relying on the UN to waive its jurisdictional immunity before submitting to either domestic or international judicial review undermines the legitimacy of public international law as the body of law that has been evolving to manage all public international relationships. Even though the UN is the flagship international institution, it continues to have the capacity to operate at the periphery of international law as a result of both its immunity under domestic law and the anachronistic nature of the ICJ statute. Under Article 65 of the ICJ statute, the UN bodies are empowered to "request" an advisory opinion but are not required to seek opinions even if there is a live dispute between a State

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its purposes."); Privileges and Immunities Convention, *supra* note 23, art. II § 2 ("The United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.").

40. See Rb.'s-Gravenhage 10 juli 2008, JOR 2008 (Mothers of Srebrenica/The State of the Netherlands and the United Nations) (Neth.), available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u\\_ljn=BD6796](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u_ljn=BD6796).

41. *See id.*

42. See Hof's-Gravenhage 30 mars 2010, JOR 2010 (Mothers of Srebrenica/The State of the Netherlands and the United Nations) (Neth.), available at [http://www.haguejusticeportal.net/Docs/NLP/Netherlands/Mothers\\_of\\_Srebrenica\\_Judgment\\_Court\\_of\\_Appeal\\_30-03-2010.pdf](http://www.haguejusticeportal.net/Docs/NLP/Netherlands/Mothers_of_Srebrenica_Judgment_Court_of_Appeal_30-03-2010.pdf).

43. Rachel Irwin, *UN Ruled Immune From Srebrenica Prosecution*, INSTITUTE FOR WAR AND PEACE REPORTING (Apr. 3, 2010), <http://iwpr.net/report-news/un-ruled-immune-srebrenica-prosecution> (observing that at the end of their appellate decision, the Dutch judges "say they 'regret' that the UN 'has not instigated an alternate course of proceedings' as they were required to do when the organisation was created in 1946, as a condition of immunity.").

44. Rachel Irwin, *Dutch UN Troops Face Srebrenica Probe*, CURRENT INTELLIGENCE (Sept. 8, 2010), <http://www.currentintelligence.net/features/2010/9/8/dutch-un-troops-face-srebrenica-probe.html>.

45. *Id.*

and a UN institution over an international legal issue.<sup>46</sup> In lieu of an adjudicative process articulating authoritative legal rulings on matters of international organization, responsibility, and liability, the UN relies primarily on resolving disputes involving UN Member States through diplomatic channels which lack the public transparency associated with “good governance” and general practices of rule of law.<sup>47</sup>

### C. AD HOC DISCRETIONARY JUSTICE

Despite having absolute immunity, the UN has privately acknowledged some responsibility for injuring innocent parties by offering compensation to certain injured parties. For example, as a result of certain UN Operations in the Republic of the Congo, the UN agreed in negotiations with Belgium not to “evade responsibility where it was established that the United Nations agents had in fact caused unjustifiable damage to innocent parties.”<sup>48</sup>

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46. ICJ Statute, *supra* note 11, art. 65 (“The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”).

47. *See, e.g.*, Servet Yanatma, *UN Delays Release of Flotilla Report at Israel's Request*, TODAY'S ZAMAN (July 25, 2011), <http://www.todayszaman.com/news-251578-un-delays-release-of-flotilla-report-at-israels-request.html> (delaying the UN report to allow Turkey and Israel to continue their diplomatic reconciliation). *See generally* Francis N. Botchway, *Good Governance: The Old, the New, the Principle, and the Elements*, 13 FLA. J. INT'L L. 159, 160–62 (2001) (discussing transparency in relation to good governance and rule of law). Discussions within diplomatic channels are private, so it is difficult to report on how diplomats arrived at their decision. However, in some instances public discussions of responsibility have become subsumed into ongoing private discussions resulting in action through the General Assembly. For example, high profile survivors of the 1994 Rwandan genocide prepared a suit against the UN for the UN's complicity during the genocide which resulted in the survivors' spouses' deaths. *See, e.g.*, ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* 399–401 (2001); Karen MacGregor, *Survivors Sue UN for 'Complicity' in Rwanda Genocide*, THE INDEPENDENT (London), Jan. 11, 2000, at 16, available at <http://www.independent.co.uk/news/world/africa/survivors-sue-un-for-complicity-in-rwanda-genocide-727146.html>. While the lawsuits have been dropped and the UN has not accepted any responsibility, *see* NEUFFER, *supra*, at 400–01 (“The United Nations legal staff . . . has denied all liability . . . [and the parties] parted company with their legal team . . .”), the lawsuits helped spur public interest that led to an independent inquiry into the UN's actions in Rwanda commissioned by UN Secretary General Kofi Annan. *Id.* at 400. Partly because of this independent inquiry's report, the UN then created assistance programs for survivors of the Rwandan genocide. *See, e.g.*, Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence, G.A. Res. 60/225, U.N. Doc. A/RES/60/225 (Mar. 22, 2006).

48. Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals, U.N.-Belg., Feb. 20, 1965, 535 U.N.T.S. 199 [hereinafter UN-Belgium Settlement]; *The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities: Study Prepared by the Secretariat*, [1967] 2 Y.B. Int'l L. Comm'n 219, U.N. Doc. A/CN.4/SER.A/1967/Add.1 [hereinafter Privileges and Immunities Study]

Early after its establishment, the UN also acknowledged liability for damage caused by the UN Emergency Force,<sup>49</sup> the UN's first internationally organized emergency peacekeeping force.<sup>50</sup> In 2004, the UN Secretariat agreed that the UN must pay compensatory liability where "an act of a peacekeeping force is, in principle, imputable to the Organization, and . . . committed in violation of an international obligation."<sup>51</sup> Yet paying compensation in private is not the same as publicly admitting a legal obligation.

More broadly, the UN Secretary-General made a statement in a 1965 letter to the Government of Belgium regarding the UN-caused damages in the Congo: It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population [sic] during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.<sup>52</sup>

Here, the UN Secretary-General, without accepting any legal obligation, acknowledges that it is UN organizational 'policy' to pay for harms it has caused. The discretionary approach towards compensation is also reflected in the language of a 1997 General Assembly Resolution which "requests the Secretary-General to continue, in the new system, to take into account, when considering all mission-related death and disability claims, that such injury or death should be compensable . . ."<sup>53</sup> As a policy matter, compensation remains a discretionary issue that "should be" rather than "is" payable.<sup>54</sup>

While the UN may have squarely and conscientiously "assumed its liabilities for damage caused by members of its forces in the performance of their duties" during the earliest UN peacekeeping operations,<sup>55</sup> the

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(discussing an instance of a claim made by a State against the UN).

49. C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 242 (1996).

50. G.A. Res. 1000 (ES-I), U.N. GAOR, 1st Emergency Special Sess., Supp. No. 1, U.N. Doc. A/3354, at 2-3 (Nov. 5, 1956).

51. U.N. Secretariat, Letter dated Feb. 3, 2004 from the Secretariat to the International Law Commission, *in* Responsibility of International Organizations, Comments and Observations Received from International Organizations, Int'l L. Comm'n, 56th Sess., May 3-June 4, July 5-Aug. 6 2004, § 2(G), U.N. Doc. A/CN.4/545 (June 25, 2004).

52. Privileges and Immunities Study, *supra* note 48, at 220.

53. Death and Disability Benefits, G.A. Res. 52/177, ¶ 7, U.N. Doc. A/RES/52/177 (Jan. 20, 1999).

54. *Id.*

55. U.N. Secretary General, *Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations*

UN's practice of paying damages has been predicated largely on moral grounds rather than a legally articulated obligation to pay compensation.<sup>56</sup> In practice, this means that there is no external check, outside of the withholding of dues by Member States, on the UN's exercise of its discretion to provide compensation when requested.<sup>57</sup> The discretion to accept or reject responsibility for potential wrongful UN acts leaves numerous States like Bosnia with civilian victims in the precarious position of relying on the UN's good faith efforts to redress injuries as it sees politically fit.<sup>58</sup>

With the potential for the ILC Project on Responsibility of International Organizations to be mainstreamed by States, the driving force, which is largely moral at present, may be slowly transformed into a legalized regime. Given the statements of the Secretary-General in 1965,<sup>59</sup> combined with a historical precedent for paying for damages inflicted by peacekeeping troops on civilians,<sup>60</sup> there may be an emerging customary international rule that the UN must offer compensation when it is responsible for a breach of international law. If customary international law has reached the point when UN responsibility and liability are beginning to crystallize, there remains a crucial deficit: an absence of institutions capable of ensuring that an admissible claim of responsibility can be judicially reviewed, rather than simply subject to ad hoc judgments of UN agencies.

The current approach for trying to ensure that UN responsibility translates into liability is largely a private, diplomatically-negotiated matter outside of the review of public tribunals. Domestic courts that

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*Preventive Deployment Force and the United Nations Peace Forces Headquarters and Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, ¶¶ 7–8, U.N. Doc. A/51/389 (Sept. 20, 1996).

56. Although the UN has a legal obligation to establish a mechanism to resolve legal disputes between the UN and other parties, *see* Privileges and Immunities Convention, *supra* note 23, § 29, the UN is immune from suit. *Id.* § 2. However, the UN has bolstered its obligation to pay damages despite its immunity by citing to “the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as . . . considerations of equity and humanity which the United Nations cannot ignore.” Privileges and Immunities Study, *supra* note 48, at 220.

57. *Cf.* Norman Kempster, *House Wants to Withhold Dues to U.N.*, L.A. TIMES (May 10, 2001), <http://articles.latimes.com/2001/may/10/news/mn-61661> (threatening to withhold UN dues unless the U.S. is put back on the Human Rights Commission).

58. *See, e.g.*, Hof's-Gravenhage 30 mars 2010, JOR 2010 (Mothers of Srebrenica/The State of the Netherlands and the United Nations) (Neth.), *available at* [http://www.haguejusticeportal.net/Docs/NLP/Netherlands/Mothers\\_of\\_Srebrenica\\_Judgment\\_Court\\_of\\_Appeal\\_30-03-2010.pdf](http://www.haguejusticeportal.net/Docs/NLP/Netherlands/Mothers_of_Srebrenica_Judgment_Court_of_Appeal_30-03-2010.pdf) (holding that the UN is immune from suit in this instance).

59. Privileges and Immunities Study, *supra* note 48, at 219–20.

60. *See, e.g.*, UN-Belgium Settlement, *supra* note 48.

have challenged the compliance of the UN with international law, including customary international law, have been stymied from proceeding by claims of privileges and immunities and have been unable to proceed to the merits of cases.<sup>61</sup> Even when actions are attributed to the UN, parties may be unable to collect any judgment. For example, the District Court of The Hague in the Netherlands ruled in a civil action that the actions of Dutch soldiers working for the UN Protection Force would be “attributed, strictly, as a matter of principle to the United Nations.”<sup>62</sup> However, the UN was never named as a party to this decision and there was no indication in the court record of how the plaintiff could avail himself of damages that had been attributed to the UN Protection Force.<sup>63</sup> These ad hoc approaches of making qualified attribution rulings in certain limited cases, while applying absolute privileges and immunities in numerous other cases, has the potential to lead to at least two substantial problems: the non-enforcement of international law against international organizations and the inability to collect damages from international organizations.

Notably, some UN bodies, and the World Bank, do allow for suit in national courts.<sup>64</sup> However, what results is an ad hoc approach as national courts apply, in a piecemeal fashion, their national laws on immunity to interpret international rights and obligations.<sup>65</sup> The World Bank’s constitutive statute provides that “[a]ctions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for purpose of accepting service or notice of process, or has issued or guaranteed securities.”<sup>66</sup> What this means in practice is that a case brought in the United States has the potential to result in a different legal outcome regarding international obligations than a case in Germany. Such disparate outcomes would depend on a number of factors, including

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61. See, e.g., *Rb.’s-Gravenhage* 10 juli 2008, JOR 2008, ¶¶ 5.16–5.22 (Mothers of Srebrenica/ The State of the Netherlands and the United Nations) (Neth.), available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u\\_ljn=BD6796](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u_ljn=BD6796).

62. *Rb.’s-Gravenhage* 10 September 2008, JOR 2008, ¶ 4.11 (H.N./The State of the Netherlands) (Neth.), available at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0181>.

63. *Id.*

64. International Bank of Reconstruction and Development Articles of Agreement art. 7(3), Dec. 27–Dec. 31, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 [hereinafter IBRD].

65. Compare *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (holding that international organizations have virtually absolute immunity pursuant to International Organizations Immunities Act), with *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 764–65 (3rd Cir. 2010) (holding that there are exceptions to international organizations’ immunity pursuant to the International Organizations Immunities Act).

66. IBRD, *supra* note 64, art. 7(3).

system-wide approaches to law, familiarity of a judge with international law, and constraints of respective domestic laws implementing international obligations.

One of the recurring problems in addressing UN accountability is a lack of certainty about where plaintiffs can bring cases identifying potential UN responsibility under international law. As Professor Reinisch observes:

In the case of certain international organizations, express treaty-based constitutional provisions have even led to questions of whether or not the respective organizations are bound by ‘extraconstitutional’ legal standards at all. This has resulted in serious doubts about whether any forum has the power to assess this issue.<sup>67</sup>

While *ex gratia* payments may satisfy the fundamental need for a remedy without the potential complications of judicial review, this ad hoc approach interferes with the progressive development of international legal norms regarding responsibility. There is nothing systematic about side-payments and there is the potential, particularly when there may be a power imbalance between the UN and its Member State, that *ex gratia* payments do not reflect the gravity of a particular violation.

The following section of this article explores the need to identify a single, neutral, international judicial forum to adjudicate issues of UN responsibility under international law. Under the current approach, the UN is largely immune from any legal proceedings in domestic courts unless it discretionarily submits to adjudication or enters a settlement agreement.<sup>68</sup> This approach is inadequate in terms of creating a balanced rule of law framework within the UN.

### III. UNIFORM JUDICIAL REVIEW BY THE ICJ OF UN RESPONSIBILITY AND LIABILITY

Given the ad hoc nature of dispute resolution involving UN responsibility, there is a nagging issue of how to uniformly, yet equitably, approach issues of UN responsibility and liability. This part explores two proposals to address the need for a judicial review forum for matters involving UN responsibility: 1) reviving historical efforts to amend the ICJ Statute to give the ICJ contentious jurisdiction over the UN and its specialized agencies, and 2) expanding the realm of ICJ “binding advisory opinions” through a supplementary treaty requiring disputes involving the UN and international legal responsibility to be submitted to the ICJ.

The patchy legal landscape of scattered privileges and immunities

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67. Reinisch, *supra* note 7, at 133.

68. See Privileges and Immunities Convention, *supra* note 23, art. 2, § 2; *see, e.g.* UN-Belgium Settlement *supra* note 48.

for the UN, combined with occasional binding decisions under the advisory jurisdiction of the ICJ,<sup>69</sup> generates uncertainty in assessing UN responsibility. What is needed to ensure that principles of liability for violations of international law are applied uniformly across the UN system is a single judicial forum that is available to all States. Of course, this forum should include actors knowledgeable in applying international laws and principles. As the UN's principal judicial organ, the best-situated institution for this work is the ICJ.

Even though there has been no systematic review of disputes involving UN responsibility, the Court has historically welcomed the adjudication of matters involving the UN as part of their mission to resolve international disputes using international law.<sup>70</sup> Drawing on this practice, in his 1995 address to the UN General Assembly, ICJ Judge Mohammed Bedjaoui suggested a new relationship between States, international organizations, and the Court:

States, subjects traditionally described as "primary" or "necessary" components of the international legal order, are, in reality, no longer the only players in international relations, or the only interlocutors where peacekeeping is concerned. International life shows us every single day that, at this level, greater account must be taken of other entities, notably, the international organizations. Access to the Court's contentious procedure, currently reserved for States alone, may therefore now seem too narrow. Among the remedies found for these shortcomings has been the incorporation, into certain treaties, of ad hoc clauses laying down that, in the event of a dispute between the international organization and the States specified therein, that organization will request the Court for an advisory opinion, which the two parties agree will have a "decisive" or "binding" effect. The technique referred to as that of "compulsory advisory opinions" - whose very name underlines its singularity - is, however, no more than a stopgap, which cannot be a substitute for full access by organizations with international legal personality to the contentious procedure of the Court.<sup>71</sup>

Judge Bedjaoui's comments articulate a clear demand for expanding ICJ contentious jurisdiction to encompass international organizations, including the UN, in order to reflect a legal reality that has evolved since 1949. Contrary to what was envisioned at the drafting of the UN

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69. See, e.g., Judgments of Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational, Scientific and Cultural Organization, Advisory Opinion, 1956 I.C.J. 77, 84 (Oct. 23) (issuing an advisory opinion that bound two parties in accordance with an agreement between those two parties).

70. See *Advisory Jurisdiction*, INT'L CT. OF JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (last visited Sept. 22, 2011) (explaining the ICJ's ability issue advisory opinions to certain agencies and organs of the UN).

71. H.E. Mohammed Bedjaoui, President, Int'l Court of Justice, United Nations General Assembly, Fiftieth Session, Plenary: The International Court of Justice: What Will Its Future Be? (Oct. 11, 1995), available at <http://www.icj-cij.org/presscom/index.php?pr=92&p1=6&p2=1&search=%22assembly%22>.

Charter,<sup>72</sup> international organizations on behalf of coalitions of States have assumed leadership roles in managing international conflict and developing humanitarian aid.<sup>73</sup> Yet, even in light of the organization's pivotal role in the international arena, UN actions are generally not judicially reviewable.<sup>74</sup> In Judge Bedjaoui's comments, he is far more dismissive of the possibility of securing a broader role for binding advisory opinions than this article. As described below, while extending contentious jurisdiction to the UN by amending Article 34 of the ICJ Statute is legally desirable, it may be unrealistic. On the other hand, negotiating a treaty providing for binding advisory opinions for international legal disputes involving the UN would be more politically palatable to States because it would not trigger a complex UN Charter amendment procedure.

#### A. OPTION ONE: AMEND ARTICLE 34 OF THE ICJ STATUTE

Article 34 of the ICJ statute provides that “[o]nly states may be parties in cases before the Court” thereby restricting the Court's *ratione personae* jurisdiction.<sup>75</sup> While legal persons (natural or corporate) cannot be named parties to an ICJ dispute,<sup>76</sup> States may appear on behalf of a non-State actor if there has been an international legal violation.<sup>77</sup> When the ICJ Statute was promulgated, the drafters did not provide standing for private persons with disputes against their own States. This was presumably because disputes between natural persons and States could be handled under municipal law. While this rationale may make sense for individual citizens or corporations, the rationale does not apply to international organizations. This is especially true of the UN with its

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72. For a discussion of the limited scope of early UN peacekeeping missions, see Aiyaz Husain, *The United States and the Failure of UN Collective Security: Palestine, Kashmir, and Indonesia 1947-1948*, 101 AM. J. INT'L L. 581, 583 (2007), and for a discussion of UN gridlock due to United States-Soviet Union tension on the Security Council, see *id.*, at 594–96.

73. See *The United Nations Today: International Peace and Security*, UNITED NATIONS, <http://www.un.org/aboutun/untoday/peacesec.htm> (last visited Sept. 22, 2011); *The United Nations Today: Humanitarian Action*, UNITED NATIONS, <http://www.un.org/aboutun/untoday/haction.htm> (last visited Sept. 22, 2011).

74. See Privileges and Immunities Convention, *supra* note 23, § 2 (providing immunity to the UN “from every form of legal process” with the only exception being when the UN voluntarily waives that immunity).

75. ICJ Statute, *supra* note 11, art. 34(1).

76. See *How the Court Works*, INT'L CT. OF JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited Sept. 23, 2011) (“Only States . . . may be parties to contentious cases.”).

77. *Frequently Asked Questions*, INT'L CT. OF JUST., <http://www.icj-cij.org/information/index.php?p1=7&p2=2#2> (last visited Sept. 23, 2011) (“[A] State may take up the case of one of its nationals and invoke against another State the wrongs which its national claims to have suffered at the hands of the latter . . .”).

bundle of privileges and immunities that shield it from the legal process in municipal courts.<sup>78</sup> Since the UN can have the ICJ give opinions regarding States' failure to comply with international obligations,<sup>79</sup> due process and fairness necessitate that the UN also be subject to the same process when it is initiated by States.

Under Chapter II of the ICJ Statute, the UN's role in the Court's contentious jurisdiction is restricted to being the provider of "information relevant to cases before" the ICJ when the international organizations "on their own initiative" or at the request of the Court present such information.<sup>80</sup> This secondary role in dispute resolution when the UN serves as a consultant to the Court is inadequate. The role envisioned no longer reflects the *reality* that intergovernmental organizations have international obligations and thus may be responsible for violating international law.

In order to secure binding decisions on UN liability, it is theoretically possible to broaden Article 34 of the ICJ Statute to give the UN standing under the Court's contentious jurisdiction. This approach has been proposed enthusiastically by jurists and academics over the last 50 years but has yet to garner enough political momentum.<sup>81</sup>

While theoretically possible, such an amendment would be a difficult legal proposition since the amendment process is involved. Specifically, under Article 69 of the ICJ Statute, the process would mirror that required to amend the articles of the UN Charter.<sup>82</sup> Any amendment of the ICJ Statute needs the vote of two-thirds of the members of the General Assembly and to be ratified by two-thirds of the

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78. See, e.g., Hof's-Gravenhage 30 mars 2010, JOR 2010 (Mothers of Srebrenica/The State of the Netherlands and the United Nations) (Neth.), available at [http://www.haguejusticeportal.net/Docs/NLP/Netherlands/Mothers\\_of\\_Srebrenica\\_Judgment\\_Court\\_of\\_Appeal\\_30-03-2010.pdf](http://www.haguejusticeportal.net/Docs/NLP/Netherlands/Mothers_of_Srebrenica_Judgment_Court_of_Appeal_30-03-2010.pdf).

79. For an example of a case wherein the General Assembly was able to seek a judicial intermediary concerning a dispute between the UN and State members, see *Certain Expenses of United Nations*, Advisory Opinion, 1962 I.C.J. 151 (July 20) which advises on a refusal by the Soviet Union and other Member States to pay amounts the General Assembly had assessed for peacekeeping operations in the Middle East and the former Belgian Congo.

80. ICJ Statute, *supra* note 11, art. 34(2).

81. See, e.g., ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 60–66 (1991) (concerning environmental and human rights claims); KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 236–37 (2002); Laurent Jully, *Arbitration and Judicial Settlement Recent Trends*, 48 AM. J. INT'L L. 380, 390–91 (1954); Bedjaoui, *supra* note 71.

82. ICJ Statute, *supra* note 11, art. 69 ("Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.").

members of the UN, including all members of the Security Council.<sup>83</sup> Achieving this level of international consensus may be politically challenging. As described below, historical efforts to revise the ICJ Statute have been subject to considerable debate among States already.

The idea of providing standing under the ICJ's contentious jurisdiction to international organizations is not a new idea and has a relatively long history, nearly as long as the ICJ itself. When the ICJ was created in June 1945 by statute, States were concerned with maintaining continuity between the Permanent Court of International Justice and the ICJ, newly created by the UN Charter.<sup>84</sup> Under the League of Nations, the Permanent Court had been organized exclusively to settle State-to-State disputes grounded in the classic view of international law as a discipline concerned exclusively with the rights and duties of States.<sup>85</sup>

At the 1945 UN Conference on International Organization where the UN Charter was signed, some participants, such as Venezuela, proposed that international organizations should have standing to appear before the Court in some contentious matters.<sup>86</sup> While the proposals were not adopted by the conclusion of the conference, the idea remained in circulation and negotiators agreed that international organizations should be engaged in the court process. Specifically, Article 34, paragraph 2 provided that the Court could request information from public international organizations on matters before the Court.<sup>87</sup> Under paragraph 3 of this article, the UN Registrar is required to communicate with international organizations when there are questions about the construction of a constituent instrument, or about an international convention adopted by an international organization.<sup>88</sup> But Article 34, paragraph 1 remains steadfast that only States can participate in cases

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83. U.N. Charter, art. 108 ("Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.").

84. *See id.* art. 92.

85. *See* Permanent Court of International Justice Statute art. 34, Dec. 16, 1920, 6 L.N.T.S. 379 (1921), available at <http://treaties.un.org/doc/Publication/UNTS/LON/Volume%206/v6.pdf> ("Only States or Members of the League of Nations can be parties in cases before the Court.").

86. United Nations Conference on International Organization, San Francisco, 1945, *Proposed Draft of Article 34 Submitted by the Delegation of Venezuela*, 13 U.N.C.I.O. Docs. 480, Doc. 284 (English) IV/1/24 (May 14, 1945) (proposing that the text of Article 34(2) be drafted so that "[u]pon request from any of the intergovernmental international organizations or offices dependent on the United Nations, the Court shall settle conflicts of jurisdiction which may arise among them").

87. ICJ Statute, *supra* note 11, art. 34(2).

88. *Id.* art. 34(3).

where the Court exercises its contentious jurisdiction.<sup>89</sup> Even though the articles provided a role for international organizations under Article 34(2) and 34(3),<sup>90</sup> the UN was still not permitted to appear as a party in a contentious matter.<sup>91</sup>

The ICJ's advisory opinion in its 1949 *Reparation for Injuries* signaled that the UN may eventually become subject to ICJ binding judicial review.<sup>92</sup> The Court affirmed that the UN has the capacity to bring international claims because of its status as an international organization formed under the Charter.<sup>93</sup> No specific source of the right to bring claims was discussed and the Court simply noted that it was "clear"<sup>94</sup> that the UN had the right to bring claims for damages through such methods as "protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the [ICJ's] Statute."<sup>95</sup> In spite of the Court's language, which suggests that the UN might bring general claims under the ICJ Statute, the reality is that the only claims "authorized by the Statute" available to the UN are advisory opinions issued under Article 65 of the ICJ Statute.<sup>96</sup> Article 34(1) remains unequivocal in its limitation of the ICJ's exercise of contentious jurisdiction to States alone.<sup>97</sup>

In the 1950s, groups of legal experts began to raise concerns about the state-centric limitations of the ICJ.<sup>98</sup> In 1954 the Institut de Droit International expressed concern about the inability of international organizations whose membership includes States to appear as respondents before the ICJ.<sup>99</sup> In addition, the International Law Association, as a group of legal experts, proposed in 1956 an amendment to the ICJ Statute such that the UN and its specialized agencies would be

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89. *Id.* art. 34(1).

90. *Id.* art. 34(2)–(3).

91. *Id.* art. 34(1).

92. *Reparation for Injuries*, *supra* note 28.

93. *Id.* at 180.

94. *Id.*

95. *Id.* at 177.

96. ICJ Statute, *supra* note 11, art. 65.

97. *Id.* art. 34(1).

98. *See, e.g.,* WELLENS, *supra* note 81 (discussing two organizations of legal scholars: the International Law Association and the Institut de Droit International).

99. *Id.* at 237 (citing *Resolutions Adopted by the Institute at its Session at its Session at Aix-en-Provence, 22 April–1 May 1954*, 45(II) INSTITUT DE DROIT INT'L 296, 298 (1954)). The Institut de Droit International is an invitation only, independent organization of legal experts. *Statutes*, INSTITUT DE DROIT INT'L art. 1, art. 5, [http://www.idi-iil.org/idiE/navig\\_statutes.html](http://www.idi-iil.org/idiE/navig_statutes.html), (last visited Sept. 21, 2011). After being founded in 1873, it was awarded the Nobel Peace Prize in 1904 for its work on promoting arbitration between States as a means of peaceful conflict resolution. *History*, INSTITUT DE DROIT INT'L, [http://www.idi-iil.org/idiE/navig\\_history.html](http://www.idi-iil.org/idiE/navig_history.html), (last visited Sept. 24, 2011).

able to appear before the Court in contentious cases.<sup>100</sup> Both the Institute de Droit International and the International Law Association were concerned with ensuring that international adjudication reflected the emerging relationships among primary international actors, including international organizations.

In 1977, the U.S. Department of State, in response to Senate Resolution 78 (May 9, 1974),<sup>101</sup> published a study on whether the United States should undertake diplomatic efforts to widen access to the ICJ for individuals, corporations, non-governmental organizations, intergovernmental organizations, and regional organizations for cases raising questions of international law.<sup>102</sup> The report noted that widening access to the Court would increase the Court's contribution to the development of international law by promoting "unification in the interpretation and application of international law."<sup>103</sup> The report examined the possibilities of increasing the number of organizations capable of requesting advisory opinions or amending Article 34(1) of the Statute.<sup>104</sup> On the issue of amending Article 34(1), the Department of State was open to the idea of international organizations being subject to contentious jurisdiction as long as both the General Assembly and Security Council agreed on any potential submission of a matter to contentious jurisdiction.<sup>105</sup> The Department of State recognized in the 1970s that achieving the needed votes for an amendment would be difficult but that it supported an amendment "in principle . . . at some later, more propitious time."<sup>106</sup>

Scholars and practitioners have urged for some time that international organizations, including the UN, should be subjected to ICJ's contentious jurisdiction. One year after the formation of the ICJ, Director-General of the International Labour Organisation Wilfred Jenks criticized the ICJ's bifurcated jurisdictional structure, finding that the "[i]nconvenient and irritating restrictions upon access to the Court by the specialized agencies will encourage the latter to rely upon *ad hoc* tribunals for the determination of questions which might more appropriately be referred to the Court."<sup>107</sup>

Laurent Jully observed arbitration and settlement trends in 1954 and

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100. WELLENS, *supra* note 81, at 236.

101. S. Res. 78, 93d Cong. (1974) (enacted).

102. U.S. DEP'T OF STATE, STUDY ON WIDENING ACCESS TO THE INTERNATIONAL COURT OF JUSTICE, *reprinted in* 16 I.L.M. 187 (1977).

103. *Id.* at 190.

104. *Id.* at 196–200.

105. *See id.* at 201.

106. *Id.* at 205.

107. C. Wilfred Jenks, *The Status of International Organizations in Relation to the International Court of Justice*, 32 TRANSACTIONS OF THE GROTIUS SOC'Y 1, 19 (1946).

emphasized the need for consistency in international law, writing that “the revision of Article 34 will be one of the first tasks to be undertaken as being capable of bringing about an important improvement in this special province of international law.”<sup>108</sup> Jully, noting the light docket of the ICJ at the time, expressed concern that:

It is somewhat paradoxical that the numerous specialized agencies, which stand in close relationship to the United Nations, should be obliged to set up separate and ad hoc bodies for the settlement of future disputes, while the Charter has established, or rather confirmed in existence, a first-class judicial organ, benefiting from a long experience as well as a high reputation, and which could certainly deal with more work than is at present being entrusted to it.<sup>109</sup>

In terms of institutions structured to hear public international legal disputes, the ICJ is perfectly situated to adjudicate any public international legal dispute involving the UN.

Cambridge University lawyer Sir Elihu Lauterpacht argued that international organizations should have the power to present claims to the ICJ.<sup>110</sup> In particular, he observed that where an international organization acts as a defendant in a given case, such as a responsibility case, the ICJ’s exercise of contentious jurisdiction would be especially reasonable because such a case would involve a dispute over international law.<sup>111</sup> As he commented:

While [the rights and duties of international organizations] can, of course, be resolved in any particular *ad hoc* arrangement for dispute settlement involving international organizations . . . Article 34 of the Statute of the ICJ should be so amended that international organizations are no longer *a priori* excluded from participation in the contentious work of that Court.<sup>112</sup>

As Lauterpacht observes, the ICJ is the most appropriate institution to hear cases when the UN is in conflict with a State or group of States.

Sir Gerald Fitzmaurice, the United Kingdom’s counsel to the ICJ, observed that there “[t]here is a strong case, though it may not be free from all difficulty” for international organizations to be litigants.<sup>113</sup> He observed:

It seems probable that had the basic drafting of the Court’s Statute been carried out within, say, the last twenty years, instead of over half a century ago, the present paragraph 1 of Article 34 of the Statute—while not necessarily including international organizations in terms as entitled to be parties as litigants—would at least not have been drafted in such a way . . . as clearly to exclude them.<sup>114</sup>

What Sir Fitzmaurice recognized over 30 years ago is how

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108. Jully, *supra* note 81, at 391.

109. *Id.*

110. See LAUTERPACHT, *supra* note 81, at 61–65.

111. See *id.* at 66.

112. *Id.*

113. Gerald Fitzmaurice, *Enlargement of the Contentious Jurisdiction of the Court*, in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 478–79 (Leo Gross ed., 1976).

114. *Id.* at 479.

anachronistic the ICJ Statute is in its treatment of international organizations as disputants. However, in 1945, few States recognized that the UN would have legal claims to assert and that States might also have claims to assert against the UN.<sup>115</sup>

Shabtai Rosenne, author of numerous treatises on the ICJ, explained why nothing has happened to secure Article 34 reform in spite of numerous suggestions for it. Professor Rosenne related that even though there appeared to be a practical *need* for UN standing in contentious cases, the absence of political will explains the lack of reform.<sup>116</sup> He illustrated his premise with two proposals presented by the States of Guatemala and Costa Rica in 1997 to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization.<sup>117</sup> Both of these proposals requested amendment of the ICJ Statute to allow the UN and other international organizations to be parties to contentious cases.<sup>118</sup> When the proposals were considered, the Special Committee adopted no conclusions,<sup>119</sup> and the General Assembly expressed its intent to take no action that might have implications for any changes in the UN Charter or the Statute.<sup>120</sup> In 1999 Guatemala withdrew its proposal to extend contentious jurisdiction to certain international organizations and to evaluate whether international organizations generally should have direct access to the ICJ's contentious jurisdiction.<sup>121</sup> According to Rosenne, the proposal was "feasible

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115. *See id.* ("[T]he notion of international organizations of States as having an international personality of their own separate from and additional to that of their individual component members . . . had not gained any real currency.")

116. *See* SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005, VOL. II JURISDICTION* 632–33 (4th ed. 2006).

117. *See id.*

118. *See* Special Comm. on the Charter of the U.N. and on the Strengthening of the Role of the Org., Jan. 27–Feb. 7, 1997, Possible Amendments to the Statute of the International Court of Justice to Extend its Competence with Respect to Contentious Matters to Disputes Between States and International Organizations, Working Paper Submitted by Guatemala, U.N. Doc. A/AC.182/L.95 (Jan. 28, 1997) [hereinafter Guatemala Proposal]; Special Comm. on the Charter of the U.N. and on the Strengthening of the Role of the Org., Jan. 27–Feb. 7, 1997, Possible Amendments to the Statute of the International Court of Justice to Extend its Competence with Respect to Contentious Matters to Disputes Between States and International Organizations, Working Paper Submitted by Costa Rica, Alternative Drafting to the Working Paper Submitted by Costa Rica, U.N. Doc. A/AC.182/L.97 (Feb. 4, 1997) [hereinafter Costa Rica Proposal].

119. *See* Rep. of the Special Comm. on the Charter of the U.N. and on the Strengthening of the Role of the Organization, U.N. Doc. A/53/33; GAOR, 53d Sess., Supp. No. 33 (1998) (refraining from recommending action upon the proposals).

120. G.A. Res. 53/106, ¶ 4(e), U.N. Doc. A/RES/53/106 (Dec. 10, 1998).

121. *See Special Committee On UN Charter Concludes Two-Week Session*, SCIENCE BLOG (Apr. 23, 1999), <http://www.scienceblog.com/community/older/archives/L/1999/A/un990575.html>

("Marja-Liisa Lehto (Finland), Chairman of the Special Committee, commended the flexibility shown by the Guatemala delegation in withdrawing a proposal that did not

technically but not politically, at least for the time being.”<sup>122</sup> Guatemala’s speech withdrawing its proposal before the Special Committee reflected on the political hurdles of amending the ICJ Statute with reserved optimism:

We consider it advantageous that the predominantly favourable views that, primarily in the academic area, have been expressed with regard to the possibility of expanding the ICJ’s jurisdiction in the manner proposed have been complemented by the reaction of States to that possibility . . . . We consider that we should now take a long-term view and have regard to both the rapidity with which everything evolves in this era of profound and unpredictable changes, and the importance that intergovernmental organizations, whose number grows incessantly, are increasingly taking on. We believe that within this long-term perspective the hope subsists that the proposal we have presented will one day be adopted.<sup>123</sup>

As the fifty-plus years of effort to amend Article 34 of the ICJ Statute suggest, international law evolves slowly and States, as well as other key players, are rarely inclined to experiment with new legal arrangements. Given the incremental nature of international legal reform, it is not surprising the U.S. Department of State in the 1970s suggested waiting for a “more propitious time” to seek amendment of the ICJ Statute.<sup>124</sup> Mirroring this sentiment, in the late 1990s Guatemala was willing to pin its hope for reform on a “long-term perspective.”<sup>125</sup>

While it is not clear that the time for amendment is any more “propitious” today than it was in the late 1990s, the efforts of Costa Rica and Guatemala provide guidance for what an acceptable amendment might look like.<sup>126</sup> The two proposals to amend Article 34(1) of the Statute were amenable to several States in 1997.<sup>127</sup> The Guatemala

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garner support.”).

122. ROSENNE, *supra* note 116, at 633.

123. Translation of a Statement by Guatemala at the 5th Mtg. of the Sixth Committee on the Report of the Special Committee on the Charter of the United Nations and the Strengthening of the Role of the Organization (Agenda Item 159) (Oct. 13 1999), <http://www.un.int/guatemala/english/speeches/juridico/1999/13-oct-1999.html> [hereinafter, Statement by Guatemala].

124. See U.S. DEP’T OF STATE, *supra* note 102, at 205 (“[S]upport in principle of such a proposal represents a sound and forward-looking approach.”).

125. See Statement by Guatemala, *supra* note 123 (“We believe that within this long-term perspective the hope subsists that the proposal we have presented will one day be adopted.”).

126. See Guatemala Proposal, *supra* note 118 (proposing amendments to Article 34); Costa Rica Proposal, *supra* note 118 (proposing amendments to Article 34).

127. See, e.g., Press Release, Calls for Burden-Sharing Mechanism to Ease Sanctions Effects on Third States, As Sixth Committee Continues Discussion of Report of Charter Committee, U.N. Press Release GA/L/3075 (Oct. 20, 1998) (amenable to Georgia); Press Release, Sixth Committee Opens Review of Report of Charter Committee Discussing Effect of Sanctions on Third States, U.N. Press Release GA/L/3073 (Oct. 16, 1998) (amenable to Cuba). See also Statement by Guatemala, *supra* note 123 (referring to 1978 support for the principal of expanded jurisdiction by eighteen States, including two

Proposal included an amendment of Article 34(1) and the addition of a number of new articles.<sup>128</sup> The amendment of Article 34(1) opened the compulsory jurisdiction of the ICJ to the “United Nations or any other international organization comprised of States” as long as one of three things was true: the constituent instrument of the organizations permitted ICJ jurisdiction, the State members of the organization agreed in a treaty to compulsory ICJ jurisdiction for the organization, or the State parties to the dispute and the organization agreed to refer the dispute to the Court.<sup>129</sup> The Costa Rica Proposal built on the Guatemala Proposal but did not restrict Article 34(1) to international organizations comprised only of States; it permitted any international organization that was authorized by its constituent instrument to seek ICJ compulsory jurisdiction.<sup>130</sup>

The greatest hurdle to making the ICJ’s contentious jurisdiction include the UN is, as commentators have pragmatically observed, the entirety of the ICJ amendment process. The amendment process is straightforward yet lengthy. Article 69 of the ICJ Statute provides that an ICJ amendment is the same procedurally as a UN Charter amendment.<sup>131</sup> The Court has the power to propose amendments to the Secretary-General who will then propose these amendments to States.<sup>132</sup> As Rosenne alluded to in his treatise on the ICJ, amending the ICJ Statute is not really a technical problem of updating the Statute to reflect current international legal realities, but a problem of political will and political inertia.<sup>133</sup>

The problem lies in the political constraints of securing an amendment that is procedurally equivalent to a UN Charter amendment. The UN Charter provides in Article 108 that an amendment to its Charter would require an adoption by two-thirds of the members of the General Assembly and ratification by two-thirds of the members of the UN, including all of the permanent members of the Security Council.<sup>134</sup>

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permanent members).

128. See Guatemala Proposal, *supra* note 118.

129. *Id.* § B.

130. See Costa Rica Proposal, *supra* note 118.

131. There is additional language in the ICJ Statute, *supra* note 11, art. 69, providing that the amendment process is subject to General Assembly provisions that may be adopted concerning the participation of States which are parties to the ICJ Statute but not members of the UN. Presently all parties to the ICJ Statute are also members of the UN. See *States Entitled to Appear Before the Court*, INT’L CT. OF J., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=b> (last visited 23 Sept. 2011) (listing no States as parties to ICJ but not members of the UN).

132. ICJ Statute, *supra* note 11, art. 70.

133. See ROSENNE, *supra* note 116, at 633 (“The view was expressed that the proposal was feasible technically but not politically, at least for the time being.”).

134. U.N. Charter art. 108.

Likewise, an amendment to the ICJ Statute would require the same two-thirds adoption and ratification from the UN's current 192 Member States.<sup>135</sup> The reaction of the permanent members of the Security Council remains an unknown, especially as to whether they might exercise their veto power under Article 108.<sup>136</sup> Among the permanent Security Council members, only the United Kingdom has recognized the compulsory jurisdiction of the Court over itself, suggesting that the United Kingdom may be open to compulsory jurisdiction being extended further.<sup>137</sup> France and Russia have also availed themselves of the ICJ's contentious jurisdiction.<sup>138</sup> As described above, while the United States expressed in its domestic policy thirty years ago an interest in broadening access to the ICJ, it is unclear whether the same policy reform interest remains.<sup>139</sup> China has never appeared before the ICJ.<sup>140</sup>

Moreover, a request to open up an amendment process like that of the UN Charter is likely to stall because of its potential to influence other aspects of UN governance that are currently disputed. An opportunity to revise the ICJ Statute may be perceived by some States as a backdoor opportunity to reinvigorate debates that have been unsuccessfully concluded over reforming the whole UN institutional framework. The larger questions of other areas of UN reform requiring the same series of votes from the General Assembly, ratifications by Member States, and approval by the Security Council would quickly dwarf concerns of institutionalizing ICJ contentious jurisdiction over issues involving UN responsibility.

There is one other issue that requires discussion when considering whether Article 34 reform would be sufficient to review UN responsibility and accountability. Even if international organizations in general, and the UN in particular, were able to appear before the ICJ, it is unclear as to whether they would be *compelled* to appear. One of the recurring issues with pursuing a judicial matter against the UN is the

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135. Compare ICJ Statute, *supra* note 11, art 70 (adopting the U.N. Charter amendment procedure), with U.N. Charter art. 108 (requiring a two-thirds vote to amend the U.N. Charter).

136. Thomas G. Weiss, *The Illusion of UN Security Council Reform*, 26 WASH. QUARTERLY, Autumn 2003, at 147, 150.

137. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF J., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Sept. 23, 2011) (listing 66 countries submitting to ICJ art. 36(2) compulsory jurisdiction).

138. See *List of Cases Referred to the Court Since 1946 By Date of Introduction*, INT'L CT. OF J., <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited Sept. 23, 2011) [hereinafter List of ICJ Cases] (listing all countries which have appeared before the ICJ, including France and Russia).

139. See *supra* notes 102–106 and accompanying text.

140. See List of ICJ Cases, *supra* note 138 (omitting China).

prevalence of absolute immunity.<sup>141</sup> Courts have been reluctant to find that the UN has waived its immunity to appear in municipal courts.<sup>142</sup> Unless the UN was somehow required by the agreement of UN Member States to submit to compulsory jurisdiction by an amendment of Article 36, the UN may very well choose not to submit its disputes to the ICJ's contentious jurisdiction. Instead, the UN may continue to resolve international legal disputes concerning its responsibility in an ad hoc fashion. Simply granting the UN standing under Article 34 would, in and of itself, not be sufficient since the UN would then be able to strategically decide when it would appear. States with unresolved public law complaints against the UN who seek judicial resolution need greater certainty that the UN will appear. The following section looks at one judicial mechanism that could improve UN accountability without amending the ICJ Statute.

#### B. OPTION TWO: OBTAIN BINDING ADVISORY OPINION UNDER SUPPLEMENTARY TREATY

Presently only States can receive judicial review of contentious matters by the ICJ under Article 34.<sup>143</sup> UN organs and UN specialized agencies are limited to requesting advisory opinions under Article 65 which provides that “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”<sup>144</sup>

While the Court does deliberate on matters involving UN rights and responsibilities under its advisory jurisdiction, these opinions are considered to have less weight than a similarly situated contentious jurisdiction decision.<sup>145</sup> In part, this goes to the issue of whether the deliberations of the Court are *res judicata* when the ICJ acts in its advisory capacity, as opposed to its contentious capacity. Ordinarily in a contentious matter, the principle of *stare decisis* does not apply, since a decision only binds the parties to a particular case.<sup>146</sup> Even so, the Court will frequently rely on previous cases as being instructive to the Court in their legal reasoning.<sup>147</sup> Still, in issuing advisory opinions, one may

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141. See *supra* Part II.B.

142. See, e.g., *supra* notes 33, 38 and accompanying text.

143. ICJ Statute, *supra* note 11, art. 34.

144. ICJ Statute, *supra* note 11, art. 65.

145. See André Gros, *Concerning the Advisory Role of the International Court of Justice*, in *TRANSITIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP JESSUP* 313, 315 (Wolfgang Friedmann et al. eds., 1972) (explaining the distinction between advisory opinions and “judgments”).

146. See ICJ Statute, *supra* note 11, art. 59.

147. See Gros, *supra* note 145, at 315 (explaining that the common distinction

wonder whether the ICJ is simply providing well-reasoned suggestions rather than legal analyses.

Alexander Fachiri, writing about the Permanent Court of International Justice on which the ICJ was largely modeled, suggested that international court advisory opinions should not be distinguished from contentious decisions, since the deliberative processes are the same.<sup>148</sup> He wrote:

It is submitted that the principles laid down and points decided in advisory opinions have the same effect by way of precedent as the judgments of the Court, and will contribute to an equal degree in the development of international law . . . . The Court itself has shown its appreciation of the importance of its advisory opinions by framing them with elaboration and including a full statement of the reasons upon which the conclusions arrived at are based.<sup>149</sup>

The modern interpretation is that generally, unless there is language in a given treaty requiring parties to request a *binding* advisory opinion from the ICJ, such an opinion will have no binding force.<sup>150</sup> In the realm of ascertaining responsibility and assigning liability, the inability to bind parties to a particular decision is problematic. Yet as Fachiri implies, there is no reason that the Court, acting under its Article 65 powers, cannot issue decisions with the same binding force as a contentious decision.<sup>151</sup> After all, the Court uses similar procedures in an advisory case as it does in a contentious case,<sup>152</sup> and the Court is still exercising authority in a judicial fashion.

International legal practitioners have perceived this “double standard” problem and have sought to remedy it through a novel approach of applying the Court’s advisory jurisdiction. One such approach was formulated by Laurent Julliy, who observed in the 1950s that international organizations were finding alternative approaches when seeking dispute resolution:

In order to evade the obstacle of Article 34—perhaps not as formidable as it looks at first—public international organizations have used two distinct legal devices: The first is a treaty provision whereby a dispute as to the interpretation or application of the treaty in question . . . shall be submitted to the Court for an

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between advisory opinions and judgments is not a rigid barrier).

148. See ALEXANDER FACHIRI, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE: ITS CONSTITUTION, PROCEDURE, AND WORK* 71 (1925).

149. *Id.*

150. See MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 110 (2003) (explaining competing views regarding ICJ opinions).

151. See FACHIRI, *supra* note 148, at 69–70; ICJ Statute, *supra* note 11, art. 65.

152. See ICJ Statute, *supra* note 11, art. 68 (“In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.”). Articles 66 and 67 furthermore permit interested parties to furnish information on the question and require advisory opinions to be delivered publicly, respectively. *Id.* arts. 66–67.

advisory opinion, it being clearly understood that the parties will consider the opinion given by the Court as decisive. . . . The other device used by international organizations is the classical one of arbitration.<sup>153</sup>

In light of the presently non-binding nature of advisory opinions, one possible solution exists in the development of a supplementary treaty requiring the UN to submit to advisory opinions. This paper will not explore arbitration as a second device to avoid “the obstacle of Article 34”<sup>154</sup> since arbitration lacks some of the important procedural components of the ICJ. For example, unlike Article 34 decisions or advisory opinions, arbitration reports may be kept confidential from the public. In spite of the advantages of efficiency generally associated with arbitration, the evolution of public international law must remain a matter for public deliberations.<sup>155</sup>

In some limited instances, treaties have been negotiated providing the ICJ with the ability to issue binding opinions under its Article 65 powers. These treaties, such as the Convention on the Privileges and Immunities of the United Nations<sup>156</sup> and the Convention on the Privileges and Immunities of the Specialized Agencies,<sup>157</sup> contain clauses referring a dispute between the treaty members to the ICJ for a final, binding decision. The “compromissory clauses” in various international agreements requesting ICJ resolution of disputes between the UN and a State have been recognized by some scholars as adequate, albeit indirect, legal authority for triggering ICJ decisions under Article 65 of the ICJ Statute which might bind the parties.<sup>158</sup>

The legal reasoning allowing for such binding advisory opinions, in spite of there being no such authority in the ICJ Statute or Rules, was articulated early in the ICJ’s existence in the *Judgments of Administrative Tribunal of ILO* case.<sup>159</sup> The Court took the position that the ILO statute at issue<sup>160</sup> in the case was nothing more than “a rule of conduct for the

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153. Jully, *supra* note 81 at 389–90.

154. *Id.* at 389.

155. The ICJ Statute already recognizes the transparency advantages in ensuring that deliberations on public international matters remain public. Article 46 of the ICJ Statute, *supra* note 11, provides that “The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.”

156. Privileges and Immunities Convention, *supra* note 23, art. VIII, § 30.

157. Privileges and Immunities of the UN, *supra* note 27, art. IX, §§ 31–32.

158. See Roberto Ago, “Binding” *Advisory Opinions of the International Court of Justice*, 85 AM. J. INT’L L. 439, 441 (1991) (summarizing the work of Professor Paolo Benvenuti) (“From this perspective, the quality of a ‘decision,’ the ‘binding force’ attributed under certain conditions to an advisory opinion, far from being an exception to the rule, is consistent with the natural and customary effects of the definition of rights and obligations by the Court in exercising its advisory jurisdiction.”).

159. *Judgments of Administrative Tribunal of ILO upon complaints made against UNESCO*, Advisory Opinion, 1956 I.C.J. 77 (Oct. 23).

160. See *generally* Statute of the Administrative Tribunal of the International Labour

Executive Board, a rule determining the action to be taken by it on the Opinion of the Court.”<sup>161</sup> In a later decision, the Court reasoned that as long as it does not feign to be acting under the ICJ Statute or Rules when it issues a “binding advisory opinion,” it could issue advisory opinions that would functionally bind the parties.<sup>162</sup> Whether a decision was binding or not in practice was of little concern to the Court as long as the parties did not invoke the ICJ Statute or Rules to transform an advisory opinion into a “binding” advisory opinion.

In many cases, the subject of “binding” advisory opinions is largely a matter for academic debate since there are few treaties providing for ICJ review in cases of dispute with UN institutions. They include headquarter agreements, privileges and immunities agreements, and arrangements related to specific UN facilities.<sup>163</sup> There is no language in general subject multilateral treaties under which the UN is expected to invoke the ICJ’s advisory jurisdiction to conclusively decide a matter between parties. For example, existing human rights treaties, environmental treaties, and humanitarian law treaties do not explicitly address UN responsibility or liability.<sup>164</sup> Yet this omission leaves a lacuna in jurisprudence where States, as individual members within a general-subject treaty regime, are subject to international judicial review mechanisms that the UN evades. Therefore, the UN remains free of accountability as long as it has not specifically consented to bringing a dispute with a State or another UN agency to the ICJ. In practice, this means that there are few opportunities to judicially review the responsibility of the UN for *any* breach of either customary international law or treaty law.

Outside of the small population of treaties concluded between the UN and States that invoke the mechanism of “binding” advisory

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Organization, *available at* <http://www.ilo.org/public/english/tribunal/about/statute.htm>.

161. Judgments of Administrative Tribunal of ILO, *supra* note 159, at 84.

162. Application for Review of Judgment No. 158 of United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, ¶¶ 39–40 (July 12).

163. *See, e.g.*, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 66, Mar. 20, 1986, 25 I.L.M. 543, 578 [hereinafter Vienna Convention]; Agreement for the Establishment in Cairo of a Middle Eastern Regional Radioisotope Centre for the Arab Countries art. XVI, IAEA Doc. INFCIRC/38 (Oct. 18, 1962); Agreement Relating to the Headquarters of the Economic Commission for Asia and the Far East in Thailand, UN–Thai., art. XIII, May 26, 1954, 260 U.N.T.S. 35; Agreement Regulating Conditions for the Operation, in Chile, of the Headquarters of the UN Economic Commission for Latin America, UN–Chile, art. XI, Feb. 16, 1953, 314 U.N.T.S. 49.

164. Treaties, as primary sources of international law, are generally negotiated between States and cannot bind the UN unless the UN is an explicit party to the treaty. The UN is not a party to existing human rights, environmental, or humanitarian law treaties. While treaties can articulate specific duties and roles for the UN, State negotiators have declined to assign legal responsibility to the UN.

jurisdiction, there exists a failure to agree upon a binding mechanism to hold the UN responsible for international legal violations. This failure remains a substantial, systematic problem. Even in recent international discussions over recommended environmental liability mechanisms, there has been no explicit recognition of the possibility for disputes arising between the UN and States. For example, in a recent document designed to ensure liability mechanisms for victims of pollution and environmental damages,<sup>165</sup> the Committee of Permanent Government Representatives to the UN Environmental Programme encouraged each State to create domestic law that would assess strict liability to operators for activities dangerous to the environment.<sup>166</sup> Notably, the drafters focused exclusively on domestic remedies. They never contemplated that the UN itself could engage in dangerous environmental activities and that, unlike private operators who may be subject to municipal courts of law, the UN could avail itself of certain privileges and immunities that would shield it from operator liability under domestic law.<sup>167</sup> This oversight, or deliberate omission, is significant. In some respects, the UN, as a multilateral institution that frequently operates across borders, has far greater potential for creating environmentally dangerous conditions than many UN Member States who are disengaged from global affairs.<sup>168</sup>

Judge Bedjaoui, in his comments to the General Assembly, was highly critical of binding advisory opinions, declaring them “stopgap measures” that failed to address the underlying need to amend the ICJ Statute to reflect the role of international organizations as international decision makers.<sup>169</sup> However, these hybrid opinions should not be so

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165. Executive Director of the Governing Council of the United Nations Environment Programme, Appendum, *Draft Revised Guidelines for the Development of Domestic Legislation on Liability, Response Action, and Compensation for Damage Caused by Activities Dangerous to the Environment*, at 3, U.N. Doc. UNEP/GCSS.XI/8/Add.1 (Dec. 3, 2009).

166. *Id.* at 5–8.

167. An example of the UN causing domestic environmental damage could occur if the UN leaves unintentional environmental contamination at military bases as part of its peacekeeping operations.

168. The UN employs approximately 64,000 staff, see *Questions & Answers about the UN: Who Works at the UN?*, <http://www.un.org/geninfo/ir/index.asp?id=160> (last visited Sept. 23, 2011), which is equivalent to the population of some Member States, including Dominica, U.S. Department of State, *Background Note: Dominica*, <http://www.state.gov/p/wha/ci/do/> (last visited Sept. 25, 2011), and the Marshall Islands, U.S. Department of State, *Background Note: Marshall Islands*, <http://www.state.gov/r/pa/ei/bgn/26551.htm> (last visited Sept. 25, 2011). One hopes that some of these staff are involved in due diligence work on large, potentially environmentally damaging infrastructure projects.

169. Bedjaoui, *supra* note 71 (“The technique referred to as that of “*compulsory advisory opinions*” - whose very name underlines its singularity - is, however, no more than a stopgap, which cannot be a substitute for full access by organizations with

readily dismissed. Instead, they should be regarded as offering a unique opportunity for reforming the UN system to better reflect the heightened role of international organizations in implementing the international system. In addition, opting for binding advisory opinions would not trigger the general amendment process that a revision of Article 34 requires. To the extent that States agree in principle that the UN should be held accountable where there has been a demonstrable breach of international law, there is room for creating a uniform judicial mechanism. One possibility is the adoption of a narrowly-tailored treaty that would *require* both UN institutions and UN Member States to submit disputes between them that arise under treaty or customary international law, including disputes on behalf of injured third-parties, to the advisory jurisdiction of the ICJ for a binding opinion. Such a treaty would avoid the problem of these opinions currently being applied as “stopgap measures” and would provide a degree of certainty, uniformity, and predictability in the context of dispute settlement between States and the UN.

Regardless of their non-binding nature, it is apparent that the UN views current advisory opinions by the ICJ as important. For example, the UN has complied with opinions obtained under the ICJ’s advisory jurisdiction by recommending that the Security Council act in accordance with ICJ opinions, establishing Special Committees to respond to ICJ opinions, and passing resolutions specifically adopting ICJ opinions.<sup>170</sup> Even without the Court’s exercise of contentious jurisdiction binding the UN, the UN has deemed advisory opinions as authoritative judicial decisions.<sup>171</sup> From the perspective of the UN’s existing compliance with ICJ opinions, compelling the UN to submit to the Article 65 advisory capacity of the Court should not lead to widely different outcomes than if the Court exercised compulsory jurisdiction over the UN under its Article 34 powers to resolve contentious disputes. Rather, it would ensure a greater degree of accountability vis-à-vis the UN.

Article 66 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations provides some drafting guidance on measures that might

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international legal personality to the contentious procedure of the Court.”).

170. AMR, *supra* note 150, at 116–119.

171. See ICJ Statute, *supra* note 11, art. 68 (“[While exercising its advisory functions] the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.”), art. 59 (“The decision of the Court has no binding force except between the parties in respect of that particular case.”); see also Richard Falk, *International Court of Justice*, in THE OXFORD COMPANION TO POLITICS OF THE WORLD 403, 404 (Joel Krieger et al. eds., 2d ed. 2001).

ensure binding advisory jurisdiction over the UN.<sup>172</sup> Article 66 provides that in cases of interpretation under the Vienna Convention the ICJ may give a binding decision if 1) “a State is a party to the dispute to which one or more international organizations are parties” and the State asks the General Assembly, Security Council or another qualified UN agency “to request an advisory opinion of the International Court of Justice” or 2) the UN, as a party to the dispute, decides to request an advisory opinion.<sup>173</sup>

While the Vienna Convention on the Law of Treaties between States and International Organizations provides an approach for both States and the UN to trigger ICJ binding advisory jurisdiction,<sup>174</sup> under neither approach is the UN *compelled* to appear. Rather, the State and the UN both “may” request opinions. The notion of exercising discretionary power in judicial review is problematic when parties have reached an impasse. In the context of the ICJ’s discretionary power under Article 65 of the ICJ Statute, scholars have argued that:

[T]he idea of discretionary power, even if it is moderated by the safeguards found in the Court’s jurisprudence, is puzzling. The textual argument on which it is based (the “may” in Article 65 of the Statute) is very weak and should yield to the spirit of the provision on the advisory function which testifies to the *obligatory co-operation of the Court* with the UN organs in the solution of legal questions.<sup>175</sup>

If the language of the Vienna Convention on the Law of Treaties between States and International Organizations was included in a future treaty on adjudicating UN responsibility, there is some question as to whether the UN would ever choose to submit its disputes to ICJ review.

When States want to be certain that they have a forum to address UN responsibility for international legal violations, the UN should be required to submit any live dispute concerning potential UN responsibility or liability under international law that has not been resolved in a reasonable amount of time to the ICJ for an advisory opinion under Article 65. As with the Vienna Convention on the Law of Treaties between States and International Organizations and other conventions providing for “binding advisory opinions,” the States, as well as the UN, should agree that any ICJ decision would be equivalent to a judgment and binding on all parties.

However, a treaty that only requires the UN to submit disputes to the ICJ will not, by itself, be adequate to address UN responsibility or liability. In order to avoid the shield of privileges and immunities that

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172. Vienna Convention, *supra* note 163, at 578.

173. *Id.*

174. *Supra* notes 172–173 and accompanying text.

175. BENEDETTO CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* 270 (2d ed. 2000) (emphasis in original).

have prevented domestic courts, such as the Dutch courts,<sup>176</sup> from entering judgments of responsibility and liability against the UN, any supplementary treaty must explicitly waive the invocation of UN privileges and immunities for cases referred to the ICJ for an advisory decision. The treaty might also, for purposes of justice and efficiency, establish a reasonable time frame within which the UN would be expected to submit unresolved disputes, such as within one year of the dispute being brought to the attention of the UN. A timeline would encourage amicable settlements of dispute that might otherwise disrupt cooperative relations among Member States and the UN.

With the adoption of a treaty assigning binding advisory jurisdiction over most international legal claims involving the UN as a party, there are a number of advantages that solve justice and efficiency concerns. For example, the single venue for adjudication, the ICJ, avoids the possibility of fragmented interpretations of international law by various domestic systems or internal UN administrative agencies. In addition, the existence of a single venue ensures that domestic privileges and immunities do not insulate the UN from international responsibility and liability claims. Likewise, the single ICJ venue should provide continuity in international decision-making since the ICJ will have a history of the cases it has previously decided and may employ similar analytical frameworks in determining responsibility and allocating liability. Thus, in addition to consistency in the application of international law, this proposal would also provide some consistency across adjudication involving questions of responsibility and international organizations.

Any treaty concluded among State parties could exempt certain types of cases from ICJ advisory review. While this paper proposes that the ICJ should be the court of first resort for matters that implicate international organization responsibility, not all cases would necessarily be appropriate for its review. In cases that chiefly implicate UN administrative matters, such as interpretation of UN employment rules for example, review arguably should remain under the jurisdiction of the UN Administrative Tribunal. Indeed, Former ICJ Judge Roberto Ago eloquently advocated this position when the ICJ issued a “binding” advisory opinion on an internal UN matter. He stated that the ICJ had exceeded its authority, since “the International Court of Justice is thus compelled to resolve questions that, for the most part, do not involve the application of those rules of international law” which it is mandated to apply.<sup>177</sup>

Another type of case that might be exempted from judicial review

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176. See *supra* notes 38–45 and accompanying text.

177. Ago, *supra* note 158, at 444–45.

would be the review of the legality of resolutions by UN bodies.<sup>178</sup> In *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie*, the ICJ was confronted with the legality of a specific Security Council Resolution requiring Libya to submit to diplomatic and commercial sanctions in response to failing to comply with another Security Council Resolution requiring it to surrender two of its nationals for trial in the United Kingdom.<sup>179</sup> Ultimately, the Court never ruled on the legality of the Security Council Resolutions and instead limited its decision to holding that the UN Charter trumped the 1971 Montreal Convention.<sup>180</sup> In spite of the ICJ being the lead judicial organ for the UN, there would likely be strong resistance from Security Council members if the legality of specific Security Council Resolutions were to be the subject of an ICJ advisory opinion. However, examining whether a UN agency has properly complied with a resolution issued by a UN body could be suitable for an advisory opinion.

The proposal for a new treaty to waive UN privileges and immunities before the ICJ and recognize ICJ jurisdiction over disputes among UN agencies, as well as between States and the UN, is a reasonable end result of fully recognizing UN legal personality. Given the UN's articulated concerns with promoting international accountability, the UN might even be an active proponent of a treaty that strengthens the ICJ's existing powers as the premier public international legal court. Even so, there could be institutional resistance within the UN. Current dispute resolution of matters involving the UN and breaches of international law is predicated on diplomatic interventions. UN officials may be uneasy with relinquishing case-by-case diplomatic solutions to a panel of judges. Hopefully, UN officials would not lose sight of the benefits of such a treaty. After all, the negotiation of a treaty would address the recurring issue that States, acting both on their own behalf and on the behalf of third parties, lack any adequate judicial forum for engaging the UN. Furthermore, UN support of a treaty could enhance the legitimacy of the UN as an institution of good governance.

Correctly worded, a treaty would solve other logistical issues as

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178. See Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT'L & COMP. L.Q. 309 (Apr. 1997) (arguing that the ICJ has some limited authority to review Security Council decisions); Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996) (describing how the overlap between the ICJ and the Security Council will inevitably lead to some judicial review).

179. *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.)*, Provisional Measure, 1992 I.C.J. 114 (Apr. 14) *discontinued in Order*, 2003 I.C.J. 152 (Sept. 10).

180. *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.)*, 1992 I.C.J. 114, ¶42.

well. For example, the explicit identification of the ICJ as the single judicial dispute settlement body responsible for adjudicating UN responsibility would satisfy the international requirement under Section 29 of the Convention on Privileges and Immunities. Section 29 requires that the UN create “appropriate modes of settlement . . . [for d]isputes involving any official of the United Nations who by reason of his official position enjoys immunity . . .”<sup>181</sup> A treaty could also address the emerging requirement under Section 39 of the Draft Articles on the Responsibility of International Organizations that members of a responsible international organization “take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations . . .” when it is responsible for a violation.<sup>182</sup>

Precisely *how* such a treaty would be negotiated raises a number of interesting questions. Would the treaty be negotiated exclusively by UN Member States? Would States be able to make reservations regarding which advisory opinions would be deemed binding? Would those reservations interfere with the object and purpose of the treaty to provide uniform judicial resolution to matters involving UN responsibility and liability? Would the UN be invited to formally confirm the treaty? Could a failure of the UN to formally confirm the treaty prevent States from bringing this supplementary treaty into force?

These are matters that would need to be taken under advisement by the negotiating parties, which may or may not include the UN. What is certain is that the concept of international organization responsibility, as articulated in the ILC’s draft articles,<sup>183</sup> lacks substance by failing to articulate a formal judicial review measure. Twenty years ago, former ICJ Judge Ago asked whether the time has not finally come “to allow international organizations prosecuting claims against states or resisting claims by them to take the main road, rather than the byway of an ‘advisory’ procedure artificially given decisive value and binding effect, which so ill become its intrinsic nature?”<sup>184</sup> Unfortunately, Judge Ago’s request to amend the ICJ Statute, as with previous efforts, has failed to gain political traction in part, as described earlier,<sup>185</sup> because amending the ICJ Statute is perceived as part of a larger and far more complex political process of reforming the UN. Yet, there is no reason for the UN to have special protected legal status within the international legal system itself.

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181. Privileges and Immunities Convention, *supra* note 23, art. VIII, § 29.

182. ILC 2009 Report, *supra* note 16, art. 39.

183. *See supra* notes 15–22, 182 and accompanying text.

184. Ago, *supra* note 158, at 451.

185. *See supra* Part III.A.

Even if the “more straightforward” process of amending the ICJ Statute through an amendment of Article 34 is preferable to this article’s proposed “by-way” process of having a quorum of States, through a treaty, require the UN to submit disputes over responsibility to the ICJ, any proposed amendment is likely to fail without a collective agreement or at least internal momentum to amend the ICJ Statute. As Judges Ago and Bedjaoui reluctantly seem to admit by acknowledging the legal mechanism of “binding advisory opinions,” the next best option must be to rely on the existing mechanisms of the ICJ Statute as triggered by a supplementary treaty. While perhaps less elegant of a solution when compared to a simple amendment of the ICJ Statute, this second option possesses one crucial characteristic that the amendment process lacks: it is *immediately viable* for the quorum of States that sign the treaty. Furthermore, it is not inconceivable that, in efforts to negotiate a treaty to secure regular advisory jurisdiction over UN contentious matters, States will muster the political will to make amendments to Article 34 and 36 of the ICJ Statute. Until then, States are confined to applying the existing tools within the ICJ Statute, which are sufficient, although not perfect, for ensuring judicial review of matters involving UN responsibility and liability under international law.

The proposal for formalizing the mechanism of “binding advisory opinions” to include a broader array of international actions serves the dual goals proposed by the International Law Association’s Committee on Accountability of International Organisations.<sup>186</sup> In their draft report, the Committee called for rules that “will have to keep the balance between preserving the necessary autonomy in decision-making of [international organizations] and guarantee that the [international organizations] will not be able to avoid accountability.”<sup>187</sup> A narrowly drafted treaty focused on facilitating ICJ adjudication of UN responsibility could do just that.

#### IV. CONCLUSION

In order for international law to maintain its credibility among Member States, there needs to be continuity and predictability. These elements must exist in the interpretation of the law of international responsibility both as it applies to States, as well as to the UN. Currently, the responsibility of the UN for breaches of international law is approached on an ad hoc basis. In some instances, the UN has acknowledged its responsibility and made discretionary damage payments. In other instances, organizations have been protected by

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186. Int’l Law Ass’n, *First Report of the Committee on Accountability of International Organisations*, 68 INT’L L. ASS’N REP. CONF. 584 (1998).

187. *Id.* at 602.

privileges and immunities.

When the UN has damaged or caused inadvertent harm to groups or individuals as a result of their activities, there is a need for judicial review to ensure that the international law of responsibility is interpreted consistently and applied uniformly. To create this assurance, one judicial body should address these rare but important cases. As argued above, the appropriate body is the International Court of Justice.

This article has reviewed two possibilities for achieving review of the international legality of UN actions. Numerous ICJ jurists and some States have called for an enlargement of the number of parties who can invoke the ICJ's contentious jurisdiction. As former ICJ Judge Ago reflected in his seminal 1991 article, States and the UN have historically needed to be treated differently since there was great uncertainty about whether the UN would survive as an institution.<sup>188</sup> Times have changed significantly and as Ago queries, "can this differentiation be justified now that it has become commonplace for international organizations and states to be parties, on an equal footing, to disputes concerning the interpretation and application of bilateral agreements, as well as general conventions?"<sup>189</sup> This article concludes that for purposes of uniform rule of international law, States and the UN must be treated equally as primary actors of international law. To the extent that either a State or the UN fails to comply with international law, the international community needs to be able to rely on a neutral decision maker to ascertain responsibility.

Although a revised Article 34, which includes the UN as party to contentious jurisdiction, is attractive for simplicity, the proposal is fraught with bigger political issues involving stubborn discussions over UN institutional reform. While such amendments would have a major impact on the law of international responsibility, international liability, and international institutions, these amendments are unlikely to materialize because they would require commencing a complicated amendment process.<sup>190</sup>

A more politically viable option is to accept the ICJ Statute and Rules as they are and instead provide for a supplementary convention addressing the issue of UN responsibility. Such an agreement would specifically require that unless the UN is able to reach an acceptable settlement within a reasonable time frame, it must submit disputes over issues of international law to the advisory jurisdiction of the ICJ. This supplementary treaty would be an important step towards transparently

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188. Ago, *supra* note 158, at 450.

189. *Id.*

190. The amendment process described in the ICJ Statute is akin to amending the UN Charter. *See supra* Part III.A.

ensuring that the rule of law is available for State parties that cannot privately resolve their legal grievances with the UN.

The effects of such a convention on access to justice are easy to envision. In disaster-ridden Haiti, the families of the children who were mistakenly shot by UN peacekeepers and the families of cholera victims might receive some solace in knowing that the UN does not operate with impunity because it has failed to provide a standing claims commission or grievance process for individuals injured by UN bodies.<sup>191</sup> Rather, the UN, if it is to reflect the rule of law upon which it is founded, must be held to the same standards of judicial review as States and be held judicially responsible for those actions and omissions that violate fundamental public international law. As international law has evolved, both States and the UN agencies must have a reliable forum to pursue emerging issues of international responsibility, a forum in which they can assign accountability. The institutions that the community of nations created through the UN Charter must not be above or separated from the rule of law.

The proposals in this paper are an attempt to ensure that States can have some recourse for adjudicating international organization responsibility on behalf of their citizens. By calling for judicial review by the ICJ, this article endeavors to make a contribution to the line of robust scholarship by ICJ judges and international legal academics seeking to declare that the UN is not separate from, but equal to, other recognized international actors. Unlike some international reforms that threaten the status quo of international interactions, the enlargement of ICJ jurisdiction is not a threat to States; rather, it is a promise that the UN will be responsible for complying with the same body of public international law as States.

While the international community has missed past opportunities to address UN accountability due to barriers of maintaining political will, the time is now propitious to evolve the UN System to reflect international legal realities. The ILC Draft Articles on the Responsibility for International Organizations provide the policy-making momentum for States to enter a supplementary treaty or amend ICJ Article 34, in order to ensure that the UN's actions are grounded in the foundations of international law. The continued efforts at differentiating UN actions from trans-boundary State actions are legally disingenuous. As Karel Wellens has observed, "there is no inherent reason why remedial outcomes of restitution, damages, specific performance, satisfaction and injunctive relief, applicable under the regime of state responsibility should not also become available under the organizational responsibility

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191. See *supra* notes 2–5 and accompanying text.

regime.”<sup>192</sup>

Our faith in the international system as one that is just and fair depends on it being capable of responding justly and equitably to crises and disputes. States have already formally commended the ILC's Articles on State Responsibility and are exploring the possibility of a convention on State responsibility for internationally wrongful acts.<sup>193</sup> The current drafting process of the Articles on the Responsibility of International Organizations presents an unprecedented opportunity for States to overcome a half century of inertia. States should use this opportunity to champion the rule of law for both States and the UN by ensuring that the ICJ truly serves as “the principal judicial organ”<sup>194</sup> for all UN institutions.

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192. Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. OF INT'L LAW, 1, 21 (2004).

193. G.A. Res. 62/61, U.N. Doc. A/RES/62/61 (Jan. 8, 2008).

194. ICJ Statute, *supra* note 11, art. 1.