



ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

ADVISORY REPORT ON

RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

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Request for advice on the responsibility of international organisations, dated 4 May 2014

Members of the Advisory Committee on Issues of Public International Law

List of abbreviations

ARIO	Articles on the Responsibility of International Organizations
CPIUN	Convention on the Privileges and Immunities of the United Nations
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPO	European Patent Organisation
EU	European Union
ESA	European Space Agency
HR	Netherlands Supreme Court
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal)
ILC	International Law Commission
ILO	International Labour Organization
ILOAT	ILO Administrative Tribunal
NATO	North Atlantic Treaty Organization
OPCW	Organisation for the Prohibition of Chemical Weapons
Stb	Dutch Bulletin of Acts and Decrees
Trb	Dutch Treaty Series
UN	United Nations
UNAT	United Nations Appeals Tribunal

Preface

On 4 May 2014 the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law to prepare an advisory report on the responsibility of international organisations. The request for advice asked the Committee to review and assess the existing procedures and ways of holding international organisations responsible and to consider alternatives.

The group formed within the CAVV to draft the report consisted of Professor R.A. Wessel (coordinator), Dr C.M. Brölmann, Professor J.G. Lammers and Professor W.G. Werner. The drafting group would like to thank Renuka Dhinakaran for assisting with the research.

The CAVV discussed the draft advisory report for the last time at a plenary meeting on 12 October 2015, and adopted the final text on 23 December 2015.

RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

Summary

International organisations have an ever greater influence on the lives of individuals through the direct impact of their decisions. It is therefore necessary to be able to hold these organisations responsible for their acts (or omissions). Claimants seeking to use existing procedures for the settlement of disputes involving an international organisation are likely to resort to domestic courts. Immunity plays a major role in these procedures, as the granting of immunity to international organisations makes it impossible for individuals to seek legal redress at the national level.

Assessment of the doctrine of the immunity of international organisations has undergone a change as a result of both case law and academic insights. Although immunity based on headquarters agreements and constituting treaties is still inviolable, both European and national case law increasingly indicates that this inviolability may be at odds with other international obligations, notably the obligations to ensure right of access to a court and the right to a fair trial. Where international organisations do not themselves make provision for procedures enabling claimants to challenge their decisions or policies, states (and the courts of those states) find themselves increasingly confronted by a dilemma in cases where claimants invoke obligations entered into by the state in human rights conventions (particularly the European Convention on Human Rights).

The CAVV notes that there is growing recognition of the existence of a conflict between different international obligations. It also acknowledges that situations may differ significantly. Lack of adequate protection for employees of an international organisation, for example, should be distinguished from protection for third parties that are affected by acts or omissions of an organisation, say in the context of UN peacekeeping operations.

Alertness to possible gaps in legal protection is to be welcomed from a human rights perspective. Given that states have increasingly transferred powers to international organisations, it seems reasonable that the latter can be held responsible for the potentially far-reaching consequences of their actions. On the other hand, the doctrine of the immunity of international organisations has been created for a reason. It enables them to perform their duties independently of domestic legal systems, particularly that of the host state. This independence is often essential to the functioning of an international organisation. It follows that international organisations will hardly be

inclined to establish their operations in a country where they are dependent on (changing) national legislation and where they or their employees run the risk of being summoned before a domestic court that may apply rules they do not recognise. States are well aware of their responsibilities towards international organisations, and a government or foreign minister has to cope with pressure from other member states which have placed their trust in the host country as a 'secure' location.

This advisory report identifies ways of dealing with the tension between immunity and legal protection.

1. Introduction

On 4 May 2014 the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law to advise on how the international responsibility of international organisations is arranged (Annexe I). The Committee was asked, in particular, to address the following questions:

- How do you assess existing procedures for the settlement of disputes to which an international organisation is party? Do these procedures guarantee a fair trial?
- Are there sufficient ways of holding international organisations responsible?
- How do you assess the practicability of enforcing a finding of responsibility on the part of an international organisation?
- What form could alternative claim procedures take?

The request for advice mentions that these questions are prompted by two developments. First, the gradual expansion of the field of work of international organisations over a number of years now means that their actions are increasingly likely to affect individuals directly. Or, as N.J. Schrijver puts it, 'It is legitimate to ask to what extent international organisations respect human rights and fundamental freedoms, particularly where it is their function to promote such rights.'¹ This then raises the question of how the responsibility of such organisations is arranged in law. This is dealt with at length in the Articles on the Responsibility of International Organizations (ARIO), adopted by the International Law Commission of the United Nations in 2011.² Second, individuals or groups of individuals find it difficult to hold international organisations legally responsible for breaches of international law. For example, there is no general judicial authority at international level (the International Court of Justice only deals with disputes between states and requests for advice from UN bodies). International organisations have often drawn up claim procedures themselves, but these are not always complete, and holding international organisations responsible before domestic courts has often proved difficult, if not impossible, due to the immunity they enjoy.

¹ N.J. Schrijver, 'Srebrenica voorbij. De volkenrechtelijke immuniteit van de Verenigde Naties' (Beyond Srebrenica: The immunity of the United Nations under international law - translation CAVV), in *Handelingen Nederlandse Juristen-Vereniging – Immuniteiten: het recht opzijgezet?*, 2013, pp. 211-273, p. 214.

² ILC Report, Sixty-third Session (UN Doc. A/66/10 (2011) pp. 50-170; UN General Assembly resolution 66/100, 9 December 2011).

The problems connected with the responsibility of international organisations are of particular importance to the Netherlands as it is the host state of a large number of international organisations. It has recently been confronted by a number of legal cases before its domestic courts in which these issues have played a crucial role. Although these cases almost always raise the question of whether the immunity of an international organisation – as often recorded in the constituting treaty and the headquarters agreement concluded by it with the Netherlands – is an obstacle to holding the organisation responsible, the cases differ considerably. Some concern employees of an international organisation who are unable (or feel unable) to enforce their rights through the organisation's internal procedures, for example rights connected with working conditions, while others, such as the *Srebrenica* cases, show that even individuals who are unconnected with the organisation may feel a justified need to hold it responsible for injuries suffered. These cases also show the special position of the United Nations, whose immunity was held to be 'absolute' by the Dutch Supreme Court in 2012.³

This report examines the differences between international organisations, their official functions and the possibilities for their own staff and third parties to hold them liable. The CAVV notes that cases concerning the working conditions of the staff of an international organisation are different from cases involving, say, claims by surviving dependants for reparation for the consequences of acts or omissions of an organisation in an armed conflict. Nonetheless, at a more abstract level these cases may share a common theme, namely to what extent the obligation to respect immunity clashes with the obligation to protect the rights of individuals.

The issue of the responsibility of states as members of an international organisation falls outside the scope of this advisory report (and the request for advice).⁴ It cannot be ruled out that when the issue of attribution arises, member states may be found to have their own or a shared responsibility for activities carried out by or in the context of an international organisation. Despite the complex relations between an international organisation and its members,⁵ the CAVV assumes for the purposes of this report that a distinction in principle exists between them. As the basic rule continues to be that a

³ *Stichting Mothers of Srebrenica and Others v. the State of the Netherlands and the UN*, Supreme Court, 13 April 2012, ground 4.3.6, ECLI:NL:HR:2012:BW1999.

⁴ On this point, see the special issue entitled 'Member State Responsibility and International Organizations', *International Organizations Law Review*, 2015, no. 1.

⁵ For recent articles on this subject, see I.F. Dekker and R.A. Wessel, 'Identities of States in International Organizations', and C. Brölmann, 'Member States and International Legal Responsibility: Developments of the Institutional Veil', in the above-mentioned issue of the *International Organizations Law Review*.

member state can always be held responsible for its own actions (as confirmed by the Supreme Court in the *Nuhanovic* and *Mustafic* cases in 2013),⁶ it would be wrong to treat the actions of an international organisation in general as the actions of one or more of its member states. The Articles on the Responsibility of International Organizations (ARIO) also stress this distinction.

This advisory report deals with the various aspects of the issue as follows. Section 2 briefly considers the ways in which international organisations can be held responsible. A distinction is made between procedures at national and international level and within the organisation itself. At the national level we encounter a problem in procedures before domestic courts that plays a major role in the Minister's request for advice, namely the immunity of international organisations before domestic courts. This issue is therefore dealt with separately in section 3. Based on an analysis of the case law of the domestic courts and the ECtHR, the CAVV will explain how judicial bodies have dealt with the issue of the immunity of international organisations. As will be seen below, in assessing the immunity of international organisations courts often take special account of whether the organisation concerned itself provides an adequate alternative procedure. This raises the question of what is regarded as adequate. This question will also be addressed in section 3. On the basis of this analysis, the CAVV can then finally answer one of the principal questions of this advisory report, namely whether the existing procedures are adequate. Section 4 deals with the question of what is possible in practice after a finding of responsibility. The immunity of international organisations also plays a major role in practice in relation to the enforcement of judgments. Finally, the advisory report contains some conclusions and recommendations.

⁶ ECLI:NL:HR:2013:BZ9225 and ECLI:NL:HR:2013:BZ9228 respectively.

2. Existing procedures for holding international organisations responsible

2.1 International procedures

At international level, international organisations have been instrumental in establishing international courts responsible for administering justice. For example, the International Court of Justice (ICJ), the main judicial organ of the United Nations, adjudicates in disputes between states that have recognised its jurisdiction. The ICJ's jurisdiction in relation to international organisations is limited to giving advisory opinions. In this capacity the ICJ has considered the issue of the legal independence of international organisations on a number of occasions. In its 1949 advisory opinion on reparation for injuries,⁷ the ICJ noted that the UN possesses objective international personality. The arguments given in that opinion have since been frequently cited in relation to the national and international legal status of other international organisations. This status is also relevant in dealing with the issue of immunity.

The European Court of Human Rights (ECtHR), which is part of the Council of Europe, offers individuals (after domestic remedies have been exhausted) the possibility of instituting proceedings against the member states. However, ECtHR judgments have regularly dealt with the issue of the immunity of international organisations, particularly in relation to a member state's obligations to provide legal protection. The main cases are discussed later in this report. The Court of Justice of the European Union (CJEU), including the General Court, may, in certain circumstances, hear complaints against decisions of the European Union (EU) or its organs, but does not have any supervisory powers in relation to other international organisations.

Most international organisations have a procedure in place for settling disputes with the international civil servants in their employ. Such procedures usually provide for a binding ruling by an employment tribunal for the civil service. For example, the ILOAT, the specialised administrative tribunal of the International Labour Organization (ILO) in Geneva, acts as an employment tribunal for some 60 international organisations and some 46,000 international civil servants worldwide. International organisations established in the Netherlands, such as the European Patent Organisation (EPO) (the branch in Rijswijk), the International Criminal Court (ICC) and the Organisation for the Prohibition of Chemical Weapons (OPCW) also make use of the services of the ILOAT under the terms of an agreement with the ILO. UN organisations such as the Yugoslavia Tribunal (ICTY) have had the United Nations Dispute Tribunal since 2009

⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, pp. 179 and 185.

for cases of this kind (with the possibility of appeal to the United Nations Appeals Tribunal (UNAT)).

Although the employees of international organisations – international civil servants – therefore still have remedies before international tribunals, no such possibility exists for individuals who are not in the employ of the international organisations but are affected by their decisions, policies or actions.

2.2 Procedures within the organisation itself

The first category of procedures provided for by international organisations themselves are the arrangements for the settlement of disputes concerning their liability to persons in their employ, as referred to above. The staff regulations of international organisations generally provide for an administrative dispute settlement procedure for current and former staff members in relation to decisions on their legal status under employment law. These procedures, which involve action by an employee against an international organisation as employer, have much in common with procedures under administrative law.

Generally speaking, an employee who wishes to challenge a decision of the organisation that affects him must first lodge an objection with the official who has made the decision. If this fails to produce the desired result, he will often be able to appeal internally to a committee (possibly named the Internal Appeals Committee or Advisory Board), usually consisting of representatives of both management and employees. This committee produces a reasoned (non-binding) opinion, which is taken into consideration by the official deciding on the appeal. In some cases, such procedures can be compared to the civil service tribunal referred to above. The civil service tribunal may be internal (as in the case of the European Space Agency (ESA), which has its own Appeals Board, or the EU's Civil Service Tribunal), but it may also be an external body (see above).

Sometimes a conciliatory rather than an adversarial approach is adopted to dispute settlement, for example where provision is made for an ombudsperson or mediator to help resolve minor workplace disputes. International organisations differ when it comes to the procedures that individuals have to follow before gaining access, where necessary, to an international civil service tribunal. Some organisations provide that it is not necessary to exhaust the internal appeal procedure (objection followed by internal appeal) in order to bring a case before the civil service tribunal, for example

where it is not in dispute between the parties that the issue dividing them is solely a question of law.

No internal claim procedures are usually available for persons other than employees of the international organisation concerned. An example of an exception is the creation of the Office of Ombudsperson at the United Nations in response to the many claims brought at both national and regional (EU) level in respect of the lists of sanctions drawn up by the Al-Qaida Sanctions Committee (also known as the Security Council Committee pursuant to resolutions 1267 and 1989) in the aftermath of the September 11 attacks (*Kadi* and comparable cases).⁸ The (alleged) terrorists on these lists were individually affected by sanctions which the member states of the UN were required to impose, without any form of legal process to identify miscarriages of justice. Under the present system, the Ombudsperson can request the UN Security Council to remove a person from the list. Although this is not a judicial procedure, it may result in proceedings in which the claimant feels properly heard and recognised. This claim procedure before the UN shows that successes can be achieved in this way. By early 2015, 48 cases had been completed and had resulted in the 'delisting' (removal from the sanctions list) of 37 individuals and 28 entities in total. In the majority of cases the Ombudsperson found on the basis of the petitions and investigations into the actions of the 1267 Sanctions Committee that the listing was unjustified.⁹ It is important to note here that the Sanctions Committee may depart from a delisting recommendation by the Ombudsperson only by a consensus decision (in the absence of consensus the matter is referred to the Security Council).

2.3 *National procedures*

Where internal and international procedures are lacking or inadequate, litigants have in recent years increasingly sought redress before domestic courts in disputes between individuals and international organisations.¹⁰ These disputes can be roughly divided into three categories: (a) employment disputes between an organisation and its own employees; (b) disputes between an organisation and third parties with whom it has concluded a contract; and (c) disputes between an organisation and third parties affected by its acts or omissions.

⁸ For an analysis of this, see for example: C. Eckes, *EU Counterterrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford University Press, 2009.

⁹ See the report of the Ombudsperson to the President of the Security Council of 2 February 2015, S/2015/80.

¹⁰ C. Ryngaert, 'The Immunity of International Organizations Before Domestic Courts: Recent Trends', *International Organizations Law Review*, 121, 136 (2010).

When international organisations are served with a summons in proceedings before a domestic court of the Netherlands (as a host state), they generally appear. However, when they do so they invariably invoke their immunity from jurisdiction. In other words, they appear mainly in order to defend their privilege of immunity. Even if an international organisation does not enter an appearance and therefore does not expressly invoke immunity, the Dutch court has a duty to determine of its own accord whether it has jurisdiction, although this does not always happen in practice.

This position was taken, for example, by the State of the Netherlands in the case of *Stichting Mothers of Srebrenica and Others v. the State of the Netherlands and the United Nations*, and support for it can be found in article 15 of the European Convention on State Immunity of 1972¹¹ (to which the Netherlands is a party) and article 6 of the United Nations Convention on Jurisdictional Immunities of States and Their Property,¹² which was adopted in 2004 (but has not yet entered into force). Although these conventions admittedly concern immunity from jurisdiction of a foreign state, there does not appear to be any reason why the immunity from jurisdiction of an international organisation should be assessed any differently.¹³

The prevailing view is therefore that the domestic courts should decide of their own accord whether they are competent to take cognizance of and give judgment in cases against an international organisation, even if it does not enter an appearance in the proceedings.

As the issue of jurisdictional immunity has played such a central role in many cases, it is dealt with separately in the following section.

¹¹ Trb. 1973, 43.

¹² Trb. 2010, 272.

¹³ The current view, which is now also shared by the Dutch legislator (as is evident from an amendment to article 1 of the Code of Civil Procedure in 2011) and for which support could already be found in Dutch international law literature, therefore differs from the position taken by the Supreme Court in its judgment of 25 November 1994 (NJ 1995/650, with note by T.M. de Boer) in the case of *Morocco v. Stichting Revalidatiecentrum De Trappenberg* and confirmed in its subsequent judgment of 26 March 2010 (NJ 2010/526, with note by T.M. de Boer) in the case of *Azeta B.V. v. Chile*.

3. Immunity of international organisations before domestic courts

International organisations do not operate in a legal vacuum. As public law entities possessing international legal personality, international organisations too are, in principle, bound by the rules of international law. The relationship between an international organisation and its host country is governed in a legal sense by mutual obligations of cooperation and good faith.¹⁴

However, it is questionable to what extent a domestic court is competent to give judgment in a specific case on the issue of whether an international organisation has breached its legal obligations. Under international law, international organisations enjoy immunity from jurisdiction to adjudicate and jurisdiction to enforce. This is comparable to the immunity enjoyed by a foreign state and its representatives, and springs from the idea that an organisation should be able to perform its functions unhindered. International organisations are autonomous international legal entities which are bound by necessity to have their headquarters in the territory of a host state (which is almost always one of the member states). If an international organisation were subject in full to the jurisdiction of the member state concerned, this would not only impede the functioning of the organisation, internationally as well as nationally, but also affect the rights and interests of the other member states.

This is why the headquarters agreement of an international organisation with the host state, and often the constituting treaty as well, provide for the organisation to have a special status within the host country. This status basically means that the international organisation enjoys immunity within the host country's legal system. This does not imply that the organisation and its staff are not obliged to observe the rules that apply in the country concerned, but means rather that they are not subject to the jurisdiction of the courts of that country. The immunity also covers the execution of judgments, partly due to the inviolability of the organisation's property.

The question of whether immunity also applies where it is not mentioned in the constituting treaty or headquarters agreement (and whether immunity is a matter of customary law or can be said to be an 'inherent characteristic' of an international organisation) is not clearly answered in the literature, but is anyway largely of a theoretical nature because the immunities and privileges usually form the basis of a headquarters agreement and such an agreement exists in almost every case. In the Netherlands, however, the Supreme Court held in the *Spaans* judgment in 1986 that

¹⁴ Cf. International Court of Justice, Advisory Opinion of 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, I.C.J. Reports 1980, p. 73.

the international organisation should be assumed to have immunity in such cases as well:

‘It must be assumed that, even in the absence of an agreement [...], it follows from unwritten international law that an international organisation is entitled to the privilege of immunity from jurisdiction on the same basis as usually regulated in such agreements, in any event in the state in whose territory it has its headquarters with the permission of the government of that state. This means that, according to unwritten international law, an international organisation is, in principle, not subject to the jurisdiction of the courts of the host state in respect of all disputes directly connected with the performance of the functions entrusted to that organisation.’¹⁵

This principle has not been subsequently challenged in the case law.

3.1 *Waiver of immunity*

Where provision is made for the possibility of waiver of immunity (for example, under the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN) or a clause of a headquarters agreement or on an ad hoc basis), the underlying idea is that it is necessary to prevent a situation in which jurisdictional immunity would impede the course of justice in a specific case. However, in view of the reasons for the immunity of an organisation (as set out above), it is not up to the domestic courts of a single member state to determine whether immunity is lifted.

At the same time, situations do occur where an organisation continues to invoke its immunity and a domestic court feels obliged to decide between the importance of respecting immunity and a claimant’s right of access to a court.

3.2 *Relationship between immunity and alternative claim procedures*

This brings us to the next question, namely whether courts are under an obligation to recognise the immunity of international organisations. As already noted above, international organisations are, in principle, not subject to the jurisdiction of domestic courts in respect of acts connected with the performance of their functions. At the same time, states have an obligation under article 6 of the ECHR (right to a fair trial) to respect the right of access to a court. These two obligations of states (i.e. respecting immunity and providing legal protection) may clash with one another when an individual attempts to bring proceedings against an organisation before the domestic

¹⁵ HR, 20 December 1985, NJ 1986, 438, with note by P.J.I.M. de Waard, ground 3.3.4.

courts. In recent years, domestic courts and the ECtHR have regularly had to give judgment in disputes in which individuals have claimed that granting immunity to an international organisation would constitute a violation of article 6 of the ECHR. It should be noted here that the complaints heard by the ECtHR have specifically concerned the granting of immunity as an alleged breach of the right to a fair trial, whereas the Dutch courts have heard cases involving alleged violation of legal obligations by international organisations, in which immunity has been dealt with as a preliminary issue in connection with admissibility. For example, the ECtHR takes into account different interests and obligations, but, strictly speaking, usually only checks whether the state has complied with article 6 of the ECHR. By contrast, the Dutch courts may make a true legal 'assessment' when faced with a situation in which the state has two legal obligations but cannot fulfil them both simultaneously.

Whenever the ECtHR has been called upon to assess the obligation to guarantee a legal remedy, it has held, in keeping with the practice applied in the case of non-absolute rights in the ECHR, that the right of access to a court may be restricted provided that the restriction does not impair the very essence of the right, serves a legitimate aim and is proportionate to the objective of the restriction. It is apparent from the case law of the ECtHR that the granting of immunity to international organisations does, in principle, serve a legitimate aim and does not necessarily impair the very essence of the right of access to a court or violate other human rights.¹⁶ In practice, the discussion tends to focus on the third criterion, namely proportionality.

Two general considerations play a role in determining the proportionality of recognising immunity. First, whether or not an alternative claim procedure is available at the international organisation itself. As held by the ECtHR in the parallel cases of *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* (1999), the presence of an alternative form of legal process at the international organisation concerned is a material factor in assessing the lawfulness of recognition of immunity. According to the ECtHR, there should be 'reasonable alternative means to protect effectively their rights under the Convention'.¹⁷ The Supreme Court recently held that it is therefore a matter of determining whether, in view of those alternative means, the immunity from jurisdiction does indeed impair the very essence of someone's right of access to a

¹⁶ See, for example, the judgment of the ECtHR in *Naletilić v. Croatia*, App. no. 51891/99, of 4 May 2000 (to which reference is made, for example, in the Dutch judgment which gave rise to the judgment of the ECtHR in *Milošević v. the Netherlands*, App. no. 77631/01, of 19 March 2002), in which the ECtHR presumed that the ICTY's rules of procedure sufficiently respected the various rights enshrined in the ECHR.

¹⁷ *Waite & Kennedy v. Germany*, App. no. 26083/94, ECtHR, 18 February 1999.

court.¹⁸ In other case law – which deals more with the responsibility of the member states rather than with immunity – the ECtHR couched it differently, referring to the need for legal protection which is equivalent or comparable to the protection afforded by the ECHR and does not exhibit any manifest deficiencies.¹⁹ The case law of the ECtHR is reflected in proceedings before domestic courts, which are increasingly inclined to examine whether international organisations do indeed provide a form of claim procedure which enables claimants to protect their rights under the ECHR. If not, the reasoning appears to be that the state, as a party to the ECHR, has an obligation to safeguard these rights after all (see below).

The second consideration is the nature and mission of the organisation concerned. In its judgment in the *Stichting Mothers of Srebrenica* case, the ECtHR accorded a special position to the United Nations, in any event in so far as it acts through the medium of the Security Council under Chapter VII of the Charter. It held that operations carried out by the Security Council under Chapter VII are fundamental to one of the key functions of the UN, namely the protection of peace and security. According to the ECtHR, this means that

‘... the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations.’²⁰

Although the ECtHR’s reasoning is understandable (given the danger that the UN Security Council’s mission might be compromised if domestic courts could review its decisions), it also reveals the dilemma behind the request for advice. No matter how important the role of an international organisation may be in managing and regulating world affairs, individuals directly affected by international decisions should surely be able to submit their claim to an authority that has the power to adjudicate the matter.

In these cases, the ECtHR takes as its starting point (specifically with a view to the protection of the rights contained in the ECHR) the question of whether recognition by

¹⁸ HR 18 December 2015, ECLI:NL:HR:2015:3609, ground 3.3.2.

¹⁹ *Bosphorus v. Ireland*, App. no. 45036/98, ECtHR, 30 June 2005. Cf. also the above-mentioned; judgment HR 18 December 2015, in which the Supreme Court (ground 3.3.3 to the end) assumes that on appeal this criterion was equated by The Hague Court of Appeal with the criterion of impairment of the essence of a person’s right of access to a court.

²⁰ *Stichting Mothers of Srebrenica v. the Netherlands*, App. no. 65542/12, ECtHR, 11 June 2013, para. 15.

a domestic court of the immunity of an international organisation is lawful within the meaning of being compatible with the right to a fair trial as provided for in article 6 of the ECHR. The absence of an alternative remedy may mean that there is a violation of article 6 of the ECHR, but does not automatically mean that the state is obliged (or even entitled) to set aside the immunity of an international organisation.

Assuming that the Netherlands is equally bound by these two legal obligations (respecting immunity and providing legal protection), it may be concluded that neither international law nor Dutch law gives any clear indication at present which of them should take precedence. However, an authoritative trend in the academic debate over the last two decades (often connected with the ‘constitutionalisation’ of international law) ranks human rights more highly than other international rights and obligations.²¹ Although it is not clear to what extent this affects the immunity issue, the criterion of the right of ‘access to a court’ (in the broad sense), usually in the form of whether there is an alternative claim procedure, is often an important factor in the deliberations of domestic courts as well. This can be illustrated by a brief overview of judgments by the Dutch courts:

- In the *Mothers of Srebrenica* case, The Hague Court of Appeal respected the immunity of the UN despite the consequent complete absence of a remedy, but it did state, by way of *obiter dictum*, that it was regrettable that the UN had still not made any provision for a mode of settling private law disputes to which the UN is a party, as envisaged in the Convention on the Privileges and Immunities of the United Nations (CPIUN) of 1946.²²
- In a case against the European Patent Organisation (EPO) concerning a commercial procurement procedure relating to catering services for the EPO’s office in Rijswijk, where no alternative remedy (in the form of preliminary relief) was available to a disappointed tenderer, The Hague Court of Appeal sought to resolve the matter by narrowly interpreting the text of the EPO Convention with regard to what is ‘strictly necessary’ for the ‘official activities’ of the international organisation, so that the dispute would fall outside the scope of the jurisdictional immunity.²³

²¹ See, for example, Erika De Wet and Jure Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, OUP, 2012.

²² The Hague Court of Appeal, 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, ground 5.13.

²³ The Hague Court of Appeal, 21 June 2011, ECLI:NL:GHSGR:2011:BR0188.

- In preliminary relief proceedings concerning an employment dispute before The Hague District Court against the EPO (and others), for which the claimant worked but by which he was not employed (the claimant had been hired from a third party), the judge hearing the application, in respecting the immunity of the organisation, took into account the reasoning in the *Waite and Kennedy* judgment, namely that an alternative remedy was available to the claimant in the form of an action against the actual employer.²⁴
- In a recent case against the EPO, The Hague Court of Appeal held that granting immunity would constitute a violation of article 6 of the ECHR as the organisation's internal claim procedure was 'manifestly deficient'.²⁵

3.3 Requirements for available (alternative) claim procedures

As already noted, the ECtHR has given some indications about the matters to be considered when assessing the quality of legal protection within an international organisation. In view of the requirements for a fair trial, which include the right of access to a court, the legal protection which an international organisation may be expected to provide is 'comparable' but expressly not 'identical' to that provided by the domestic courts.²⁶ As international organisations are not and cannot be a party to the ECHR (with the possible exception of the EU in due course), this criterion hardly comes a surprise. It also seems apparent from the case law of the ECtHR that the domestic courts are entitled to assume (subject to any proof to the contrary from the employee) that the legal protection afforded by the international organisation's own internal claim procedure meets the requirements of 'comparable' legal protection. If the remedy available to the litigant is so flawed as to be 'manifestly deficient',²⁷ it can be argued that the essence of the right of access to a court is violated. According to the judgment in the case of *Waite and Kennedy v. Germany*, the right of access to a court may not be restricted to such an extent as to impair the very essence of the right (this would amount to a denial of justice).

This tends to occur in two main categories of case, namely those where a claimant brings proceedings before the Dutch courts without first having used or exhausted a

²⁴ The Hague District Court, 3 October 2013, ECLI:NL:RBSGR:2013:16952.

²⁵ The Hague Court of Appeal, 17 February 2015, ECLI:NL:GHDHA:2015:255.

²⁶ *Bosphorus v. Ireland*, App. no. 45036/98, ECtHR, 30 June 2005; *Al-Dulimi and Montana Management v. Switzerland*, App. no. 5809/08, ECtHR, 26 November 2013, paras. 115-116.

²⁷ *Bosphorus v. Ireland* and *Gasparini v. Italy and Belgium*, App. no. 10750/03, ECtHR, 12 May 2009.

remedy available before the international organisation and those in which a claimant *has* done so and has obtained a decision (binding ruling).

Since the question of whether a remedy is effective for the purposes of the ECHR relates not to the outcome of the procedure but to how the result was achieved,²⁸ it is sufficient, in principle, for a court to find in the first main category of case – as the Dutch courts do in practice – that an alternative remedy is or was available to the applicant.²⁹ Completely abstract arguments about alleged deficiencies of the available remedy cannot form the basis of a claim, even under the ECHR.³⁰ This will also apply to claims based on hypotheses or forecasts about alleged undue delay in the available remedy.³¹ In Dutch case law, allegations of ‘general’ deficiencies in the available remedy have been made in relation to the right to oral hearings before the ILOAT,³² the issue of adequate remedies in urgent cases before the ILOAT³³ and the extent of the jurisdiction of the Appeals Board (at ESA) in assessing abstract issues concerning the validity of the international organisation’s regulations, as well as the condition that claimants must be directly and individually affected by a decision if they wish to challenge a rule or its application.³⁴ In these cases, the Dutch courts have for the time being held that the remedy available before the international organisation (or the related possibility of international appeal) is not so deficient as to impair the very essence of the right to access to a court.

As regards the second main category – cases in which the available (alternative) remedy has already been exhausted by the applicant – it should be noted that the ECtHR held in a judgment in 2000 (an employment dispute involving NATO³⁵) that an international organisation’s internal claim procedure must fulfil certain requirements. It is clear here that since article 6 of the ECHR provides for access to a judicial body, any

²⁸ See, for example, *Swedish Engine Drivers’ Union v. Sweden*, App. no. 5614/72, ECtHR, 6 February 1976, paras. 50, 122.

²⁹ See, for example, The Hague Court of Appeal, 17 September 2013, ECLI:NL:HR:2015:687; The Hague Court of Appeal, 25 September 2012, ECLI:NL:GHSGR:2012:BX8215; District Court (limited jurisdiction sector), *Douglas v. ESA* (case number 272/87, 25 March 1987, not reported).

³⁰ For example, *Chapman v. Belgium*, App. no. 39619/06, ECtHR, 5 March 2013.

³¹ The Hague Court of Appeal, 30 September 2014, case no. 200.136.028/01, not reported (discussed in the judgment of The Hague Court of Appeal of 2 June 2015, ECLI:NL:GHDHA:2015:1245).

³² Supreme Court, 23 October 2009, ECLI:NL:HR:2009:B19632.

³³ The Hague Court of Appeal, 2 June 2015, ECLI:NL:GHDHA:2015:1245.

³⁴ The Hague Court of Appeal, 6 May 2014, ECLI:NL:GHDHA:2014:1762, in connection with the above-mentioned judgment of the Supreme Court of 18 December 2015, ECLI:NL:HR:2015:3609.

³⁵ *A.L. v. Italy*, App. no. 41387/98, ECtHR, 11 May 2000; the claimant had exhausted the remedy available within NATO.

internal appeal procedure within the organisation that may precede such access is not, in principle, governed by these requirements. The requirements specified by the ECtHR, as applied by the Dutch courts, relate specifically to the following questions: (i) Are the members of the court eminent persons with sufficient legal training and/or knowledge? (ii) Can they perform their duties independently and impartially? (iii) Are the proceedings conducted by way of defended action and are both parties heard and accorded equal treatment procedurally? (iv) Are reasons given for the decision?³⁶

These requirements allow scope for further elaboration by the domestic courts in specific cases, although the domestic court to which application is made must guard against reasoning from an unduly national perspective and losing sight of the specific context of international organisations and their customary institutional arrangements. For example, it may be wondered whether, in the well-known employment case of *Siedler v. the WEU*,³⁷ the Belgian courts did not attach too much importance to the classic constitutional doctrine of the separation of powers when, in relation to the issue of whether or not the immunity of the international organisation should be respected, they applied the criterion that there should be sufficient 'distance' between the international organisation and the judicial body. It should also be noted that the granting of immunity by a member state in its territory is important in relation not only to the international organisation concerned but also to the other member states of the organisation. An important rationale of immunity, namely preventing conflicting judicial decisions, might be jeopardised if a remedy available before an international organisation could be 'rejected' by one domestic court and 'approved' by another. After all, the possibility cannot be excluded that a claimant may bring the same or virtually the same case or cases before different domestic courts, for example those of the member state in which he is normally employed, the member state whose nationality he possesses and the member state where the organisation has its seat. This risk cannot be entirely excluded by invoking the principles of *lis alibi pendens* or *ne bis in idem*.

From the few cases heard in the Netherlands, it is apparent that the Dutch courts examine the characteristics of the internal claim procedure more rigorously in cases where the available remedy has already been exhausted than in cases where it is still

³⁶ For the application (to ESA's Appeals Board), cf. The Hague District Court, 14 March 2012, JAR 2012/250 and The Hague Court of Appeal, 6 May 2014, ECLI:NL:GHDHA:2014:1762.

³⁷ For a critical assessment of the judgments of the Belgian courts, particularly on appeal, in the case of *Siedler v. the WEU*, see, for example, E. de Brabandere, 'Belgian courts and the immunity of international organisations', *International Organizations Law Review*, vol. 10, no. 2, 2014, p. 484 ff.

available. Given the nature of these cases, this is hardly surprising since a dispute about a remedy that has already been exhausted in a specific case is bound to provide more basis for differences of opinion between the parties than a dispute based on abstractions and hypotheses about the available remedy. In practice, however, this means that where the Dutch courts criticise the procedure followed in a specific case before an international organisation they are indirectly playing a kind of supervisory role. This is undesirable in so far as these 'domestic' criticisms are even remotely connected with what can still be termed a 'manifest deficiency' in the internal procedure. After all, it could be argued that where a domestic court influences or attempts to influence the internal procedures of an international organisation, its criticisms should be based upon and supported by general principles of procedural law.

3.4 Functional immunity

Ascertaining in what capacity an international organisation acts is always worthwhile. Like states, international organisations can also act in the capacity of 'private contracting party'. Immunity is intended first and foremost to enable an organisation to perform its public function properly. Whereas this distinction is already well established when it comes to determining the immunity of states, international organisations (and courts) have a tendency to treat all their activities as connected with their function. As a result, immunity assumes an absolute character in practice, even where it concerns disputes about matters that could be said to be not directly related to the organisation's official function.

This functionality criterion has been regularly applied as a test by the Dutch courts as well. Some examples show that the courts generally take a good look at the nature of the activities and accept a claim of immunity where these activities take place 'in the context of performing the organisation's functions'. More specifically, the Dutch courts often consider the broader question of what is immediately connected with the organisation's function.

- This became apparent in a Supreme Court judgment of 2007 where it was held that, as an international organisation, Euratom enjoyed functional immunity and could not be prosecuted for acts (causing environmental damage) directly connected with the performance of its official functions.³⁸

³⁸ ECLI:NL:HR:2007:BA9173, ground 6.4.

- The Supreme Court's judgment of 2009 in the case against the EPO deals with the criterion of 'disputes directly connected with performance of the functions with which the international organisation has been entrusted'.³⁹
- The series of judgments in the case of *Stichting Mothers of Srebrenica and Others v. the State of the Netherlands and the United Nations*, where the court always granted immunity to the UN (in this case mainly on the basis of the above-mentioned Convention of 1946).⁴⁰
- The Hague Court of Appeal has twice given judgment (in 2012 and 2013) in an employment dispute between the Iran-US Claims Tribunal and an employee. In 2012 it held as follows:

'Since the Tribunal is acting within the scope of the performance of its tasks, it is not subject to the jurisdiction of the Dutch courts.' [...]

'Disputes directly connected with the performance of the tasks of the international organisation in any event include employment disputes which can arise between the organisation and those in its employ who play an essential role in performing such tasks.'⁴¹

A year later, in 2013, the Court of Appeal held as follows:

'Disputes directly connected with the performance of the tasks of the Tribunal in any event include employment disputes which can arise between the Tribunal and those in its employ who play an essential role in performing such tasks.'⁴²

- In the above-mentioned case involving a procurement procedure relating to catering services for the EPO, The Hague District Court held as follows at first instance:⁴³ 'that disputes immediately connected with the performance of the defendant's tasks do not include disputes which can arise between the

³⁹ ECLI:NL:HR:2009:BI9632, ground 3.3.

⁴⁰ The Hague District Court, 10 July 2008, *Stichting Mothers of Srebrenica and Others v. the State of the Netherlands and the United Nations*; The Hague Court of Appeal, 30 March 2010, *Stichting Mothers of Srebrenica and Others v. the State of the Netherlands and the United Nations* (see ground 5.14); Supreme Court, 13 April 2012, *Stichting Mothers of Srebrenica and Others v. the State of the Netherlands and the United Nations*, para. 4.3.6. The domestic proceedings were followed by the proceedings before the ECtHR, which held that 'the grant of immunity to the UN served a legitimate purpose and was not disproportionate' (para. 169). See note 19 above, in conjunction with the main text.

⁴¹ ECLI:NL:GHSGR:2012:BX8215, ground 8.

⁴² ECLI:NL:GHDHA:2013:3938, ground 4.2.

⁴³ ECLI:NL:RBSGR:2010:BL4892, ground 3.3.

defendant and the claimant in connection with the contract. [...] A catering facility for the employees of the defendant does not unmistakably [contribute] to the performance of the task entrusted to the defendant, namely the issuing of European patents.'

4. Sufficient ways of holding organisations responsible?

It is apparent from what has been said above that ways of holding international organisations responsible are limited. At international level there are generally few, if any, possibilities (with the exception of civil service disputes). And although the picture is not entirely uniform at national level, immunity from jurisdiction mostly tends to prevent domestic courts from hearing cases against international organisations on their merits. This is particularly relevant when the claimants are third parties wishing to hold an organisation responsible for loss or injury.

Mention should be made, however, of the impact of the naming and shaming that can accompany a procedure at national level, even where this does not result in a binding judgment on the substance of the case. For example, a court may hold that in its view there is something structurally amiss with the legal protection. For example, in the *Mothers of Srebrenica* judgment, The Hague Court of Appeal stated it was regrettable that the UN had still not made any provision for a mode of settling private law disputes to which the UN is a party, as envisaged in the 1946 Convention on the Privileges and Immunities of the United Nations (see also below). Another example is the ILOAT judgment, which is cited by the ECtHR in its judgment in *Klausecker v. Germany*.⁴⁴ Here the court noted that there was unfortunately a gap in the legal protection afforded to external applicants who had been rejected for a post in an international organisation (this concerned proceedings brought against the EPO). In practice, domestic courts are generally prepared to scrutinise the legal protection closely, including the characteristics of the available remedy within the organisation, and to give a reasoned decision on this.

The most desirable solution from a legal point of view would be for any 'gap' in the legal protection provided against international organisations to be rectified by the organisations themselves. The lack of a fixed procedure for dispute resolution at international organisations is particularly noticeable in the case of the operational activities of the UN, which is a subject that will be considered at rather greater length in this advisory report. This concerns individuals unconnected with the organisation who suffer loss or injury caused by the organisation, but find themselves without any remedy whatever due to the unfortunate combined effect of the doctrine attributing acts to the organisation (rather than to the member states) and the organisation's immunity from national jurisdiction.

⁴⁴ *Klausecker v. Germany*, App. no. 415/07, ECtHR, 29 January 2015, paras. 19-20.

The Convention on the Privileges and Immunities of the United Nations (CPIUN) of 1946 is relevant to the analysis of this problem. Article VIII (sections 29 and 30) of this Convention contains the following provisions on such disputes:

'Article VIII – SETTLEMENTS OF DISPUTES

SECTION 29.

The United Nations shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

SECTION 30.

All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

Despite the prescriptive language used in section 29, the UN has never got around to establishing a system of dispute settlement of this kind. An incidental problem here is that even if such a system were to be established, article VIII, section 29, does not seem to have been drafted to cover the relationship between the UN and member states that participate in peacekeeping missions. Although an undertaking given by a member state at the UN's request to supply a national contingent for a UN peace mission is of a contractual nature, a contract of this kind between two international entities under public law about the use of a government instrument (the armed forces) for international public purposes (maintaining international peace and security) constitutes an agreement of a (predominantly) *public law* nature. It follows that any disputes between the parties arising from the agreement are unlikely to be treated as

private law disputes. Article VIII, section 29 (a), which covers disputes arising out of contracts or 'other' disputes of a 'private law character', does not therefore seem to have been intended to govern relations between the member states and the UN in so far as the operational implementation of UN tasks and responsibilities is concerned. The International Court of Justice could be asked to advise on this issue (under article VIII, section 30 above).

However, article VIII, section 29 (a) clearly does provide a basis for establishing a fixed procedure for disputes of a *private law* character. All things considered, article VIII, section 29 imposes on the UN only an obligation to make provision for 'appropriate modes of settlement', which is not a clear-cut term and leaves scope for ad hoc dispute resolution. The UN's practice of offering *ex gratia* payments as reparation for loss or injury suffered in missions is clearly not intended as implementation of article VIII, section 29. As long ago as 1969, in the case of *Manderlier v. the UN*, which concerned peacekeeping operations in the Congo, the Belgian courts noted that the UN had not implemented article VIII, section 29.⁴⁵

The absence of any provision is now affecting the Netherlands in the wake of the Srebrenica cases. As the UN's operational activities, particularly peacekeeping operations, can generate disputes with third parties which fulfil the definition in article VIII, section 29 (a) (an obvious basis for an action would be wrongful act, but breach of contract would also be conceivable), third parties who have suffered loss or injury caused by UN employees and are not offered compensation have no way of holding the UN directly responsible owing to the lack of claim procedures within the organisation. Attempts to hold the UN responsible through the domestic courts have failed.

Another clear indication of a legal protection vacuum in cases involving the UN concerns the sanctions policy of the UN Security Council, particularly where the financial assets of individuals and businesses are frozen on the basis of sanctions lists. Until recently, there was no possibility of appeal against inclusion on such lists (see in particular the *Kadi* cases mentioned previously).

⁴⁵ *Manderlier v. the United Nations and Belgium*, Brussels Court of Appeal, 15 September 1969 (69 ILR 139).

5. Practical consequences of a finding of responsibility

Even if a Dutch court were to feel justified in ‘setting aside’ the immunity and declaring that it has jurisdiction, for example because it concludes that the international organisation’s claim procedure is ‘manifestly deficient’ and therefore impairs the essence of the right of access to a court, the question still arises of what specific consequences this would or might have in substantive law.

As already noted above, the immunity of international organisations certainly also includes immunity from execution. In other words, even if a domestic court were to conclude that the organisation’s claim to immunity from jurisdiction must fail because of the absence of any adequate internal claim procedure and that the organisation has violated a legal obligation, it is still by no means certain that a judgment would be enforced. As a general rule, immunity can be said to be absolute when, in order to enforce a court judgment, it is necessary, for example, to obtain a writ of execution to enter the organisation’s buildings or freeze its financial assets in a national bank account.

In such cases, a host country understandably takes seriously its duty under the headquarters agreement to protect the organisation from (physical) interference, as happened in connection with the proposed enforcement of The Hague Court of Appeal’s judgment in which it described the EPO’s internal claim procedure as ‘manifestly deficient’ (see above). The Minister of Security and Justice ruled (on the advice of the Minister of Foreign Affairs) that enforcement of the judgment would be contrary to the Netherlands’ obligations under international law. The CAVV shares Mr Blokker’s view that ‘Immunity from execution [...] is of a fundamentally different nature than immunity from jurisdiction. [...] Reciprocity helps in observance of the rules of state immunity, but is absent in relation to the immunity of international organisations. Whereas state immunity is mainly based on the principle of the formal equality of states (*par in parem non habet imperium*), international organisations need immunity in order to perform their functions independently. They have no territory of their own, and are largely dependent on their host state in performing their functions independently.’⁴⁶

It is also clear that immunity from execution can undermine or negate the effect of lifting jurisdictional immunity. In their review of the EPO case, where the Minister gave notice to the bailiff not to serve the writ of execution, Ryngaert and Pennings go so far

⁴⁶ N.M. Blokker, ‘Korte reactie op: “Fundamentele arbeidsrechten en immuniteit – De zaak tegen de Europese Octrooi Organisatie”’ (Brief reaction to: ‘Fundamental labour rights and immunity – The case against the European Patent Organisation’ – translation CAVV), by Cedric Ryngaert and Frans Pennings, *NJB*, 8 May 2015, pp. 1212-1218.

as to state that: 'Not only does this notice undermine the constitutional doctrine of the separation of powers, but it is also not even required by international law: immunity from execution, like immunity from jurisdiction, can be granted only if the organisation adequately protects fundamental rights.'⁴⁷ This argument goes too far, in the CAVV's opinion. The execution of a judgment has a far-reaching impact on an international organisation and failing to provide immunity in this area might cause the whole system to unravel. However, armed with a judgment of a domestic court, a host state has a means of exerting political pressure on the organisation to induce it to modify or discontinue certain activities.

The autonomy of an international organisation in regulatory matters also raises the question of whether a domestic court can make an order for specific performance requiring the organisation to act or refrain from acting in a particular way, where this would directly affect the legal status of an employee, for example ordering it to cancel a disciplinary sanction,⁴⁸ re-employ a dismissed employee or appoint a particular candidate.⁴⁹ If the dispute has already been submitted to the internal claim procedure and a Dutch court declares that it has jurisdiction, this does not mean that the international employment tribunal would cease to be competent to hear the case. Where a binding decision has already been made by the international employment tribunal between the parties to the same dispute, the Dutch court cannot set aside or 'redo' that decision. And even if it purported to do so, the organisation's immunity from execution would clearly prevent enforcement of that judgment.

⁴⁷ C. Ryngaert and F. Pennings, 'Fundamentele arbeidsrechten en immuniteit – De zaak tegen de Europese Octrooi Organisatie' (Fundamental labour rights and immunity – The case against the European Patent Organisation – Translation CAVV), *NJB*, 8 May 2015, pp. 1212-1218.

⁴⁸ The ECtHR case of *Lopez Cifuentes v. Spain*, App. no. 18754/06, 7 July 2009, implies that such a decision, which takes effect within the organisation and is also limited to it, is not subject to review by the domestic courts.

⁴⁹ The ECtHR cases of *Perez v. Germany*, App. no. 15521/08, 29 January 2015 and *Klausecker v. Germany* (see note 44 and the main text) also imply that such a decision, which takes effect within the organisation and is also limited to it, is not subject to review by the domestic courts.

6. Alternatives

As the above analysis shows, an adequate remedy is not available in certain situations. The final question in the request for advice concerns the form which any alternative claim procedures might take. In this section we take a critical look at a few alternatives and consider whether the standard or certainty of existing procedures could be improved.

1. An obvious solution – albeit perhaps in practice politically rather difficult – would be to include an obligation in the headquarters agreement between the host country and the international organisation to have a claim procedure which satisfies the ECHR requirements (always assuming that the constituting treaty does not provide for such a procedure). Countries such as Switzerland, Austria and Italy already have such a policy in place. In any event, a clause of this kind should certainly be a subject of negotiation with international organisations seeking a location for their operations.
2. As regards UN peace operations, the Netherlands could advocate amending the current (1990) Model Status of Forces Agreement (SOFA) along these lines.⁵⁰ It has already argued in favour of establishing standing claims commissions, possibly modelled on the UN Dispute Tribunal and the UN Appeals Tribunal set up to hear internal disputes concerning personnel matters.⁵¹
3. A review mechanism at international level could protect international organisations from domestic courts that overstep the bounds of their authority under international law and also help to promote a degree of uniformity in case law.⁵² The idea is that domestic courts should, in principle, be able to dispose of claims in the correct way, striking a balance between the various obligations under international law. However, the examples cited above reveal some inconsistency. To quote Reinisch:

‘Where a state’s judiciary has clearly impeded the independence and hampered the functioning of an international organization, this might give rise to the international claim concerning a denial of justice.’⁵³

⁵⁰ N. Schrijver, ‘Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations’, *International Organizations Law Review*, vol. 10, no. 2, 2014, pp. 588-600.

⁵¹ *Ibid.*

⁵² A. Reinisch, *International Organizations before National Courts*, CUP, 2000, p. 389.

⁵³ *Ibid.*, p. 390.

4. Within such a mechanism, consideration should also be given to cases in which an international organisation could be deemed to waive immunity. This could be based on existing practice, in which waivers are often given for traffic offences, sexual abuse charges and material damage caused by peace operations.⁵⁴
5. Such a mechanism may also be envisaged *a priori*. An example would be a procedure under which a domestic court (either an appeal court or the supreme court) could refer a question to an international court or tribunal for a preliminary ruling. Consideration could be given to whether a procedure for obtaining an advisory opinion from the International Court of Justice would be worthwhile and practicable. For the record, it should also be noted that states may arrange, through a majority in the General Assembly of the UN or through the Security Council, for the responsibility of an international organisation to be reviewed by the International Court of Justice in the form of an advisory opinion.⁵⁵
6. Finally, in some cases ombudsperson-like mechanisms could obviate the need to seek protection of a strictly legal nature. Such an arrangement might often be seen as less 'intrusive' and for this reason more palatable to an international organisation. The establishment of the Office of the Ombudsperson at the UN as a point of contact for individuals placed on the Al-Qaida sanctions list shows that this could be a good and effective first step, certainly if the advisory opinions of the Ombudsperson are accorded due weight in the proceedings. Quite apart from the success rate (which is very high, as has been seen in the case of the UN Ombudsperson), the very existence of a body to which claimants can turn in the knowledge that their case will be properly investigated will in itself be a welcome relief for many.

⁵⁴ See also Schrijver, *op.cit.*, p. 257.

⁵⁵ Karel Wellens, *Remedies against International Organisations*, CUP, 2002, p. 228. See also I.F. Dekker and C. Ryngaert, 'Immunity of international organisations: Balancing the organisation's functional autonomy and the fundamental rights of individuals', *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, No. 138 – Making Choices in Public and Private International Immunity Law – KNVIR Preadviezen, 2011.

7. Conclusion

Individuals that are negatively affected by acts or omissions of international organisations are likely to turn to domestic courts. Immunity plays a major role in these procedures, as the granting of immunity to international organisations makes it impossible for individuals to seek legal redress at the national level. Views on the doctrine of immunity of international organisations have changed, as reflected in both case law and legal literature. Although immunity based on the headquarters agreement and constituting treaty is still inviolable, both European and national case law increasingly indicates that this inviolability may be at odds with other international obligations, notably the obligations to ensure right of access to a court and the right to a fair trial. Where international organisations do not themselves make provision for procedures enabling claimants to challenge their decisions or policies, states (and the courts of those states) find themselves confronted by conflicting obligations. The CAVV notes that there is growing recognition of the existence of this conflict between different international obligations and that full application of the immunity rule is therefore not always self-evident.

This is to be welcomed from a human rights perspective. After all, in a situation where states are increasingly transferring powers to international organisations, it is unsatisfactory if the organisations subsequently prove to be immune when held to account by individuals for what are sometimes very serious and far-reaching consequences of their acts or omissions. On the other hand, the doctrine of immunity has been created for a reason. It enables international organisations to perform their duties independently of the host state's legal system. This independence is often essential to the functioning of an international organisation. It follows that international organisations will hardly be inclined to establish their operations in a country where they are dependent on (changing) national legislation and where they or their employees run the risk of being summoned before a domestic court that applies rules they do not recognise. States are well aware of their responsibilities towards international organisations, and a government or foreign minister also has to cope with pressure from other member states which have placed their trust in the host country as a 'secure' location.

In view of the above, the CAVV draws the following conclusions in relation to the questions put to it.

- *How do you assess the existing procedures for the settlement of disputes to which an international organisation is party? Do these procedures result in a fair trial?*

A distinction must be made here between proceedings instituted by employees of an organisation and those brought by third parties. Many organisations have internal procedures for their own staff, sometimes through a shared tribunal such as the ILOAT. The CAVV views these procedures as essential and considers that they should, where necessary, be expanded so that in legally borderline cases claimants who would otherwise feel obliged to institute proceedings before domestic courts can instead bring their claim before the organisation itself. The position of third parties who are affected by decisions or policies of an international organisation is more difficult. In most cases, internal procedures do not provide for the admissibility of claims brought by non-employees. Such claimants will therefore often apply to the domestic courts. Where claims by third parties against an international organisation are brought before domestic courts, the organisation is usually granted immunity. It follows that at national level too the individual is left without a legal remedy.

– *Are there sufficient ways of holding international organisations responsible?*

As seen above, the answer to this question depends on the situation. The case law includes both proceedings brought by persons employed by or working for an international organisation and those brought by third parties who suffer the consequences of what they consider to be an organisation's wrongful acts. The CAVV emphasises once again that cases concerning the working conditions of employees of international organisations are not comparable to situations involving third parties, for example where surviving dependants seek reparation for the consequences of the acts or omissions of an organisation in an armed conflict. In many cases, the internal procedures for the organisation's own employees are satisfactory and the nature of the claim is of an entirely different order. Nonetheless, the CAVV believes that in all these situations claimants are entitled to a fair trial of their claim. International organisations would do well to keep control of these procedures. Where the procedures are inadequate when judged by criteria developed in international case law, the CAVV sees a role for the domestic courts, although they must act on the basis of a clear and uniform assessment framework (see below).

It is also clear that international organisations have not yet made use of all possibilities. The most telling example is the UN's failure to make provision for a mode of settling private law disputes to which it is a party (see article VIII, section 29 of the CPIUN above). The CAVV recommends that the Netherlands continue to draw attention to this obligation of the UN. In a transitional situation, the creation of an ombudsperson would

also be a way of giving claimants the possibility of having their case heard and even receiving legal protection.

Where there are claims against an international organisation, an even clearer distinction could be made between tasks which are essential to the functioning of the organisation and other matters where this is not the case but which can still lead to legal disputes. However, there is a tendency to link the immunity of international organisations to a broadly interpreted category of cases which are 'directly connected with' the organisation's performance of its functions. In practice, for example, the immunity of organisations is of a more absolute nature than that of states. When acting as a private party, for instance in concluding commercial contracts, international organisations often include arbitration clauses for the settlement of contractual disputes. It would be worthwhile promoting this legal development in such a way as to make the same distinction between 'public' acts and acts performed as a private party that exists in relation to state immunity.

The CAVV recommends examining whether it would be possible to introduce an internationally agreed assessment framework that would enable the host country to carefully weigh the comparative merits of recognising immunity and affording legal protection. These international agreements would be of particular importance in ensuring that organisations do not establish themselves only in states where immunity is treated as an absolute right and the protection of human rights is always of only secondary importance. Such a framework could take various forms. One possibility would be international consultation between the different supreme courts or government lawyers responsible for handling international law matters (perhaps initially only within Europe), but the development of an international convention comparable to the UN Convention on State Immunity⁵⁶ would also seem to be a possibility in due course, in any event from a legal perspective. The case law of the ECtHR could serve as a basis for the content.

The Netherlands could use its best endeavours to start an international debate in the appropriate forums on how to deal with the immunity of international organisations. The CAVV would be willing to assist in preparing discussion meetings with the relevant authorities and other experts with a view to producing a basic document that could serve as a guide for the courts, perhaps initially mainly in the Netherlands, in weighing

⁵⁶ United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, Trb. 2010, 272. See also the European Convention on State Immunity, Basel, 16 May 1972, Trb. 1973, 43.

up competing interests. One question that should certainly be taken into account in such a framework is in what cases immunity could be qualified, particularly where they concern matters not immediately connected with the organisation's performance of its functions or where its own claim procedure is inadequate. Consideration could also be given to whether it would be possible and worthwhile to establish a court (or division of a court) specialised in immunity cases in order to streamline the case law.

– *How do you assess the practicability of enforcing a finding of responsibility on the part of an international organisation?*

Immunity rules also apply to the execution of court judgments. This means that even where claimants are able to bring proceedings before a domestic court, they will ultimately find it impossible to enforce a judgment in their favour. The immunity of an international organisation is affected even more by the execution of a judgment than by a finding that it has violated the rules. After all, it is often necessary in the case of execution for the host country to cooperate in seizing bank balances or other property of the organisation or in providing access to buildings or property of employees. Such acts are almost always in breach of the agreements made by the host country with the organisation in the headquarters agreement and/or the constituting treaty. To execute the judgment, a successful litigant will therefore remain dependent on the goodwill of the organisation.

– *What form could alternative claim procedures take?*

The CAVV believes that the best solution would be for international organisations themselves to put in place procedures that satisfy the requirements, particularly those made by the ECHR. These procedures should provide both the organisation's own employees and third parties with sufficient safeguards that their claim will be treated fairly. This would avoid a conflict with the immunity of international organisations.

Ideally, the existence of such procedures should be part of the negotiations on the headquarters agreement, but the notion that existing headquarters agreements might be amended or host states inclined to take the political initiative is admittedly unrealistic. However, in new cases this should be one of the themes of the negotiations on the headquarters agreement.

The CAVV also notes that international organisations still do not provide a good claim procedure, particularly for claims brought by third parties (i.e. by persons other than their employees). This is why a role for the domestic courts (based, for example, on the

judgments of the ECtHR) will remain essential. In due course, this could also produce improvements in the international organisation's own system, as is apparent from the complaints system introduced by the UN for individuals and groups on the UN sanctions lists. This would help to prevent unduly disparate judgments and outcomes of national (and regional) courts. The *Kadi* judgments of the EU Court of Justice (as well as comparable judgements at national level) have increased the pressure on the UN to improve the existing system of legal protection. As critical judgments of national courts may harm the image of international organisations, they may also help to prompt a dialogue between the organisation and the host country. As noted, however, every effort will have to be made to prevent arbitrary outcomes when courts make their own (sometimes instinctive) assessments about recognising immunity.

Bearing in mind the special position of the UN, it is certainly necessary to ascertain whether the mandate of the UN Appeals Tribunal could not be expanded in due course to include not only appeals instituted by persons who are employed by or work for the UN but also cases involving third parties.⁵⁷

In view of the possible alternative claim procedures described in section 6 above, the CAVV proposes that further action could first take the form of the following concrete steps:

1. Increase and broaden domestic courts' awareness and knowledge of the subject of immunity of international organisations in order to develop an assessment framework based on international law principles and case law.
2. Study whether it would be possible and desirable for district courts to have a division with specific expertise in immunity cases.
3. Try to ensure that new headquarters agreements with international organisations include a clause providing for a fair trial both for the organisation's own employees and for third parties. The ECHR and the relevant case law could serve as a guide in the negotiations.
4. Initiate a debate on this subject in international organisations, first of all in organisations that have their seat in the Netherlands.⁵⁸ It is important to recognise that,

⁵⁷ See also N. Schrijver, 'Srebrenica voorbij', *op.cit.* p. 261.

⁵⁸ The CAVV realises that previous attempts to harmonise the privileges and immunities of international organisations were not an unmitigated success. See also *Zetel akkoord? Eindrapport van de werkgroep Beleidskader werving en opvang internationale organisaties* (Headquarters agreement? Final Report of the Working Group on the Policy Framework for

although international organisations have their own legal personality, member states can also be regarded as managers of such organisations and that the Netherlands, together with other member states, therefore has its own responsibility in this respect. In the case of the UN, one matter that continues to demand particular attention is the implementation of article VIII, section 29 of the CPIUN, but discussion of a possible expansion of the UN Appeals Tribunal's mandate is also important.

5. Announce and promote internationally the assessment framework referred to above at 1 in order to secure international agreement on the issue of how domestic courts should handle the conflict between a state's obligation to respect immunity and its obligation to provide legal protection. Not only could the possibility of a convention on the immunity of international organisations be explored, but consideration could also be given to whether agreement can be reached on the basic principles of the immunity of international organisations through 'transnational' contact between courts or with government lawyers responsible for handling international law issues.

Annexe I

Request for advice on the responsibility of international organisations, dated 4 May 2014

Prof. W.G. Werner
Chair, Advisory Committee on Issues of
Public International Law
Postbus 20061
2500 EB Den Haag

Date: 9 May 2014

Re: Request for advice on the responsibility of international organisations

Dear Professor Werner,

There is agreement internationally that international organisations can be held responsible under international law for their acts and omissions. However, the possibilities for invoking such responsibility before a court are limited. For example, only states can be a party to proceedings before the International Court of Justice. International organisations often enjoy immunity from jurisdiction before domestic courts and are very reluctant to waive this immunity.

In theory, international organisations fairly regularly provide an alternative remedy in the form of an established dispute settlement mechanism. In practice, however, remedies of this kind tend to be used ad hoc, and the discretionary power of organisations to waive immunity in cases about responsibility issues sometimes produces unsatisfactory results. The absence of a sound claim procedure is particularly noticeable in cases where international organisations perform operational activities. Settlement of claims arising from operational activities has recently attracted much publicity, both generally and in legal circles. This is partly due to the cholera epidemic in Haiti, for which UN peacekeeping forces are allegedly responsible.

Given the huge increase in both the number of international organisations and the scope of their activities and their increasingly independent position in matters governed by international law, it would be desirable to carry out further study of the hitherto incomplete system for the settlement of disputes concerning the effects of acts or omissions of these organisations. In view of the CAVV's expertise, I wish to obtain your advice on the existing claim procedures and possible alternatives. I should therefore like you to advise me on this subject, using the following questions as a guide:

- How do you assess the existing procedures for the settlement of disputes to which an international organisation is party? Do these procedures result in a fair trial?
- Are there sufficient ways of holding international organisations responsible?
- How do you assess the practicability of enforcing a finding of responsibility on the part of an international organisation?
- What form could alternative claim procedures take?

I should be grateful to receive your advisory report before 1 July 2015.

Yours sincerely,

Frans Timmermans
Minister of Foreign Affairs

Annexe II

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The Advisory Committee on Issues of Public International Law advises the government and parliament on international law issues.