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Final Report International Institutional Law; Secure Haven project**  
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## Secure Haven

Final Report of WP 1110  
International Institutional Law  
July 2009



# Protection and Effective Functioning of International Organizations

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## TABLE OF CONTENTS

<b>1.</b>	<b>International Institutional Law and Secure Haven; an introduction.</b>	<b>6</b>
1.1.	Subject matter and playing field of WP 1110	6
1.2.	The role of WP 1110 within Secure Haven	8
1.3.	The definition of 'International Organization'	9
1.4.	Classification of International Organizations	13
1.5.	Legal status of International Organizations	16
1.5.1.	International legal personality	17
1.5.2.	National legal personality	21
1.5.3.	Capacity and competence; rights and duties	22
1.6.	Privileges and Immunities and the other IGO's in Secure Haven	23
<b>PART I – THE LEGAL SYSTEMS OF PRIVILEGES AND IMMUNITIES</b>		<b>24</b>
<b>2.</b>	<b>International Privileges and Immunities; introduction to the systems</b>	<b>24</b>
<b>3.</b>	<b>Diplomatic immunities</b>	<b>26</b>
3.1.	Development of diplomatic immunities	26
3.2.	Legal basis of diplomatic immunities	26
3.3.	Legal sources of diplomatic immunities	27
3.4.	The success factor of the system: reciprocity	28
<b>4.</b>	<b>Organizational Immunities</b>	<b>29</b>
4.1.	Development of organizational immunities	29
4.2.	Legal basis of organizational immunities	30
4.2.1.	Functional necessity; effective functioning	30
4.2.2.	'Sovereignty', or historically acquired rights	34
4.3.	Legal sources of organizational immunities	35
<b>5.</b>	<b>Diplomatic Immunities vs. Organizational Immunities</b>	<b>37</b>
<b>PART II – LEGAL QUESTIONS CONCERNING THE PREMISES OF INTERNATIONAL ORGANIZATIONS IN A SECURE HAVEN</b>		<b>39</b>
<b>6.</b>	<b>What status do IO premises enjoy in the Netherlands?</b>	<b>39</b>
6.1.	The legal construction of 'inviolable premises'	39
6.1.1.	Physical boundaries; what encompasses 'premises'	39
6.1.2.	Duty to abstain; elements of inviolability of premises	42
6.2.	Why do they have such a special status?	48
6.3.	What consequences does this status have for the authority on IO premises?	48
6.4.	Are IO premises inviolable even without a treaty provision to that effect?	53
<b>7.</b>	<b>Are there exceptions to the status in specific cases, like emergencies and issues national security?</b>	<b>57</b>
7.1.	Emergencies; assuming consent	57
7.1.1.	Emergency clauses of the IO's in the Netherlands	57
7.1.2.	Assuming consent in emergencies as a general rule?	59
7.2.	National security and public order	61
<b>8.</b>	<b>Possibilities for altering the status of premises under international law</b>	<b>62</b>
8.1.	IO premises as situated on internationalized territory	62
8.2.	A 'buffer zone' on host state territory surrounding the premises of an IO	66

<b>PART III – QUESTIONS CONCERNING THE DUTY TO PROTECT INTERNATIONAL ORGANIZATIONS</b>	<b>68</b>
<b>9. The duty to protect in the relationship between the Netherlands and the IO's</b>	<b>68</b>
9.1. Constitutional documents and multilateral treaties	68
9.2. The duty to protect in seat agreements concluded with the Netherlands	68
9.2.1. Seat agreements with a 'due diligence'-duty to protect	68
9.2.2. Seat agreements with 'effective & adequate'-duty to protect	71
9.2.3. Seat agreements with a 'diplomatic' duty to protect	71
9.2.4. Seat agreements without an explicit duty to protect	72
9.3. The duty to protect in other seat agreements	73
9.4. Relevant numbers; conclusion	74
<b>10. Fundamental questions concerning the duty to protect</b>	<b>76</b>
10.1. Obligation of effort or obligation of result?	76
10.2. Are both the 'security' and 'safety' of the IO included?	76
10.3. Preventive or reactive protection?	77
10.4. Does the duty to protect apply to all IO's in the Netherlands?	82
<b>11. Analysis of the content of the duty to protect an IO</b>	<b>87</b>
11.1. State responsibility and the duty to protect	87
11.1.1. Secondary rules: circumstances precluding wrongfulness	88
11.1.2. The primary rule; contents of the provisions of protection	92
11.2. Qualities of an object benefiting from protection	92
11.3. Methods against which protection is required	95
11.4. Necessary amount of state conduct	97
11.4.1. 'Due diligence'	98
11.4.2. 'Special duty to take all appropriate measures'	101
11.4.3. 'All effective and adequate measures'	105
11.5. Appropriate protection and adequate (police) protection	106
<b>12. The duty to 'facilitate'; providing the IO's with necessary services.</b>	<b>107</b>
<b>13. Conclusions and recommendations</b>	<b>110</b>
13.1. Conclusions of Part I – the legal systems of Privileges and Immunities.	110
13.2. Conclusions of Part II – the premises of International Organizations.	110
13.3. Conclusions of Part III – duty to protect International Organizations.	111
13.4. Is there a need for alteration of the systems?	113

For further information on the Secure Haven project, please visit [www.securehaven.eu](http://www.securehaven.eu),  
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## LIST OF ABBREVIATIONS

Adv. Op.	Advisory Opinion
AIVD	Algemene Inlichtingen en Veiligheidsdienst
AJIL	American Journal of International Law
AMSCO	African Management Services Company
Art.	Article
AU	African Union
BOIE	Benelux Organisatie voor Intellectueel Eigendom
BYIL	British Yearbook of International Law
BZ	Ministerie van Buitenlandse Zaken (Netherlands)
BZK	Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Netherlands)
CFC	Common Fund for Commodities
CTA	Technical Centre for Agricultural and Rural Cooperation
DKDB	Dienst Koninklijke en Diplomatieke Beveiliging
doc.	document
EBB	Eenheid Bewaking en Beveiliging
EC	European Communities
ECommHR	European Committee for Human Rights
ed(s)	editor(s)
Ed.	Edition
EP	European Parliament
EPIL	Encyclopedia of Public International Law
EPO	European Patent Organization / European Patent Office
ESA	European Space Agency
ESA/ESTEC	ESA European Space Research and Technology Centre
EU	European Union
f.n.	footnote
FAO	Food and Agricultural Organization
HCPIIL	Hague Conference on Private International Law
HoM	Head of Mission (of IO or diplomatic mission)
HqA	Headquarters Agreement
IATA	International Air Transport Association
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep.	ICJ Reports
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Court for the former Yugoslavia
IJIL	Indian Journal of International Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMF	International Monetary Fund
IO	International Organization
IOM	International Organization for Migration
ITC – UNESCO	ITC – UNESCO Centre for Integrated Surveys
IUSCT	Iran United States Claims Tribunal
JRC-IE	Joint Research Centre – Institute for Energy (EC affiliated)
LJIL	Leiden Journal of International Law
MFA	Ministry of Foreign Affairs
NAPMA	NATO Airborne Early Warning & Control Programme Management Agency
NATO	North Atlantic Treaty Organization
NC3A	NATO C3 Agency
NATO-JFC	NATO Joint Force Command Headquarters (Brunssum)
NCTb	Nationaal coördinator Terrorismebestrijding

NGO	Non-Governmental organization
NL	The Netherlands
NT	Nederlandse Taalunie
OAS	Organization of American States
OPCW	Organization for the Prohibition of Chemical Weapons
OPEC	Organization of Petroleum-Exporting Countries
OSCE	Organization for Security and Co-operation in Europe
OSCE/HCNM	OSCE High Commissioner for National Minorities (office of [...])
P&I	Privileges and Immunities
p(p).	Page(s)
para.	paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Res	Resolution
RIAA	Reports of International Arbitral Awards
RIO	Recht der Internationale Organisaties
SANDILJ	San Diego International Law Journal
SCSL	Special Court for Sierra Leone
SH	Secure Haven
Stb.	Staatsblad
STL	Special Tribunal for Lebanon
Trb.	Tractatenblad
UN	United Nations
UNDP	UN Development Programme
UNEP	UN Environment Programme
UNEP-GPA	UNEP Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities
UNESCO	UN Educational, Scientific and Cultural Organization
UNESCO-IHE	UNESCO-IHE Institute for Water Education
UNGA	UN General Assembly
UNICEF	UN Children's Fund
UNJY	UN Juridical Yearbook
UNRWA	UN Relief and Works Agency
UNSC	UN Security Council
UNTS	UN Treaty Series
UNU-MERIT	UN University - Maastricht Economic and Social Research and Training Centre on Innovation and Technology
UPU	Universal Postal Union
USA	United States of America
VCCR	Vienna Convention on Consular Relations (1963)
VCDR	Vienna Convention on Diplomatic Relations (1961)
VCLT	Vienna Convention on the Law of Treaties (1969)
VCLTSIO	VCLT between States and IO's and between IO's (1986)
VCRSIO	Vienna Convention on the Representation of States with IO's with an universal character (1975)
Vol.	Volume
WHO	World Health Organization
WP	Werkpakket
WTO	World Trade Organization
YBIL	Yearbook of International Law
YILC	Yearbook of the ILC

## 1. International Institutional Law and Secure Haven; an introduction.

### 1.1. Subject matter and playing field of WP 1110

In this paragraph the 'playing field' is described of WP 1110 and Secure Haven. What are the stakeholders, or 'players' in the International Organization – host state relationship? By whom and on what levels is the law of international organizations regulated? Of specific interest in that regard is the role of a host-city like The Hague (in the eyes of many the Legal Capital of the World) in comparison to that of the host state when it comes to the facilitation of an IO.

#### *Relevant basics of international law 'in a nutshell'*

International law was traditionally seen as only inter-state law, the law between states, instead of law applicable between individuals. While this is no longer fully valid because of the significant changes international law has gone through the last decades, the basic players in international law are still the 190+ states of today's world. The proliferation of International Organizations introduced another 'player' to the field of international law. International Organizations are nowadays considered to possess international legal personality, which for example means that they are able to conclude treaties and incur responsibility under international law. They have become subjects of international law, not equal to states but nevertheless important factors in the international community. International Organizations have taken on an important role in the field of international law, as creators and interpreters of that law.

States and international organizations frequently use the instrument of treaties to make agreements, laws and rules under international law. The power to conclude treaties is reserved only for them. Individuals, corporations, or NGO's do not have this power. Neither do individual organs of a state, such as Ministries, provinces or municipalities. If specific organs of a state do engage in the negotiations on a treaty, it should always be in the name of the state and logically in conformity with national constitutional legislation on that subject.

The law of international organizations is a vast and diverse area of international law. One part of the law of international organizations of specific interest for the Secure Haven project is the area of law which is known as International Institutional Law: it comprises those rules of (international) law which govern the legal status, structure and functioning of international organizations.<sup>1</sup> It is an interesting area of law, but not one of many absolute truths. This is well illustrated by some of the questions which come up at the beginning of most studies on this field of law. These are questions like "*what exactly is an International Organization*" or "*is there a body of law which can be called International Institutional Law to begin with*". I believe that one of the main reasons for this apparent lack of clarity is the core purpose of practically all international Organizations: international cooperation. Although with some Organizations this purpose is more evident than with others, they were all created because of the need for international cooperation on one or more issues which were international in nature instead of national, or which needed to become international in nature.

International cooperation starts at the political level. The instruments for international cooperation therefore tend to be more based on politics than anything else. For International Organizations this is no different. The form of international cooperation that is called International Organization, although used more and more frequently, is not created on the basis of a solid legal framework, a 'blue-print' if you will, specifying conditions, powers, rights and duties. Instead, every International Organization is designed to meet the specific requirements of the issue or issues it is intended to deal with. Thus International Organizations literally come in all shapes and sizes. They can be set up by just a couple of states to administrate or regulate the shipping on one of the main rivers which flow through these states (Rhine Commission), or it can be a 'universal' organization with vast political influence, such as the United Nations. There are International Organizations which are created by a group of states to facilitate regional cooperation, membership of which is thus not open to states outside the region (European

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<sup>1</sup> Schermers & Blokker 2003, para. 7.

Union, African Union), and there are International Organizations which are open to all states but deal only with a very specific subject (Universal Postal Union). All these organizations differ in their assigned tasks, in their attributed powers, in their importance/influence, in their procedures for decision making, etc.<sup>2</sup>

To some, International Institutional Law is no more than just a descriptive discipline, because in their opinion all International Organizations are *sui generis*. But despite all the diversity amongst International Organizations, there is the area of International Institutional Law, which studies the commonalities between all those Organizations and tries to provide more insight and perhaps even more unity in the law of International Organizations. In comparison, the differences between every state with regard to legal system, state structure and political system does not prevent there being a common set of rules with regard to states in general. These observations should be kept in mind when dealing with questions like “what exactly is an International Organization”.

This very brief overview of the players and the playing field of international (institutional) law tells us some important things. Firstly that the basic player is the state. This means that international law is in principle formed by states. Secondly that although a state may be represented by specific organs of that state, it will always be at the national (policy) level where international legal obligations are created, agreed to and interpreted. In other words, individual organs of a state are not individual actors on the international stage. So, logically, the municipality of the Hague is not an individual subject of international law, does not have the power to conclude treaties and in principle is dependent on national authorities for the interpretation and application of international agreements such as treaties.

With this being said, it also becomes clear on what level WP 1110 will primarily do its research. It is the interpretation and application of international (institutional) law and the role of the Dutch national authorities in these processes. Nevertheless, for implementation and executive action (like the physical protection of an IO), there certainly is an important role to play for the different (local) Dutch authorities. This will not be ignored during this research and will be dealt with where relevant.

#### *Scope of WP 1110*

Another question is what exactly falls within the scope of the research of WP 1110 (and the Secure Haven project). One of the key issues in that respect is the legal definition of ‘International Organization’. This must be the starting point, since the project revolves around the presence of International Organizations in the Netherlands (and in particular in the city of The Hague). When the legal definition of an International Organization is discussed, later in this report, we will see that NGO’s, private ‘internationalized’ organizations and large multinational corporations do not fit the profile of an International Organization. Therefore, they principally fall outside the scope of WP 1110. After all, this WP deals with aspects of international law in which those ‘non-IO’ entities only play a marginal role. Nevertheless, other (related) entities may be of interest to the Secure Haven concept, such as NGO’s, diplomatic missions and perhaps even internationally operating private corporations. When and where relevant, these entities will then be covered by the research. Still, the separate legal status of International Organizations under international law warrants the primary scope to be on those organizations.

More in general, the subject matter of the research is international law when relevant to facilitating IO’s. Naturally, the law of international organizations (more specifically: International Institutional Law) is of specific relevance. National law, such as constitutional law, administrative or criminal law, is in principle not incorporated in this research. One of the basic rules of the law of international organizations is that host states should take *all appropriate measures to ensure the effective functioning of the international organization*. Arguably, one of the consequences of this basic rule is the inviolability of IO premises. In addition, this basic principle may be interpreted to encompass some form of protection of the IO, which has to be provided by the host state. So, it is an international legal obligation of a host state to provide adequate

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<sup>2</sup> See on the diversity of IO’s Schermers & Blokker 2003, p. 15-16, 21-25; Sands & Klein 2009, p. 16-18.

protection for an IO in order to ensure its effective functioning. Because of this link with international institutional law, the latter may contain additional criteria for application of the principle of protection and of effective functioning, and can possibly be employed to make a thorough legal interpretation of the duty to protect of a host state, explaining the scope and extent of its rights and duties. Thus a direct link between security, protection and the effective functioning of an International Organization is enshrined in the law of international organizations. This explains more clearly the role of WP 1110 in the Secure Haven project.

Because the subject matter of the research of WP 1110 is international law, and international institutional law in particular, it is important to briefly outline the basics of this area of law. In this chapter those basics are discussed and references to additional literature for further research of these basic issues is provided. These basic issues are relevant for the outline of the specific issues as arise in the research of WP 1110.

## **1.2. The role of WP 1110 within Secure Haven**

With regard to the Secure Haven concept as a whole, two main issues may be discerned which will contribute to the design of the zone and the improvement of the image of The Netherlands / The Hague as professional host state and host city respectively.

The first issue focuses on the legal status of the premises of an IO and the legal and practical implications of this status. An analysis of the issue of legal status will be made, discussing also the practical consequences of this special legal status of premises. In this respect the host state authorities have a *duty to abstain* from any action on the premises of IO's, which also has effects on the way in which these authorities may deal with emergencies occurring within IO premises. Some recommendations are then made that focus on how the legal status of IO premises must be dealt with and incorporated in host state and/or Secure Haven policy.

The second issue relates to the already mentioned *duty to protect*. As will be seen, a host state has a duty under international law to protect the International Organizations it hosts, and the interpretation of this legal obligation and its implementation in everyday practice is a main subject of research of WP 1110. The analysis of this duty to protect should assist Dutch authorities in determining what practical and policy measures should be taken to fulfil the international legal obligations of the Netherlands. In this respect, due attention will be paid to the joint responsibilities for IO and host state as well as to the responsibilities of the IO itself regarding its security and towards the host state authorities.

An additional benefit of such a system to implement the duties of a host state is that it can contribute to the international image of the Netherlands as a professional host state. While it is debatable whether or not providing security is an issue with which a host state may discern itself from possibly competing host states, the fact that the host state takes such a structural approach towards fulfilling its legal obligations will strengthen the image of a host state. It portrays the host state as one which takes its function of host seriously, and deals with the issues in a professional, efficient and legally sound manner.

### *Relevant links with other WP's and the Secure Haven concept*

An important part of this report deals with the duty to protect IO's. Also, the rules applying to the premises of IO's in emergencies are discussed. These matters should be seen in close relation to the work of *WP 1200*, which deals with risk management and the protection of vital infrastructures. Elements of the latter can also be found in this report in the form of the 'security chain' as applied in the assessment of the scope and content of preventive and reactive protection of IO's.<sup>3</sup> There are also some links with WP 1120 on the protection of human rights and fundamental freedoms in a security-society. These links concern the status of IO premises and the inherent struggle between the privileges of an IO (like the maintenance of peace surrounding its premises) and fundamental freedoms of individuals (like the right to demonstrate). There are no direct links to WP 1300 and WP 1400, which deal with social environment and economic impacts respectively.

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<sup>3</sup> See Chapter 10 para. 3 of this Report.

### *Stakeholders of WP 1110*

As stated above, the municipality of the Hague only has a supporting role to play when it comes to fulfilling the international legal obligations of a host state. Nevertheless, on the level of implementation, the municipality may be identified as a stakeholder.

Since the national authorities have primacy when it comes to interpreting and implementing international law, here the primary stakeholders can be found. The ministry of Foreign Affairs is responsible for the daily contact and cooperation with the International Organizations and diplomatic missions in the Hague and the rest of the Netherlands. This ministry also primarily deals with interpretation and implementation of international (institutional) law. Another stakeholder on the national level is the *Ministerie van Binnenlandse Zaken en Koninkrijksrelaties*. This ministry is responsible for the law enforcement and the emergency services, and as such can be seen as an important stakeholder regarding providing the IO's with adequate protection. In addition, this ministry is responsible for the NCTb, together with the Ministry of Justice. The NCTb is responsible for conducting security and threat analyses for the benefit of the IO protection and as such is closely involved in implementing the duty to protect the IO's. Other related stakeholders are the AIVD (under BZK responsibility) the EBB (*Eenheid Bewaking en Beveiliging*, under BZK responsibility) and the DKDB (*Dienst Koninklijke en Diplomatieke Beveiliging*, also under BZK responsibility).

### **1.3. The definition of 'International Organization'**

It must be made clear in advance that defining International Organizations is hardly an exact science and that the reality of international entities can not always be completely covered by general legal definitions. However, there are some general criteria which *prima facie* make it possible to determine whether or not an entity is an IO.

A first fundamental distinction to be made is that between public, governmental (or inter-state) organizations (International Organizations) and private organizations. This distinction provides the clearest definition of what constitutes an International Organization. That does not mean it is completely clear what that is; there is no generally accepted legal definition of an International Organization. The few definitions that are provided by instruments of international law all fail to specify real characteristics of an IO. For example, in the Vienna Convention on the Law of Treaties (1969), it is stated that an "*international organization*" means an *intergovernmental organization*".<sup>4</sup> A similar definition can be found in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975) and in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).<sup>5</sup>

The term intergovernmental organization is presented as a definition, but it is often used merely as a synonym for International Organization; there is no clear definition of an intergovernmental organization either. However it does provide some additional clarification of the term International Organization, since the term "intergovernmental" clearly excludes purely private companies and other organizations such as NGO's, regardless of how international/multinational their activities are.<sup>6</sup> Prior to 2003, the International Law Commission of the UN (ILC), which originally drafted the articles that formed the basis of the three above-mentioned conventions, decided on numerous occasions not to provide for a definition any more specific than that.<sup>7</sup>

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<sup>4</sup> Art. 2.1(i) VCLT 1969.

<sup>5</sup> Art. 1.1(1) VCRSIO 1975; Art. 2.1(i) VCLTSIO 1986.

<sup>6</sup> ILC Yearbook 1966, Vol. II, p. 190; see also Schermers & Blokker 2003, para. 29A.

<sup>7</sup> See for example ILC Yearbook 1985, Vol. II, Part 1, p. 105-107; see also Schermers & Blokker 2003, para. 29A.

However in 2003 the ILC formulated a new definition of the term International Organization in the Draft Articles on the responsibility of international organizations:

*“the term ‘international organization’ refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International Organizations may include as members, in addition to states, other entities”*.<sup>8</sup>

Some entities which do not fully fall within the scope of the quoted definition are nevertheless often considered to be international organizations.<sup>9</sup> The reason for this apparent lacuna is that the draft articles of the ILC deal with IO's which would have international responsibility, not with providing a comprehensive definition of an International Organization.<sup>10</sup> Still, this definition largely represents the general consensus in doctrine of what characteristics an IO must possess. These, and additional characteristics of an IO other than stated in the definition of the ILC, will now be discussed.<sup>11</sup>

Four basic characteristics of an international organization can be defined, dealing with the following areas: (1) form of creation; (2) form of membership/parties; (3) the body of law governing the organization; and (4) its basic structure. The characteristics will be discussed in detail below.

**1. The entity must be established by an international agreement, preferably laid down in a treaty;**<sup>12</sup>

A treaty, which is a written agreement governed by international law,<sup>13</sup> is the most preferred form of international agreement for creating an IO, since it provides the organization with a basic document governing its creation. However, if an international agreement is reached, in whatever form, on establishing an international organization it must be assumed that it is thereby established. Some scholars are of the opinion that the entity should have some sort of constitutional document, however this should not be seen as an indispensable characteristic.<sup>14</sup> If there is a constitutional document for an entity, then this is good evidence that the entity is in fact an International Organization. When the entity was established by treaty, in most instances that treaty qualifies as a constitutional document. The fact that the organization should be created by an international agreement indicates that it is not possible for private parties to create an International Organization. This is explained further when dealing with the next characteristic.

**2. The international agreement must be concluded between states and/or other International Organizations. Also, membership of the entity must consist primarily of states and/or other International Organizations;**<sup>15</sup>

This characteristic deals with the parties to the initial agreement and the parties to the international organization itself. In general, organizations are established by the will of sovereign states. However, since International Organizations themselves are viewed (more and more) as independent subjects of international law, they too have created new international organizations, sometimes even without involving any state.<sup>16</sup> There are also numerous entities which are created within the legal framework of one International Organization, for example by virtue of a UN Security Council resolution under Chapter VII. However it must be made clear

<sup>8</sup> Draft Article 2, Report of the ILC, 55th session (2003), p. 38; Schermers & Blokker 2003, para. 29A.

<sup>9</sup> Mostly this is because of a lack of international legal personality, as is the case with OSCE. See on this issue Schermers & Blokker 2003, p. 986-994.

<sup>10</sup> Schermers & Blokker 2003, para. 29A.

<sup>11</sup> Amerasinghe 2005, p. 10; Schermers & Blokker 2003, para. 29 *et seq.*; Klabbers 2009, p. 6-12; Sands & Klein 2009, p. 15-16; Muller 1995, p. 4.

<sup>12</sup> Amerasinghe 2005, p. 10; Schermers & Blokker 2003, para. 34 *et seq.*; Klabbers 2009, p. 9-11; Sands & Klein 2009, p. 15; Draft Article 2, Report of the ILC, 55th session (2003), p. 38.

<sup>13</sup> art. 2.1 (a) VCLT 1969.

<sup>14</sup> Amerasinghe 2005, p. 10; Schermers & Blokker 2003, para. 41.

<sup>15</sup> Amerasinghe 2005, p. 10; Sands & Klein 2009, p. 15, 537-540; Klabbers 2009, p. 7-9.

<sup>16</sup> In particular the Joint Vienna Institute. See further Sands & Klein 2009, p. 540.

that such entities do not constitute independent international organizations in the strict legal sense. The ICTY is one of the strongest examples of such an entity: it is frequently referred to as an international organization, although it is not a separate international organization; it is *an organ of* an international organization: the UN.

Partly flowing from the characteristic that the founding members of the entity are states and/or International Organizations, is the point of membership subsequent to creation. The entity must consist primarily of states and/or other International Organizations as its members, instead of national legal persons such as corporations or NGO's. It is the membership of international legal persons that gives the IO its legitimacy as international legal person.

As stated, this characteristic deals with the form/nature of membership. The diversity and many forms of international organizations notwithstanding, it must be clear that it is for subjects of international law to create them and be members of them, not private actors or companies which are only governed by national law. Part of the reasoning behind this is that an entity cannot create another entity with more powers than itself. Thus, entities solely governed by national law cannot create an entity which has powers or legal personality under international law. This is also expressed in the third (next) characteristic.

**3. The entity must be governed by international law. In other words, it may not be governed by any specific national legal system. Since an international agreement is on itself governed by international law, it can be assumed that the entity thereby created is also governed by international law, unless otherwise provided;**

This characteristic is directly connected to the second one, but is more broad in scope. Entities which are not actors under international law cannot create an entity fulfilling this or the prior characteristic. But entities which are actors under international law, such as states or International Organizations, also have the capacity to create entities which are merely governed by a national system of law. In other words, the mere fact that its creators are actors under international law, does not imply that the new entity also becomes one.<sup>17</sup> It must deliberately be created under international law and be governed by international law. So if an international agreement provides for one national system as governing the created entity, it is not an International Organization.

**4. The entity must have at least one organ with a distinct will, separate from the members of the entity. Also, if it is explicitly endowed with international legal personality it constitutes an International Organization.<sup>18</sup>**

This characteristic, which deals with the structure of an International Organization, strikes the core of what an international Organization is. It is an entity, separate from its member states and assumed to be independent from those member states (at least to some extent).<sup>19</sup> When an organ with a distinct will separate from its members exists within an entity, this is a structural expression of that independence. And, in accordance with its separate status and independence, it can be assumed that the International Organization possesses some degree of international legal personality, apart from its members. In addition, if it is clear from the international agreement or constitutional documents that the entity possesses international legal personality, the entity will constitute an International Organization. The concept of international legal personality will be discussed later.

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<sup>17</sup> Klabbbers 2009, p. 8.

<sup>18</sup> Schermers & Blokker 2003, p. 34-36; Klabbbers 2009, p. 11-12; Amerasinghe 2005, p. 10; Sands & Klein 2009, p. 15.

<sup>19</sup> On the difficulties surrounding independence of an IO from its members, see for example Klabbbers 2009, p. 11-12, 174-177. It is actually the main theme of Klabbbers' textbook, which shows also from the motto of the book: "You are my creator, but I am your master; obey!" (a quote from Mary Shelley's famous book 'Frankenstein').

Besides these four characteristics, two additional characteristics can be found in doctrine. These are that (1) the entity has treaty-making capacity;<sup>20</sup> and (2) the entity is capable of adopting norms addressed to its members.<sup>21</sup> These characteristics can be seen as helping to identify an International Organization, but they do not form part of the basic characteristics that every International Organization must possess before it can be identified as such. As pointed out earlier, the characteristic that the entity must possess a constitutional document is also indicative for being an International Organization, but it is not compulsory for every organization. Both characteristics refer to specific powers of the International Organization. These flow from the possession of (some degree of) international legal personality and must be supported by the terms of its creation (i.e. the constitutional document).<sup>22</sup> As the ILC has pointed out, treaty-making International Organizations necessarily enjoy international legal personality, but not all International Organizations with international legal personality have treaty-making powers.<sup>23</sup>

#### *International Organizations and Secure Haven*

The 4 basic characteristics as discussed above enable us to define what constitutes an International Organization. So now we can look at the different entities with an international character in the Netherlands and determine whether or not they qualify as International Organization. The focus will primarily be on those entities that are present within the city limits of the Hague, since they are the most relevant to the Secure Haven project.

The ICC is an example of an independent IO, which was created by international agreement, between a large number of states, which is governed by international law and which has (several) independent bodies. It is loosely affiliated with the UN, but it is explicitly not an organ or specialized agency of the UN. Europol and Eurojust are affiliated to the European Union, but are also independent International Organizations. Evidence of this is the fact that seat agreements have been concluded directly between these organizations and the Netherlands. This is different for the ICTY and the ICTR. Technically these are not international organizations since they were not created by an international agreement and they do not have their own member states. Instead, they are both created as an organ of the United Nations, by virtue of UNSC Resolutions under Chapter VII. Because these tribunals are not independent international organizations but organs of a larger IO, the seat agreements concerning the two tribunals have been concluded with the UN and not with the organs themselves. The ICJ also is not an independent International Organization but a principal organ of the UN. Important to note is that although these judicial bodies are not IO's on itself, they are *part of* an IO so they should be seen as one. Similarly, when an IO has a seat in the Netherlands, but which is not its main office (or *headquarters*) the part which is in the Netherlands should be treated as an IO simply because it is part of an IO. In that sense, the being of an IO should be seen as an undividable whole, which may be spread over different physical locations.

Other examples of independent International Organizations, although some are in one way or the other affiliated to another IO, are the OPCW, the HCPIIL, the PCA, the IOM, the BOIE, the *Nederlandse Taalunie* and the IUSCT. Examples of 'organs' (or entities part of) of a larger IO are EPO in Rijswijk, ESA/ESTEC in Noordwijk, NATO C3 Agency and UNEP/GPA in the Hague.

Of special interest is the HCNM. This High Commissioner on National Minorities is part of the OSCE, an international entity devoid from international legal personality and an entity which is seen by many as an international forum not constituting an IO. Because of this lack of international status no treaty could be concluded with the OSCE concerning the HCNM. The Netherlands wanted to create a legal basis for the status of the HCNM and decided to enact unilateral national legislation dealing with subjects like legal personality, privileges and immunities of the HCNM.<sup>24</sup>

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<sup>20</sup> Amerasinghe 2005, p. 10.

<sup>21</sup> Sands & Klein 2009, p. 16.

<sup>22</sup> Amerasinghe 2005, p. 10-11.

<sup>23</sup> Para. 8(a) of the Report of the ILC covering the work of its 11<sup>th</sup> Session (doc A/CN.4/122) as reproduced in YILC 1959, Vol II., p. 96; see also Sands & Klein 2009, p. 477.

<sup>24</sup> Wet HCNM, 31/10/2002 (Stb. 2002, no. 580).

As already stated, the four basic characteristics of IO's exclude a large group of entities which are in some way internationally active. The clearest examples are international companies like Shell and Unilever. They are 'multinationals' but they have not been created by international agreement. Instead they were created as a company under the national law of a single state, and expanded over time. The fact that they are governed by national law is strong evidence that they are not IO's, as is the fact that it was created by individuals instead of by states. An interesting example is the International Air Transport Association (IATA). This entity is, bluntly stated, merely a group of airports and airlines and is primarily concerned with looking after their interests. It is thus a consortium of private companies, not created by states by virtue of an international agreement. Nevertheless, IATA made very serious attempts (with extensive legal briefs on the subject) to be recognized by the Dutch Ministry of Foreign Affairs as an International Organization, presumably because of the considerable (fiscal) privileges connected to that status. Needless to say that their efforts remained fruitless.

A more difficult category is that of NGO's and then especially those NGO's entrusted with public international tasks. NGO's are always created by national legal persons (clearly not governments of states) and are therefore not governed by international law. They are created under a national legal system and not by international agreement and are devoid of international legal personality. However, their tasks may on first glance seem to warrant the status of "international organization". Look for example at Amnesty International, Human Rights Watch and the International Crisis Group: important entities, engaged in different forms of international politics and active all over the world, often in places where they could do with some (legal) protection. Most important example, in my view, is that of the ICRC. Entrusted with the paramount task of aiding victims of war (POW's, non-combatants and combatants) all over the international plane and an influential entity. Nevertheless, it is not an International Organization. Independent of the subject matter of an entity, it is the international act of its creation in conformity with the criteria discussed above that make an IO.

#### 1.4. Classification of International Organizations

International Organizations can be classified in numerous ways based on how they function.<sup>25</sup> It must be emphasized here that the classification of an Organization cannot substitute the studying of the specific International Organization itself. In addition, the classifications as presented below do not provide clear, mutual exclusive categories. Neither do they necessarily entail relevant legal differences between the different categories. Every organization is different and thus labelling cannot substitute analysis.<sup>26</sup>

Below different means of classification are outlined. Please note that these different means are not the only possible ones, the outline is not limitative.

##### *Membership*

Firstly, a distinction can be made according to membership. On the one hand it can be an open, or 'universal' organization. This means that in principle the Organization is open to all states, albeit there may be certain conditions to fulfill. It does not necessarily mean that the organization has in fact universal membership.<sup>27</sup> Examples of open organizations are the UN and the OPCW. On the other hand it can also be a 'closed' organization. This means that membership is limited to a certain group of states with commonalities. For example an Organization may only be open to states in a certain geographical region (European Union, African Union),<sup>28</sup> or to states with a common background such as language (*Nederlandse Taalunie*) or religion (Organization of the Islamic Conference),<sup>29</sup> or only to states with a common endeavour such as the oil-exporting states (OPEC).<sup>30</sup>

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<sup>25</sup> Amerasinghe 2005, p. 9 *et seq.*; Schermers & Blokker 2003, para. 48 *et seq.*; Klabbers 2009, p. 21-25; Sands & Klein 2009, p. 17-18.

<sup>26</sup> Klabbers 2009, p. 21; Sands & Klein 2009, p. 18.

<sup>27</sup> Amerasinghe 2005, p. 11; Schermers & Blokker 2003, para. 51; Klabbers 2009, p. 22.

<sup>28</sup> Amerasinghe 2005, p. 12; Schermers & Blokker 2003, para. 54, 57.

<sup>29</sup> Schermers & Blokker 2003, para. 55, 57.

<sup>30</sup> Amerasinghe 2005, p. 12; Schermers & Blokker 2003, para. 56, 57; Klabbers 2009, p. 22-23.

### *Supranational v. intergovernmental*

Secondly, a distinction can be made between intergovernmental organizations and supranational organizations. Supranational organizations have some fundamental characteristics: they should have the power to take decisions binding on the member states; its organs should not be entirely dependent on the cooperation of the member states in making these decisions; the organization should be empowered to make rules which directly bind the inhabitants of the member states; and the organization should be empowered to enforce its decisions.<sup>31</sup> Currently, only the European Communities (EC) qualify as supranational in character.<sup>32</sup> Nevertheless, there are other organizations which have supranational elements, such as the UN.<sup>33</sup> Most other International Organizations can be qualified as intergovernmental organizations, which are mostly aimed at facilitating the cooperation among states and are in no way superior to those states. For example, member states cannot usually be bound against their will by decisions of such organizations.<sup>34</sup>

### *Subject matter*

Thirdly, a distinction can be made on the basis of the intended subject matter of the organization. Most organizations are established to perform a specific function or to deal with a specific issue. Examples of such functional organizations are the Universal Postal Union, European Patent Office and the World Health Organization. Such organizations are usually not supposed to address the more general issues or political issues and this may even be explicitly indicated.<sup>35</sup> In contrast, there are organizations which may deal with any subject matter which arises in the course of international affairs. These are usually labelled 'general' or 'political' organizations. These organizations, such as the UN, the EU and the Organization of American States (OAS), mostly have comprehensive competence instead of limited competence and usually have some form of diplomatic representation of each member state within the structure of the organization.<sup>36</sup>

Within this basic distinction on subject matter, numerous sub-classifications can be made, such as organizations dealing with development aid, economic cooperation, military cooperation, peace and security and so on. However, the boundaries between those issues are in reality rather vague.<sup>37</sup>

### *Legal or judicial bodies or 'organizations'*

Another distinction on the basis of functions which can be made is that between judicial bodies and non-judicial bodies.<sup>38</sup> The term "judicial organizations" is deliberately avoided, since technically most of the judicial bodies in international law cannot be regarded as separate international organizations. An example of a truly independent international judicial organization is the International Criminal Court (ICC) in the Hague. But other well-known judicial bodies, such as the International Court of Justice (ICJ) or the International Criminal Tribunal for the former Yugoslavia (ICTY) are not international organizations, but (independent) *organs of an international organization*, in these cases the UN. See for example article 7 para. 1 and Article 92 of the UN Charter, or article 1 of the ICJ Statute: "The International Court of Justice established by the Charter of the UN as the *principal judicial organ* of the United Nations [...]" (my *italics*).<sup>39</sup> The UN Administrative Tribunal is also an organ of the UN, created by the General Assembly, and the ICTY and the ICTR are also UN organs, created by the Security Council under chapter VII of the UN Charter. The distinction between judicial and non-judicial bodies

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<sup>31</sup> For a more detailed analysis of the fundamental characteristics, see Schermers & Blokker 2003, para. 61-62.

<sup>32</sup> Klabbers 2009, p. 24. The EU is also mentioned in this regard, see Schermers & Blokker 2003, p. 25.

<sup>33</sup> The resolutions of the UN Security Council when acting under Chapter VII of the UN Charter, is an example of such an element.

<sup>34</sup> Schermers & Blokker 2003, para. 58-59; Klabbers 2009, p. 24-25.

<sup>35</sup> Schermers & Blokker 2003, para. 63; Klabbers 2009, p. 23-24.

<sup>36</sup> Schermers & Blokker 2003, para. 64; Sands & Klein 2009, p. 17.

<sup>37</sup> Klabbers 2009, p. 22.

<sup>38</sup> Amerasinghe 2005, p. 12.

<sup>39</sup> Art. 92 UN Charter, art. 1 ICJ Statute; But see also Amerasinghe 2005, p. 220.

may prove useful when dealing with privileges and immunities, especially when it comes to the level of security measures needed for the different tribunals. This relates directly to the Secure Haven project.<sup>40</sup>

*'Recht, vrede en veiligheid' and 'Legal Capital of the World'*

In Dutch politics and media, an additional distinction is made within the group of International Organizations. In accordance with the image the city of the Hague presents itself with, "the city of peace, justice and security",<sup>41</sup> it is often suggested that there is a specific group of "International Organizations for peace, justice and security" (*Organisaties van recht, vrede en veiligheid*). The distinction is mostly made to characterize and emphasize the position which is held by the Netherlands as the host state of such influential organizations. However, this distinction is without legal value and for most purposes without practical value as well. Within the framework of the Secure Haven project, this distinction is also mentioned. Nevertheless, at this point it is not considered necessary for the characteristics of this group to be defined within either WP 1110 or the project. A concept, or slogan if you will, which is related to the one discussed above is that of "The Hague, Legal Capital of the World". This concept is in my view more relevant to the Secure Haven project, and seems in first instance more widely known on the international level than the peace/justice/security-version of the city of the Hague itself. The reason why I consider it to be more relevant is that it provides for a more clear indication as to what kind of organizations are linked to the concept. It is confined to entities with a legal task, or object/purpose linked to (international) law.<sup>42</sup> Admittedly, this may still encompass a wide variety of entities, but object and purpose, and therefore arguably also competence and privileges and immunities, are more related than in the first concept discussed in this paragraph. Therefore, employing this slogan in order to create a relevant category of IO's may prove to be of some use to the Secure Haven project.

*Possible uses of the discussed matters of classification*

Of course, the different means of classification, as set out above, are only relevant when they can be used to analyze the different needs, rights and obligations concerned with the specific categories. If this would be possible, then classification can be a useful tool in designing the Secure Haven concept. If this is not possible at all, classification is not functional.

Using the classification of membership may be illustrative of the level of acceptance of some of the more controversial principles and interpretations of international (institutional) law. After all, there are different ways of thinking about international law and privileges and immunities in different parts of the world and different legal systems. However, this information is mostly interesting from an academic point of view and will not provide any practical classification for the Secure Haven project. Whether an IO is 'open' or 'closed' does not have any significant influence on the scope and extent of privileges and immunities, nor does it seem to have any other direct influence on the obligations of the host state towards those IO's. Therefore, no clear general conclusions can be drawn based on this means of classification with regard to facilitation and host state obligations.

The classification of IO's as intergovernmental or supranational on the other is definitely interesting from an institutional point of view, since a supranational IO can (on specified issues) issue binding regulations and create binding obligations for all its member states, including the host state. However, since the number of supranational organizations is extremely small, it is

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<sup>40</sup> Important to note is that although these judicial bodies are not IO's on itself, they are *part of* an IO so they should be seen as one. Similarly, when an IO has a seat in the Netherlands, but which is not its main office the part which is in the Netherlands should be treated as an IO simply because it is part of an IO. In that sense, the being of an IO should be seen as an undividable whole, which may be spread over different physical locations.

<sup>41</sup> See <<http://www.thehague.nl/default.asp?id=DG-JUSTICE>>. More recent statements of the municipality of the Hague confine themselves to the slogan "city of peace and justice", thereby dropping the security element. Although this can definitely be seen as a more accurate description of the work of the IO's in the region, it still provides for too broad a scope to serve as a real classification tool.

<sup>42</sup> Arguably, this would not include an IO like the OPCW, since its tasks are not in essence legal tasks (although its work may have significant legal consequences, as does the work of most IO's).

virtually impossible to generalize any rules applicable to those IO's. Thus, as a general categorization for the benefit of the Secure Haven project, this means of classification does not seem to be useful.

A lot more relevant seems to be the classification based on the subject matter. Firstly, it could be argued that subject matter of an IO is related to the level of external threats directed at the IO, which is relevant for the level of protection that needs to be provided by the host state. After all, it is not difficult to accept that the Universal Postal Union runs a lot less risk of for example being the target of terrorism than does the headquarters of Europol. This in effect tells us something about what a host should expect when it hosts an IO with a specific category of subject matter. So classification by means of subject matter could reveal important considerations regarding foreseeable threats and the effort level related to the duty to protect an IO. It could be argued that specific knowledge raises due diligence; an IO dealing with a politically sensitive subject matter (such as the ICC) raises knowledge of what types of risks to expect, and as a consequence this knowledge raises the effort level related to the due diligence principle, which have to be maintained by the national authorities.<sup>43</sup> Of course it will be difficult to devise clear categories of subject matter and link these to different host state obligations, because of the sheer endless variety in the IO's of the world. IO's whose subject matter lies in regulation and monitoring of technical issues, such as the UPU and ITU, but also the *Nederlandse Taalunie*, fall in a category for which the effort level of due diligence is significantly lower than that of IO's whose subject matter lies in fields like international justice or law enforcement.

The Dutch 'recognition' of a group of IO's concerned with '*Recht, vrede en veiligheid*' should mostly be seen as a political positioning of the Netherlands as host state. Clearly, the wording refers to the subject matter of the different entities. The combination of those three 'power words' do have a nice ring to them in the (inter)national political arena, but the category is simply too broad to form a separate workable category within the classification on the basis of subject matter. The group of IO's concerned with 'veiligheid' alone encompasses endless possible candidates. Since the issues related to (international) refugees are identified by the UNSC as a possible threat to the international peace, should the UNRWA be classified as a 'veiligheid'-IO? Possibly, but this classification only blurs the threat levels and effort levels which can reasonably be expected. As stated in the previous paragraph, the concept of 'The Hague Legal Capital' may provide for a category of more practical use.

Finally, it is interesting to note that a more general classification employed by the Dutch ministry of Foreign Affairs, that of the list of "International Organizations" that are hosted by the Netherlands, contains numerous entities which are not on itself independent International Organizations. Most of those entities are organs of international organizations, with differing degrees of independence, which are seated in the Netherlands as separate units but are still part of a larger International Organization which is seated in another host state. A clear example of such a 'mother-organization' is the UN, hosted by the USA, and its different organs such as the ICJ, ICTY and ICTR which are hosted by the Netherlands. This different legal setting cannot be overlooked, as it entails possible problematic issues as determining which organ/official has the authority to waive organizational immunities, where the competence rests to make binding legal agreements between the host state and the organ of the IO. Nevertheless, the list seems to serve mostly the goal of practical generalization without directly attaching specific legal implications thereto. Where necessary, this will be elaborated upon in the report.

### **1.5. Legal status of International Organizations**

International Organizations enjoy a special legal status under international law. The details of such a legal status, primarily illustrated by the *international legal personality* of an IO, is discussed below. But why do these entities, known as international organizations, enjoy such a special, principal legal status? The short answer to this question is that they need this to be able to function effectively, as well as independently from the (member) states involved in the Organization. As discussed, an International Organization is usually created by a group of

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<sup>43</sup> See further Part III of this Report.

states. Under international law, states are the principal actors and are completely equal and sovereign in their mutual relations. This principle of 'sovereign equality' is part of customary international law and is also enshrined in the UN Charter as one of the basic principles of the UN.<sup>44</sup> This principle of international law is also reflected in the axiom *par in parem non habet imperium*. Freely translated: no-one has power over one's equals.

When an IO is created, it is usually with the intention that that organization functions in the international arena as an effective actor on specific issues, such as environment, peace and security or human rights (the subject matter of the organization). For this, the IO has to be able to authoritatively interact with the principal actors in that international arena; the states. The same states which are its creators and/or members and which are often the parties which have the final votes within the relevant decision making organs of the IO. Depending on its object and purposes as envisaged by its creators, the IO must nevertheless still be in a position to deliberate with those states, make arrangements with them, instruct them, report on them and even reprimand them. For an IO to be able to effectively fulfil such functions, it needs a status which makes it 'stand out' on the international level and gives it a position in which it may interact with states in the ways described above. For this an IO needs to have legal standing on the international level, it must be able to conclude legally binding agreements and, most importantly, it must be able to operate independently and without direct influence of individual states. This is necessary to prevent the IO from becoming a mere policy tool for one or a few states or that its functioning is rendered ineffective by (member) states operating out of self-interest. This is a complex task and in IO's like the UN there is evidence to show that it is not always possible to prevent this.<sup>45</sup>

At the outset of this paragraph it is important to note that the legal status of IO's, although amounting to (theoretical) independence of states, falls short of raising an IO to the same level as states. An IO does not become some sort of 'superstate'.<sup>46</sup> It enjoys some of the legal powers and rights of states, but at this point the relationship between states and IO's is not characterized by (some form of) sovereign equality. The axiom of *par in parem non habet imperium* is not applicable since states definitely have power over IO's. The legal implications of such a special status are discussed below, in order to sketch the general framework within which IO's operate. Not all issues are dealt with *in extenso*, since almost all of these issues entail vast (academic) discussions on interpretation and extent. For the benefit of the Secure Haven project it should suffice to provide just the basics and some suggestions on further reading where necessary.

### 1.5.1. International legal personality

International legal personality is distinct from national legal personality (which is discussed in the next paragraph), although in certain aspects both are somewhat comparable, since they refer to the same concept. The concept of legal personality is always linked to a relevant legal system. If an entity possesses legal personality within a legal system then it enjoys rights, duties and powers within that system. The entity that enjoys legal personality is an independent *subject* of the legal system. All subjects of a legal system have powers, like the power to acquire property, to contract and to institute legal proceedings.

When an entity possesses personality within a *national* (or *domestic*) legal system, it possesses *national* legal personality, i.e. the capacity to have rights and obligations in that national legal system. A national legal system usually has different forms of entities which may possess national legal personality, depending on the applicable civil code of the legal system. In national systems, natural persons are subjects of the legal system; they possess legal personality. But also other entities such as corporations may possess legal personality, like for example the NV, the BV and the '*stichting*' within the Dutch system and the GmbH within the German system.

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<sup>44</sup> See Art 2(1) UN Charter; Warbrick in Evans 2006, p. 222-224; Brownlie 2008, p. 289-298; Shaw 2008, p. 6, 197, 214-215; See also ICJ *Nicaragua* 1986, para. 212.

<sup>45</sup> Look for example at the difficulties surrounding the UN Human Rights Council, or the stalemate in the Security Council during the Cold War.

<sup>46</sup> See ICJ *Reparations* 1949, p. 179.

With regard to *international* legal personality, the relevant legal system is the international legal system, the international community which is governed by international law. As with national legal personality, entities that possess international legal personality are independent legal subjects within the system of international law<sup>47</sup> and possess certain rights, powers and duties.<sup>48</sup> But contrary to national legal personality, there is no 'civil code' or any other codified set of general rules within international law where those rights, duties and powers are specified, nor are there any codified rules of general international law providing exactly which types of entities possess international legal personality.<sup>49</sup> During the 19<sup>th</sup> and early 20<sup>th</sup> centuries it was argued that the only subjects of international law, and thus the only entities which possessed international legal personality, were states. Nowadays it is generally recognized that international organizations can also possess international legal personality.<sup>50</sup> In 1949 this was explicitly confirmed by the International Court of Justice (ICJ) in its authoritative *Reparations for Injuries* Advisory Opinion.<sup>51</sup> In this Advisory Opinion the question whether the United Nations possessed international legal personality was answered in the affirmative.

#### *Attribution of international legal personality*

As Ahluwalia remarks, it seems evident that it has become customary to endow international organizations with juridical personality and legal capacity.<sup>52</sup> International legal personality may be explicitly attributed to an organization in its constitutional documents, but this is usually not the case.<sup>53</sup> So, legal personality can also be deduced by other means. There are two general methods to determine whether an International Organization possesses international legal personality. Firstly, the personality may be derived from the rights, duties and powers which are conferred upon the organization by its creators. This method is based on the paramount importance of the will of the states which were party to the international agreement constituting the Organization. The creators must have expressed in some way in the constitutional documents of the International Organization their will to vest the organization with legal personality under public international law.<sup>54</sup> Obviously this does not mean that explicit reference must be made to personality, since this is a method to deduce personality when it is not explicitly mentioned. With this method, one looks at the specific rights, duties and powers that are explicitly mentioned in the constitutional documents and consequently determines if international legal personality is necessary for the organization for effectively exercising those functions.<sup>55</sup> Support for this method of attributing legal personality can be found in the reasoning of the ICJ in the already mentioned *Reparations* Advisory Opinion:

*"the [UN] was intended to enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane. [...] It could not carry out the intentions of its founders if it was devoid of international personality".*<sup>56</sup>

The wording suggests not only that intention plays a paramount role, but also that the contents of international legal personality may differ per organization. This would suggest that legal personality is not a static concept with some basic rights duties and powers entailed by it, but that personality is a fluid concept which can be possessed in more or lesser extent by those entities that are subjects of international law.

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<sup>47</sup> Bekker 1994, p. 54-55; See for a definition on international legal subject McCorquodale in Evans 2006, p. 308-309.

<sup>48</sup> Amerasinghe 2005, p. 78. See also Schermers & Blokker 2003, para. 1562-1571, 1582-1590.

<sup>49</sup> Akande in Evans 2006, p. 281; Schermers & Blokker 2003, para. 1562.

<sup>50</sup> Schermers & Blokker 2003, para. 1563; Klabbers 2009, p. 46-47.

<sup>51</sup> ICJ *Reparations* 1949, p. 179.

<sup>52</sup> Ahluwalia 1964, p. 65.

<sup>53</sup> Amerasinghe 2005, p. 78; Schermers & Blokker 2003, para. 1564-1565.

<sup>54</sup> Amerasinghe 2005, p. 79; Schermers & Blokker 2003, para. 1565.

<sup>55</sup> Rama-Montaldo 1970, p. 111; Amerasinghe 2005, p. 79, 81.

<sup>56</sup> ICJ *Reparations* 1949, p. 179.

A different approach for determining whether international legal personality is enjoyed by a specific international entity, is to see if the entity fulfils certain objective criteria.<sup>57</sup> As Bekker summarizes them,<sup>58</sup> these criteria refer to the existence of international organs, which: (1) are not all subject to the authority of any other organized community (but only to that of the participating communities acting jointly through their representatives on such organs), which perform 'sovereign' and/or international acts in their own name; and (2) are not authorized by all their acts to assume obligations (merely) on behalf of the several participating communities.

If these criteria are met and can be derived from facts and practice of the entity, then that entity possesses international legal personality.<sup>59</sup> This method *prima facie* derogates the will of the creators to general international law: if an entity fulfills objective criteria under general international law, then it possesses international legal personality, regardless of the founders' intention.<sup>60</sup>

An important example of an international organization which clearly possesses international legal personality but to which it is not explicitly attributed, is the United Nations. The Charter of the UN does explicitly attribute "*legal capacity*", but this only refers to national legal personality, since the scope of this article is explicitly limited to "the territory of each of its members".<sup>61</sup> However, as indicated above, this lack of explicit attribution did not result in denying the UN its personality, as stated clearly by the ICJ in its authoritative *Reparations* Advisory Opinion.<sup>62</sup> In the same Advisory Opinion the Court made clear beyond doubt that it is possible for other entities than states, such as International Organizations, to possess international legal personality.<sup>63</sup> When dealing with the personality of the UN, the ICJ also spoke of its rights and duties:

*"the rights and duties of an entity such as the [UN] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."*<sup>64</sup>

This wording suggests that the ICJ supports the view that the question whether or not an organization possesses international legal personality primarily depends on the will of the creators. However, this wording does not necessarily exclude the other view that personality is based on the fulfillment of objective criteria, but the issue of specific rights and duties of an IO must still be derived from the principles and purposes of the IO. This reasoning is closely linked to the principle of functional necessity.<sup>65</sup> Arguably, evidence for both views can be found in the Opinion of the ICJ.<sup>66</sup>

It is submitted here that while the *consequences* of possessing international legal personality (*inter alia* the exact scope of rights, duties and powers) differ for each international organization, the *quality* of international legal personality (i.e. being a subject of international law) is in fact a static concept, which is either possessed or not.<sup>67</sup> When an international organization has the quality of international legal personality, this also entails certain basic rights and duties,

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<sup>57</sup> For more on these criteria, see F. Seyersted, 'International Personality of Intergovernmental Organizations. Do their capacities really depend upon their constitutions?', 4 IJIL (1964), at p. 1; F. Seyersted, 'International Personality of Intergovernmental Organizations valid vis-à-vis Non-Members?', 4 IJIL (1964), at p. 233; Bekker 1994, p. 54-57

<sup>58</sup> See Bekker 1994, p. 56.

<sup>59</sup> Seyersted, 'International Personality of Intergovernmental Organizations. Do their capacities really depend upon their constitutions?', 4 IJIL (1964), at p. 39-41, 53.

<sup>60</sup> Amerasinghe 2005, p. 79, but see also p.81-82; Schermers & Blokker 2003, para. 1565; Bekker 1994, p. 55-56; Klabbers 2009, p. 49.

<sup>61</sup> Art 104 UN Charter.

<sup>62</sup> ICJ *Reparations* 1949, p. 174.

<sup>63</sup> Schermers & Blokker 2003, para. 1563, 1566.

<sup>64</sup> ICJ *Reparations* 1949, p. 180.

<sup>65</sup> Bekker 1994, p. 39-51; Akande in Evans 2006, p. 281-282, 290.

<sup>66</sup> Akande in Evans 2006, p. 282.

<sup>67</sup> Bekker 1994, p. 54-55; although he links this conclusion to the 2nd method of interpretation.

regardless of and independent from additional rights and duties derived from for example the principle of functional necessity.<sup>68</sup>

In my opinion, this does not necessarily contradict the ICJ's words on the subject in the Reparations for Injuries Advisory Opinion, where mention is made of "a large amount of international personality".<sup>69</sup> This may easily be explained when one views the concept of international legal personality as it was well known until that time: as possessed by states only. It was confirmed earlier in this report that states are comparable, but not equal to states; no 'super-state' is created. It is in this light that the words of the ICJ should be read: IO's do not enjoy international legal personality *to the fullest extent*, as states do. However, they do enjoy a related form of this objective status. For IO's this is also an objective status, not a fluid concept, but when it is compared to what existed at that time, the personality of states themselves, it only makes up for a *large amount* of that status. In my view it should only be read as another way of confirming that the legal status of states and IO's are not identical, and that IO's will never achieve the 'prototype' personality that states possess; an important consideration in the judgment of the Court.<sup>70</sup>

It was already pointed out in earlier paragraphs what the lack of international legal personality entails. For example, entities which lack international legal personality are not capable of concluding a seat agreement with its host state, because international legal personality is a corollary for an entity to be able to conclude treaties (such as a seat agreement). This is why the HCNM of the OSCE in the Hague does not have a seat agreement governing its presence in the Netherlands: the OSCE does not possess international legal personality.<sup>71</sup>

It is clear that only entities with international legal personality may conclude seat agreements. This also entails that organs of IO's possessing international legal personality are not capable of concluding their own seat agreement. After all, they do not possess separate international legal personality but enjoy the benefits as part of a bigger whole. Therefore the seat agreements with ICTY and ICTR were concluded with the UN, as the bigger whole, in stead of with the two entities themselves. The same applies to the situation of the Special Tribunal for Lebanon (STL), which was created under Chapter VII of the UN Charter following an agreement between the UN and the government of Lebanon.<sup>72</sup> The seat agreement of the STL was therefore concluded between the UN and the Netherlands.

An international tribunal which is the exception to the rule is the SCSL. The main seat of the SCSL is in Freetown, Sierra Leone. However, especially for the main defendant of the SCSL, Charles Taylor, an additional seat was created in the Netherlands. The SCSL was created by an international agreement between the UN and the government of Sierra Leone and does not form an organ of the UN in any way. So although it is affiliated to the UN, the SCSL seems a separate entity. In the agreement creating the SCSL there is no reference to any international

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<sup>68</sup> If one looks at the new treaty for the Benelux, it becomes obvious that international legal personality can indeed be modified or limited (or at least it is done in practice). In article 28 of the Benelux-treaty it is determined that the Benelux has international legal personality "[...] *met het oog op de verlening van voorrechten en immuniteiten*", or, in the equally original French text "[...] *aux fins de l'octroi de privilèges et immunités*". - art. 28 Benelux-verdrag, 17/06/2008 (Trb. 2008, nr. 135). Clearly it was the intention of the drafters to limit the international legal personality only to a legal basis for privileges and immunities, omitting thereby other powers such as treaty-making powers etc. It is suggested that this solution is a settlement of the discussion between the parties whether or not the Benelux possesses international legal personality and, more importantly, whether it needs it.

<sup>69</sup> ICJ *Reparations* 1949, p. 174.

<sup>70</sup> ICJ *Reparations* 1949, p. 179; see also Amerasinghe 2005, p. 92; Schermers & Blokker 2003, para. 1555, 1566.

<sup>71</sup> This specific problem was (partially) solved by the Netherlands through unilaterally enacting national legislation to create the legal basis which would otherwise be created by a seat agreement: Wet HCNM, 31/10/2002 (Stb 2002, nr. 580).

<sup>72</sup> It must be pointed out that the STL is not an organ of the UN as the ICTY is.

legal personality. Nevertheless, the seat agreements for both Sierra Leone and the Netherlands were concluded directly with the SCSL.<sup>73</sup>

### 1.5.2. National legal personality

National legal personality means legal personality on the level of national law, thus within the national legal system of a (member) state. It is comparable to the concept of legal personality of private organizations under national law, such as the Dutch forms BV and NV (*besloten vennootschap* and *naamloze vennootschap*), the German GmbH (*Gesellschaft mit beschränkter Haftung*), and the English JSC (*Joint Stock Company*). However, when an International Organization possesses national legal personality it does not actually become a legal person according to national law (contrary to the mentioned forms of private organizations), it is merely recognized that IO's have the legal capabilities that national legal persons possess.<sup>74</sup>

It is generally accepted that an IO that has national legal personality possesses the rights necessary for its functioning within the national legal order.<sup>75</sup> Numerous constitutional documents of IO's provide for national legal personality of the organization in all its member states. There are generally two ways in which national legal personality is attributed: the functionality approach and the summing up of specific capacities of the IO in a national law system.<sup>76</sup> The former can be found in for example article 104 of the UN Charter:

=====  
*Article 104*  
The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.”  
=====

The latter provision can be found in most seat agreements, as for example in article III of seat agreement between the UN and the Netherlands concerning the ICTY:

=====  
*Article III – Juridical Personality of the Tribunal (ICTY – NL seat agreement 1994)*  
1. The Tribunal shall possess in the host country full juridical personality. This shall, in particular, include the capacity:  
a) to contract;  
b) to acquire and dispose of movable and immovable property;  
c) to institute legal proceedings  
2. [...]  
=====

If it is established that an IO has international legal personality, then national legal personality can be deduced from that.<sup>77</sup> However international legal personality cannot automatically be deduced from national legal personality.

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<sup>73</sup> SCSL – NL seat agreement 2006; SCSL – Sierra Leone seat agreement, 21/10/2003 (at <[www.scsl.org/documents](http://www.scsl.org/documents)>).

<sup>74</sup> For extensive discussions on the scope and extent of national legal personality of international organizations, see Amerasinghe 2005, p. 69-77; Seidl-Hohenveldern in Simma 2002, p. 1302 *et seq.*; Muller 1995, p. 88-116; Bekker 1994, p. 61-63; Ahluwalia 1964, p. 59-64; Jenks on personality in 22 BYIL (1945), p. 267-271.

<sup>75</sup> Muller 1995, p. 92.

<sup>76</sup> See for an analysis of the two methods Muller 1995, p. 88 *et seq.*

<sup>77</sup> Muller 1995, p. 91; Bekker 1994, p. 62-63.

### 1.5.3. Capacity and competence; rights and duties

This paragraph deals with two aspects of the powers of an International Organization. First the issue of capacity is discussed: the capacity of an IO is what it principally is legally capable of doing. Second the competence of an IO is discussed: the competence of an IO is what it is legally allowed to do (or: competent to do) according to relevant legal instruments. For example, an IO can have the *capacity* to contract, but it may only have the *competence* to enter into contracts necessary for the effective exercise of its functions, in order to realize its purposes. The legal concept of *capacity* must thus be understood as what an entity is potentially entitled to do.<sup>78</sup> The legal concept of *competence* must then be understood as what a specific organization, being a subject of law endowed with the potential capacity to act, is *specifically empowered* to do.<sup>79</sup> While the Secure Haven project is principally not dealing with the range of powers of international organizations, this is an important and complex issue in international institutional law, so some clarification on the subject is in order. Because of the vastness of the (academic) debates on these and related issues, only a very brief overview will be provided.

As stated, international legal personality as a legal concept does not necessarily provide International Organizations with the full range of rights, duties and powers that is possessed by states. Instead, International Organizations enjoy, because of their international personality, only a basic set of capacities. These capacities are supplemented by specific capacities, rights and duties which it enjoys because of the purposes and functions that are bestowed upon it.

When an IO possesses international legal personality, it is endowed by virtue of that legal personality with a number of basic, or *inherent*, capacities. This statement is not entirely uncontroversial, but there is evidence for it. As the ICJ stated in the *Reparations* Advisory Opinion: “if the organization is recognized as having that [international legal] personality, it is an entity capable of availing itself of obligations incumbent upon its members.”<sup>80</sup> This suggests some support for the concept of inherent capacities.

Amongst these inherent capacities is mentioned the capacity to bring international claims for the purpose of maintaining its own rights, also known as international procedural capacity.<sup>81</sup> Arguably an international organization with international legal personality also has the inherent capacity to conclude treaties.<sup>82</sup> Although the question whether a particular type of treaty is within the competence of any particular organization depends on its explicit or implied powers, it is submitted here that every organization at least has the competence (where not expressly denied) to enter into certain types of treaties. These include host State agreements and treaties for the purpose of settling claims by and against the organization.<sup>83</sup> A third inherent capacity would be the responsibility, or liability, for the non-fulfilment of its legal obligations.<sup>84</sup> This entails that the liability of the organization should be seen separate from the liability of its member states.

Additional support for the concept of inherent capacities can be found in the 1990 ILC Report to the UNGA, in which it is suggested that from international legal personality of international organizations, legal powers derive ‘such as the capacity to conclude treaties, capacity to file an international claim and the active and passive right of legation’.<sup>85</sup>

In addition to the inherent capacities, an International Organization may possess specific capacities (or powers) which either flow from its constitutional instrument or are implied. Logically, IO’s enjoy the rights and duties provided for in their constitutional documents. But in addition to that, International Organizations may be considered to possess those powers, rights and duties which are necessarily implied by the functions and purposes as bestowed upon the

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<sup>78</sup> Bekker 1994, p. 63.

<sup>79</sup> Bekker 1994, p. 75.

<sup>80</sup> ICJ *Reparations* 1949, p. 178.

<sup>81</sup> Bekker 1994, p. 63.

<sup>82</sup> Bekker 1994, p. 64; But see Muller 1995, p. 83.

<sup>83</sup> ICJ *Reparations* 1949, p. 181.

<sup>84</sup> Akande in Evans 2006, p. 283.

<sup>85</sup> ILC Report on its 42nd session, July 1990, para. 441.

organization by its creators, and as developed in the practice of the organization. This is known as the doctrine of the implied powers.<sup>86</sup> Support for this doctrine may be found in the earlier mentioned *Reparations* Advisory Opinion of the ICJ, where it stated that

*“Under international law, the Organization must be deemed to have those powers which, though not expressly provided for in the charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”*<sup>87</sup>

Since every international organization is different in its functions and purposes, and each organization has its own constitutional document, there are considerable differences between every international organization regarding its rights, duties and powers. A clear example is the extensive set of powers which the UN has with regard to the maintenance of the international peace and security, based on Chapter VII of the Charter.

As referred to above, capacities and competences have specific consequences for the relationship between the IO and the host state. For example if the IO lacks the capacity to conclude a seat agreement with the host state, such an agreement cannot be concluded to regulate the relationship between the IO and the host state.<sup>88</sup>

#### **1.6. Privileges and Immunities and the other IGO's in Secure Haven**

In the report of WP 1400 (economic impacts) and in the final report of the Secure Haven project, reference is also made to another category of entities: the 'Internationaal Georiënteerde Organisaties' (IGO's).<sup>89</sup> This is a wider category than that of "International Organizations". The category of IGO's comprises of 4 subgroups: IO's, diplomatic missions, NGO's and knowledge institutions concerned with international affairs. From these four subgroups, only the first two are entitled to any international privileges and immunities, and are governed by rules of public international law. Of these two, it is the IO and its privileges and immunities that receives primary attention in this report. It is not argued, or proposed, that NGO's or knowledge institutions (should) enjoy some form of international privileges and immunities. For further reading on the definition and subsequent use of the group "IGO's", which is primarily used for assessing the economic impacts of Secure Haven in The Hague, see WP 1400.

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<sup>86</sup> See Amerasinghe 2005, p. 46-49.

<sup>87</sup> ICJ *Reparations* 1949, p. 169, see also p. 182. Another instance in which the ICJ dealt with the doctrine of implied powers was in the ICJ *Effect of Awards* 1954 (p. 57), where it stated that the UN had the implied power to establish an administrative tribunal, because this was 'essential to ensure the efficient working of the Secretariat' and that this capacity 'arises by necessary intendment out of the Charter'; see also Amerasinghe 2005, p. 47.

<sup>88</sup> For this reason there is no seat agreement concluded between the Netherlands and the HCNM (part of the OSCE). Instead, the Netherlands (unilaterally) adopted a national law to create the necessary legal basis for privileges and immunities, the 'HCNM-wet'.

<sup>89</sup> Internationally oriented organizations. The abbreviation IGO may cause some confusion as it is sometimes used to indicate Intergovernmental Organizations which are IO's in the true legal meaning.

## PART I – THE LEGAL SYSTEMS OF PRIVILEGES AND IMMUNITIES

In the previous chapters, a bird eyes' view was given of the basic issues of international institutional law. It is beyond doubt that the strongest link between the subject matter of WP 1110 and the Secure Haven project lies in the interpretation and implementation of the privileges and immunities as enjoyed by International Organizations under international law. Therefore, Part II of this report is devoted to the analysis of those privileges and immunities, with reference to diplomatic privileges where necessary. In subsequent parts, this analysis will be employed in order to devise international legal solutions and recommendations for the Secure Haven concept.

### 2. International Privileges and Immunities; introduction to the systems

There are multiple categories of privileges and immunities (P&I) in international law. The two main categories are state P&I and organizational P&I. The former can be divided into three main issues: the privileges and immunities of a state itself (for its acts, its own property etc.), the privileges and immunities that officials of the state enjoy due to their position, and the privileges and immunities granted to diplomatic and consular missions of the State. This report will primarily deal with the third issue, since these are the most important for Secure Haven.

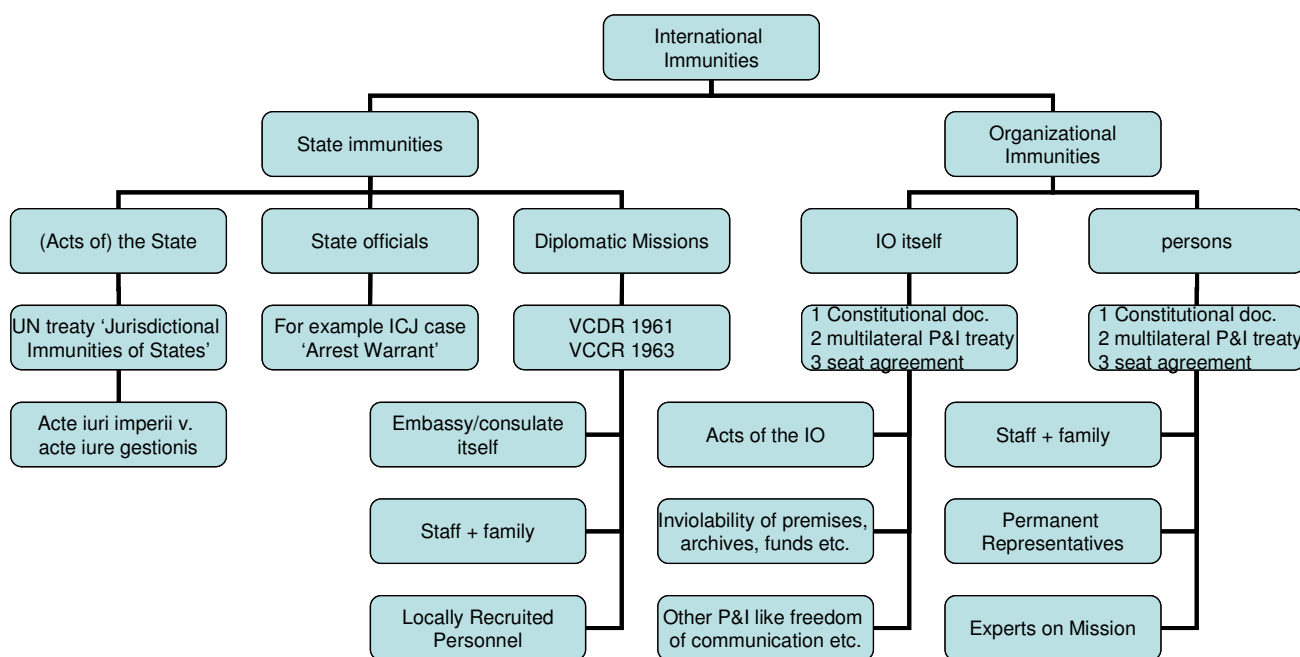


Figure 2: diagram on categories of privileges and immunities

Organizational immunities may be divided into two separate issues: the immunities which are enjoyed by the IO itself and the immunities which are enjoyed by persons affiliated in specific ways to the Organization.<sup>90</sup> The following paragraphs will deal primarily with the immunities granted to diplomatic missions itself and the immunities granted to International Organizations itself, since individuals enjoying P&I are in principle outside the scope of the Secure Haven project. Although there are significant differences between diplomatic and organizational

<sup>90</sup> Note that in literature different labels are used for the immunities of International Organizations. Often when spoken of 'international immunities', only the organizational immunities are meant. However it is my view that this label fails to provide the needed clarity as to what is meant by it. Therefore, in this report, the term 'organizational immunities' will be employed.

immunities,<sup>91</sup> there are also numerous commonalities between the two regimes. These commonalities are partly based on the historical development of privileges and immunities. Therefore the development of P&I is discussed later in this Part of the report, in an attempt to provide insight into the reasons why the currently existing privileges and immunities were created and what they entail.

In general it can be said that immunities and privileges play a paramount role in regulating the conduct between states or between (host) states and international organizations respectively. As will be explained below, the central legal foundation for granting diplomatic immunities can be identified as sovereign equality of states, which also forms the legal basis for state immunity. This flows from the direct connection between diplomatic immunities and the immunities of the State itself (and thus the legal status of the state itself). Concepts like protocol and mutual respect and precedence, which are important pillars of diplomatic discourse, are also based on sovereign equality. But the most important concept, when it comes to the practical interpretation and implementation of diplomatic privileges and immunities, is the necessity of an effective and independent functioning of a diplomatic mission. That latter concept, which will later be introduced as the concept of 'functional necessity', is also the central legal foundation for organizational privileges and immunities. In the latter system, this concept of functional necessity assumes the role of fundamental principle, especially since sovereign equality does not have a fundamental role in granting organizational immunities. An IO needs to be able to effectively exercise the functions which are attributed to it, in order to realise its purposes. But unlike a state, concepts like sovereignty and equality are not applicable in the conduct between states and International Organizations. What consequences flow from this fundamental difference in legal nature is discussed in later chapters.

For sake of clarity it is important to briefly sketch the legal instruments which form the basis of the two systems. For diplomatic immunities, this is very clear, since there are two multilateral treaties dealing with the system, which are universally accepted and adhered to. These two treaties, the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention of Consular Relations of 1963, deal with the privileges and immunities of embassies and Consulates(-General) respectively. Of these two, the VCDR 1961 is the most relevant for this research. Because of their universality, there is generally one legal instrument, and thus one legal regime, which deals with the P&I of all diplomatic missions of all states worldwide.

The system of organizational immunities lacks this singularity: there is no general (or 'universal') international instrument governing the whole body of organizational privileges and immunities. There are three different categories of legal instruments governing the P&I of a specific IO: the constitutional document/treaty, a multilateral treaty concluded between the member states, and finally the seat agreement concluded between the IO and its host state. All three categories are generally drawn up for the purpose of facilitating one single IO, and for every IO other (different) constitutional documents, multilateral treaties and seat agreements are drawn up. Consequently, the contents of the P&I of IO's differ considerable from each other. Even if a host state tends to use one single model for all seat agreements it concludes, the contents of those seat agreements still strongly depend on the contents of the other two instruments. In addition, differences in all three instruments occur frequently due to the changing composition of the teams of agents of the member (and host) states negotiating the instruments, as well as differing legal views, political circumstances and negotiation skills. Thus, the benefit of a singular and universally accepted legal regime is absent in the system of organizational immunities.

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<sup>91</sup> Unless otherwise provided, 'diplomatic immunities' and 'organizational immunities' refer to specific issues of those two categories, being the immunities granted to a diplomatic mission itself and the immunities granted to an International Organization itself.

### 3. Diplomatic immunities

#### 3.1. Development of diplomatic immunities

The system of diplomatic privileges and immunities originates as a necessary instrument for the development of 'international politics'. As early as the Roman era, sovereigns and rulers felt the need to establish permanent representation with other sovereign powers, regardless of war or peace, ally or enemy, in order to be able to negotiate and discuss important matters effectively and thus expand their influence. So they sent envoys which functioned as diplomatic representation of the sending sovereign. To prevent that the treatment and safety of their envoys changed whenever the state of affairs within international politics changed, agreements were made regarding the status of these envoys. For example, it was agreed that these envoys, as full representatives of their sovereign, were entitled to the amount of respect and preferential treatment as any sovereign would be entitled to. Also it was agreed that these envoys were inviolable with regard to the receiving sovereign; the receiving sovereign had no jurisdiction over them and thus for him they were 'untouchable', regardless of the relation between the two sovereigns. In 1758 the rules on diplomatic immunities were described by Vattel in *Le droit des Gens*, but up until that point the rules had already developed so extensively as uncodified customary law that in the following two centuries the body of law remained generally constant.<sup>92</sup> Numerous attempts for multilateral codification were made, for example by the Institute of International Law and Harvard Law School,<sup>93</sup> but the most thorough one was done by the ILC in dialogue with the 6<sup>th</sup> Committee of the UN General Assembly and national governments. This led to the conference where the central treaty for diplomatic privileges and immunities was drafted: in 1961 the Vienna Convention on Diplomatic Relations was concluded. This convention however did not only codify existing rules, but also contained some significant progressive developments of previous customary international law.<sup>94</sup> Through longstanding practice, customary rules of diplomatic law emerged. This customary international law has of course developed and still exists alongside the VCDR 1961 up until this day.<sup>95</sup> There have been many changes as to the scope and extent of diplomatic privileges and immunities, and in different parts of the world there are still different views on the interpretation of certain privileges and immunities, like for example the scope of inviolability of the diplomatic bag. Nevertheless, the body of diplomatic privileges and immunities as a whole is universally accepted and very well-adhered to.<sup>96</sup>

#### 3.2. Legal basis of diplomatic immunities

In general, three theories have been employed to explain why diplomatic immunities are granted. These are the extritoriality theory, the representational theory and the theory of functional necessity.<sup>97</sup> The first refers to the legal fiction that the premises of diplomatic missions are considered to be official territory of the sending state. This fiction has been discarded as a theory for a long time,<sup>98</sup> although it still is subject to widespread popular belief.<sup>99</sup> In consequence, under contemporary international law embassy premises are not considered as the territory of the sending state.

The representational theory is based on the idea that a diplomatic mission personifies the sending state. As such, the receiving state should treat the diplomatic mission in the same way as it would the sending state. This entails that the relation between receiving state and diplomatic mission is governed by the principle of sovereign equality, a rule of customary

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<sup>92</sup> Denza 2008, p. 2.

<sup>93</sup> Denza 2008, p. 3.

<sup>94</sup> Denza 2008, p. 3-6; Brownlie 2008, p. 349-350.

<sup>95</sup> Denza 2008, p. 15; Brownlie 2008, p. 350.

<sup>96</sup> Denza 2008, p. 1; Brownlie 2008, p. 349-350.

<sup>97</sup> Denza 2008, p. 13.

<sup>98</sup> Denza 2008, p. 14, 136-137; Ahluwalia 1964, p. 73; On the term extritoriality in some seat agreements concluded with Switzerland, see Duffar 1982, p. 55; Muller 1995, p. 132; Brandon 1952, p. 100; Perrenoud 1949, p. 132-135.

<sup>99</sup> Not only large parts of the public is erroneously convinced that embassy premises are 'another country', sometimes diplomats and other state officials, of several nationalities, are inclined to believe that same discarded fiction.

international law which is codified in the UN Charter.<sup>100</sup> This sovereignty and equality in the relation between states may also be described by the axiom *par in parem non habet imperium*, which when freely translated reads as 'no-one has power over one's equals'. Such a relationship entails refraining from exercising your jurisdiction over the other party, refraining from levying taxes from the other party as a subordinate and extending that other party respect as an equal. Issues like protocol and precedence, which are widely employed in diplomatic relations, also have their origin in the representational theory. It is submitted here that this principle can be seen as the central legal foundation for granting diplomatic immunities. However, when it comes to the practical interpretation and application, the third mentioned theory, that of functional necessity, is of paramount importance. As explained, the development of the diplomatic privileges and immunities was fuelled by the practical necessity to have diplomatic relations. These diplomatic relations could only be maintained when the diplomatic missions were enabled to effectively fulfil their functions. The principle of functional necessity justifies privileges and immunities as being necessary to enable the mission to perform its functions in the receiving state.<sup>101</sup> This is a relatively new, but pragmatic approach to the system of diplomatic privileges and immunities.

The Preamble of the Vienna Convention on Diplomatic Relations 1961 reads as follows.<sup>102</sup>

=====  
*The States Parties to the present Convention,  
 Recalling that peoples of all nations from ancient times have recognized the status of  
 diplomatic agents,  
 Having in mind the purposes and principles of the Charter of the United Nations  
 concerning the sovereign equality of States, [...]  
 Realizing that the purpose of such privileges and immunities is not to benefit individuals  
 but to ensure the efficient performance of the functions of diplomatic missions as  
 representing States,[...]*  
 =====

This preamble can be seen as evidence that both the representational theory and the functional necessity theory have been employed when drafting the VCDR 1961: it refers firstly to the sovereign equality of the states and secondly to the purpose of ensuring efficient performance of functions.

### 3.3. Legal sources of diplomatic immunities

The rules of international law which provide for diplomatic privileges and immunities are to a large extent codified in the Vienna Convention on Diplomatic Relations of 1961.<sup>103</sup> At present, this treaty is ratified by over 180 states<sup>104</sup> and thus almost universally accepted.<sup>105</sup> The ICJ has stated in the *Case concerning United States Diplomatic and Consular Staff in Tehran* of 1980 that key provisions of the treaty, which can be considered as representative of the principles of law which are embodied in the treaty, are part of general international law, that is to say of customary character.<sup>106</sup> Two years after the conclusion of the VCDR, codification of the law on consular relations took form in the Vienna Convention on Consular Relations of 1963 (VCCR). Both treaties are at present the primary instruments laying down diplomatic and consular privileges and immunities. These instruments encompass more than just privileges and immunities, and most provisions regarding privileges and immunities deal with the privileged persons: the staff members of the diplomatic and consular missions.

<sup>100</sup> See Art 2(1) UN Charter; Warbrick in Evans 2006, p. 222-224; Brownlie 2008, p. 289-298; Shaw 2008, p. 6, 197, 214-215; See also ICJ *Nicaragua* 1986, para. 212.

<sup>101</sup> ILC Yearbook 1958 Vol II p. 95; Denza 2008, p. 14.

<sup>102</sup> Preamble, VCDR 1961.

<sup>103</sup> Brownlie 2008, p. 349.

<sup>104</sup> Brownlie 2008, p. 350.

<sup>105</sup> Denza 2008, p. 1; Brownlie 2008, p. 350.

<sup>106</sup> ICJ *Tehran hostages* 1980, para. 62; see also Brownlie 2008, p. 349-350.

### 3.4. The success factor of the system: reciprocity

The factor that ensures the success of this system was the 'reciprocity' inherent to it.<sup>107</sup> This may be explained by a simple example: generally, when there was a diplomatic envoy of sovereign A on the territory of sovereign B, there also was an envoy of sovereign B on the territory of sovereign A. Since both sovereigns had a genuine interest in (1) maintaining functional diplomatic relations, and (2) ensuring that its diplomatic envoy was not targeted by the other sovereign, both sovereigns would make sure that the diplomatic envoy would not be hindered or harmed in any way. For if a sovereign would violate the immunities of an envoy, it would immediately expose its own envoys to (the risks of) the same treatment. Of course, this 'retaliation' on the basis of reciprocity does not directly amount to "an eye for an eye", since violence against and punishment of diplomats for acts committed by their sending sovereign was specifically forbidden by the rules on diplomatic representation. Nevertheless, in some ways the principle of reciprocity can still be viewed as every state having some of the other state's subjects (diplomats) held hostage, to insure that its own subjects (diplomats) are treated well.<sup>108</sup> Formulated positively, every state had something to gain with respecting the axiom *par in parem non habet imperium*. The functioning of the principle of reciprocity can be seen on a daily basis in the practice of diplomatic relations. The argument of reciprocity is always present when the treatment of a state's diplomats is discussed and it is frequently employed as a policy instrument by a receiving state when it intends to influence the treatment which its own diplomats receive. Especially with regard to increasing positive privileges like tax exemptions, the principle of reciprocity plays a paramount role. The existence of the principle of reciprocity, and its direct application, make the system of diplomatic privileges and immunities one of the examples of a body of international law which is almost always strictly adhered to.<sup>109</sup>

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<sup>107</sup> Denza 2008, p. 2.

<sup>108</sup> Denza 2008, p. 2.

<sup>109</sup> Denza 2008, p. 1-2.

## 4. Organizational Immunities

### 4.1. Development of organizational immunities

The system of organizational immunities is directly and indirectly influenced by the system of diplomatic privileges and immunities. Indirectly, because the scope and contents of certain organizational immunities are heavily influenced by, and sometimes exactly copied from, the corresponding diplomatic immunities. Directly, because it has become widespread practice to incorporate into international instruments dealing with organizational immunities provisions which declare some diplomatic immunities directly applicable within the system of organizational immunities. This practice started at the early creation of organizational immunities and lasts up to the present day. The first privileges and immunities that were enjoyed by entities and officials which were not (members of) a diplomatic mission (in the end of the 19<sup>th</sup> century) were in fact *diplomatic* immunities. The treaties by which those entities were created refer to the granting of 'privileges and immunities of diplomatic agents' (or largely similar wording) to the senior staff of the entity.<sup>110</sup> This was also the case with for example the judges of the Permanent Court of Arbitration in the Netherlands.<sup>111</sup> Immunities such as 'inviolability' were also granted to non-state entities, such as for example the International Congo Commission in 1885.<sup>112</sup> The fact that such a general term was used without specification may very well suggest that its meaning was considered sufficiently clear from the international law and practice of that time. Since organizational immunities were only very new at that time, it can be assumed that this concept was filled in completely by the related concept of diplomatic inviolability.<sup>113</sup> The League of Nations, forerunner of the UN, was accorded privileges and immunities which were directly referred to as 'diplomatic privileges and immunities', and the buildings and property was stated to be 'inviolable'.<sup>114</sup> Compare also the Permanent Court of International Justice, which was granted diplomatic privileges and immunities in its statute.<sup>115</sup>

Gradually, states came to realise that there were fundamental differences between diplomatic missions and IO's which had their effect in the application of P&I. Nevertheless, the idea of granting organizational privileges and immunities to IO's is rather exceptional until the 1940s.<sup>116</sup> During and after the Second World War the law on organizational immunities started to develop. It became almost standard practice to grant newly created international organizations with some degree of privileges and immunities in their constitutional instruments,<sup>117</sup> and multilateral treaties which dealt specifically with the subject of organizational immunities were concluded.<sup>118</sup> Of specific interest are the two UN conventions: the Convention on the Privileges and Immunities of the UN (1946) and the Convention on the Privileges and Immunities of the Specialized Agencies (1947). Both conventions provide for numerous provisions on immunities and privileges ranging from inviolability of premises and funds to the personal immunities of UN officials, representatives of the members and 'experts on mission'.<sup>119</sup> These constitutional instruments and multilateral treaties were supplemented by different seat agreements between specific organizations and their host states.<sup>120</sup> Important, authoritative seat agreements are for example the seat agreement between the USA and the UN, concerning the general headquarters of the organization,<sup>121</sup> and the seat agreement of the ICTY, concluded with the Netherlands. Both those seat agreements are supplemental to the UN P&I Convention

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<sup>110</sup> Kunz 1947, p. 828-829.

<sup>111</sup> Article 46, 1907 PCA Convention (18/10/1907); Kunz 1947, p. 829.

<sup>112</sup> Kunz 1947, p. 829.

<sup>113</sup> As stated, diplomatic law had known a strong and long development which lead to a vast body of customary law. However, at that time there was also no comprehensive codified set of rules on diplomatic immunities and privileges.

<sup>114</sup> Art. 7(4) and 7(5), Covenant of the League of Nations; Jenks 1961, p. 1.

<sup>115</sup> Art. 19 PCIJ Statute; Kunz 1947, p. 832-> detailed regulation by letter of Registrar to Dutch MFA 22/05/1928.

<sup>116</sup> Jenks 1961, p. 1; Kunz 1947, p. 829-830.

<sup>117</sup> See for the obvious example Arts. 104 and 105 UN Charter; see further Jenks 1961, p. 4-5.

<sup>118</sup> Jenks 1961, p. 2-3, 5-7.

<sup>119</sup> See for example UN P&I Convention, art. 2, 4, 5 and 6.

<sup>120</sup> Jenks 1961, p. 8-9.

<sup>121</sup> UN – USA Headquarters Agreement 1947, 11 UNTS 12.

mentioned earlier. Another relevant example, for which there also exists a multilateral treaty, is the seat agreement between the ICC and the Netherlands.<sup>122</sup> These headquarter agreements are very interesting with regard to the development of organizational immunities over time, since they tend to specify issues of the 'general' law of organizational immunities which were previously unclear or which are especially relevant for that specific (type of) international organization.

In my view, the main reason for the interconnection between diplomatic P&I and the organizational P&I is that of practical convenience. This acknowledges the fact that the connection between the two systems has been initialized together with the creation of organizational immunities and has developed over time, side by side as well as interconnected. At the time of creation of organizational immunities, the system of diplomatic immunities already existed for a considerable amount of time. Since there already was a functioning system which regulated immunities on the level of international cooperation, it was only logical that for devising organizational immunities, connection was sought with that older and more mature system. But as seen, the connection between the two systems has been reaffirmed over time. For example, even in the most recent treaties and host agreements, it is common use to grant the most senior staff members privileges and immunities as those granted to heads of diplomatic missions or diplomatic staff on the basis of the Vienna Convention on Diplomatic Relations 1961.<sup>123</sup> This means that even after the creation of some of the largest international organizations of our times (like the UN in 1945, its 'family' of related organizations and NATO in 1949) the treaty governing diplomatic immunities, which was of course not drafted with the purpose of facilitating organizational immunities, was declared directly applicable to the system of organizational immunities.<sup>124</sup>

#### **4.2. Legal basis of organizational immunities**

As explained earlier, diplomatic immunities have clear foundations in international law. Of course, so do organizational immunities. However these are not the same, since those of diplomatic immunities are for an important part inherent to the relations between states; *par in parem non habet imperium*.<sup>125</sup> This principle doesn't apply to the relationship between an international organization and its host state, since IO's are not equal to states. Therefore, the representational theory cannot directly be applied to international organizations. Likewise, the theory of extritoriality<sup>126</sup> is not applicable: besides the fact that also in relation to diplomatic missions the theory is seen as obsolete, for IO's it lacks relevance simply because they don't have territorial rights like states do.<sup>127</sup> In this paragraph the legal basis for organizational immunities will be discussed. This is necessary in order to be able to assess the scope and extent of organizational immunities and thus to determine their effect on the Secure Haven concept.

##### **4.2.1. Functional necessity; effective functioning**

The principle which is most referred to when explaining organizational immunities, in legal instruments as well as in doctrine, is the principle of 'functional necessity'. It is considered to be the main legal basis for organizational immunities, and in this paragraph this principle will be analyzed.

Loosely explained, functional necessity entails that an IO enjoys all privileges and immunities which it *needs* in order to be able to *function effectively*. Functioning effectively is usually

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<sup>122</sup> ICC – NL Seat Agreement; Agreement on P&I of the ICC, 2002.

<sup>123</sup> See for example art. 17 ICC – NL seat agreement 2007; art. 17 STL – NL seat agreement 2007; art. 14 ICTY – NL seat agreement 1994.

<sup>124</sup> Sands & Klein also refer to diplomatic privileges and immunities as analogous system of law and as the basis for the development of organizational privileges and immunities: Sands & Klein 2009, p. 490; See also judge Weeramantry in his Separate Opinion to the Advisory Opinion of the ICJ *Cumaraswamy* 1999.

<sup>125</sup> Freely translated: no-one has power over one's equals.

<sup>126</sup> On the term extritoriality in some seat agreements concluded with Switzerland, see Duffar 1982, p. 55; Muller 1995, p. 132; Brandon 1952, p. 100; Perrenoud 1949, p. 135.

<sup>127</sup> Klabbers 2009, p. 132; see also Denza 2008, p. 14, 136-137.

construed as to be able to fulfil its purposes.<sup>128</sup> This principle must be understood to entail that an IO has the privileges and immunities that it needs for its work. Nothing less, but also nothing more than it needs. As Bekker puts it: “[an IO] shall be entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfilment of its purposes.”<sup>129</sup> Because every IO is unique regarding subject matter, powers and institutional structure, the principle of functional necessity introduces an element of diversity and flexibility into the system of organizational immunities. In other words, the needs of every IO are different, so the privileges and immunities it enjoys, as well as the extent thereof, may also differ for every IO.

The principle of functional necessity as a basis for organizational immunities seems to be widely accepted.<sup>130</sup> In important studies on the subject of organizational privileges and immunities, the principle is also referred to often, although it is interpreted and implemented in different ways.<sup>131</sup> An important indication that the principle takes up a central place in the system of organizational immunities, is its incorporation in article 105 of the UN Charter. The privileges and immunities which the UN enjoys are based on this provision, and it reads as follows:

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*Article 105*

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

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Clearly, the first two paragraphs incorporate the principle of functional necessity as the legal basis for the UN’s privileges and immunities.<sup>132</sup> Interesting to note is that in paragraph 2 of the provision the ability to independently exercise its functions is explicitly mentioned as the purpose of those privileges and immunities.<sup>133</sup> In accordance with article 105 UN Charter, the seat agreement between the USA and the UN determines in Section 27 that it shall be construed in the light of the primary purpose of that agreement, which is to enable the UN to “fully and efficiently, to discharge its responsibilities and fulfil its purposes”.<sup>134</sup> The central role of the principle of functional necessity has also been stressed by the ICJ, in its Advisory Opinion on *Reparations for Injuries Suffered in the service of the UN*.<sup>135</sup> Here the ICJ stated that by entrusting the UN with certain functions, the states that created the UN have also provided it

<sup>128</sup> See for example art. 105 UN Charter; See also Muller 1995, p. 151; Bekker 1994, p. 39; Brandon 1951, p. 94.

<sup>129</sup> Bekker 1994, p. 39.

<sup>130</sup> Sands & Klein 2009, p. 490; Gerster & Rotenberg in Simma 2002, p. 1315; Scobbie in Dupuy 1998, p. 833; Muller 1995, p. 151; Bekker 1994, p. 111-112; Jenks 1961, p. 18; see already Kunz 1947, p. 841; For a more critical view on functional necessity, see Klabbers 2009, pp. 32-35, 132-137 and Reinisch 2000, p. 206, 331.

<sup>131</sup> Report of the ILC, 42<sup>nd</sup> Session, UN GAOR Supp. (no. 10), UN Doc A/45/10 (1990), para. 442, 449 (but see para. 447-448 in which it is suggested that applying functional necessity to the immunity from jurisdiction would be ‘an error’); Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), p. 12, 14. See also Appendix at 73 *et seq.*, p. 90.

<sup>132</sup> Gerster & Rotenberg in Simma 2002, p. 1317; Bekker 1994, p. 111.

<sup>133</sup> Although this paragraph deals with personal immunities instead of organizational immunities, it can safely be assumed that it is the purpose of both categories. Especially since personal immunities are also granted for the benefit of the organization.

<sup>134</sup> Section 27 UN – USA Headquarters Agreement 1947, 11 UNTS 12.

<sup>135</sup> ICJ *Reparations* 1949, p. 174.

with the competence required to enable those functions to be effectively discharged.<sup>136</sup> Later on the ICJ confirmed the role of the principle of functional necessity regarding organizational immunities in its *Mazilu* and *Cumaraswamy* Advisory Opinions.<sup>137</sup>

#### *Functional necessity as applied to International Organizations*

In theory, three different issues of international institutional law can be discerned to which the principle of functional necessity is applied. The first deals with the fundamental aspect of legal status and scope *ratione personae* of an International Organization. As already discussed earlier, the principle is applied to determine the legal personality, capacity and competence (powers) of an IO. The existence and operation of the capacity and powers can be related to the functions and purposes of the organization.<sup>138</sup> See for example article 104 of the UN charter, with regard to national legal personality of the UN: "...such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes".<sup>139</sup> In this report this first aspect of functional necessity is of less relevance.

The second issue concerns the selection of specific privileges and immunities which an international organization should enjoy by virtue of the principle of functional necessity. Privileges and immunities are considered necessary for the effective functioning for a number of reasons. One of the most important reasons is that international organizations should have a status which protects them against control or interference by any (member) state in the performance of their functions.<sup>140</sup> This may be characterized as the need for political independence.<sup>141</sup> Of course, this consideration is of even more importance regarding the host state, since the physical presence of the IO in its jurisdiction places the host state in 'the best position' to exercise control or to try to interfere with the work of the IO. Interesting to note is that Bekker views this reason also as a foundation for the duty to protect the IO against acts by individuals, threatening to interfere with the IO by legal or more drastic means.<sup>142</sup> Another reason, closely related to that of political independence, is that of guaranteeing the impartiality of the IO.<sup>143</sup>

Another important reason that may be discerned is that of the equality of the member states. Since all states are equal, they remain equal in relationship to each other and in relationship to the IO when they become members of the latter. If in different states an IO would enjoy different immunities, this equality would be compromised.<sup>144</sup> Again closely connected with that reason, another one can be discerned: that of avoidance of undue financial advantage of the host state.<sup>145</sup> A host state, as fellow member state of the IO, should not benefit more from the organization than its fellow members, just because it hosts the organization.<sup>146</sup> This is the main reason for attributing fiscal privileges to international organizations. However, levying taxes could also constitute a way in which a host state may interfere with the functions of the IO. Therefore with regard to fiscal privileges there is also a connection to the earlier mentioned argument of political independence.<sup>147</sup>

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<sup>136</sup> *Reparations* 1949, p. 179.

<sup>137</sup> ICJ *Mazilu* 1989, para. 52; ICJ *Cumaraswamy* 1999, para. 43.

<sup>138</sup> Bekker 1994, pp. 51 *et seq.*, p. 235.

<sup>139</sup> Art 104 UN Charter.

<sup>140</sup> Jenks 1961, p. 17, 18; Scobbie in Dupuy 1998, p. 834; Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), p. 12.

<sup>141</sup> Bekker 1994, p. 100.

<sup>142</sup> Bekker 1994, p. 102.

<sup>143</sup> Bekker 1994, p. 103.

<sup>144</sup> Bekker 1994, p. 104-105.

<sup>145</sup> Jenks 1961, p. 17; Bekker 1994, p. 105; Ahluwalia 1964, p. 90; Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), p. 12.

<sup>146</sup> Interestingly enough, a large part of the Secure Haven project revolves around just that aspect of being a host state: the economic benefit of the host state from the presence of IO's (!).

<sup>147</sup> See also Bekker 1994, p. 106.

The reasons mentioned here may be regarded as the most fundamental. Nevertheless, other reasons may be discerned. For example, equality of status with other organizations according to protocol, prestige and authority of the organizations, and even precedents created with other (earlier established) organizations can sometimes be found in doctrine as reasons for providing an IO with certain privileges and immunities.<sup>148</sup> It may be argued that these reasons still fall within the category of functional necessity, since it may enable those organizations to function more effectively. However, as was stated above IO's should only receive those privileges and immunities that are strictly necessary. It is submitted here that these latter reasons should not be discussed in the light of functional necessity, but should be viewed as historically developed connections with the regime of diplomatic law and interstate relations.

As stated in the beginning of this paragraph, there are three issues of international institutional law in which functional necessity plays an important role. Above, two of these three issues have been discussed: the first issue deals with 'the basics' of an IO like its legal status and the second provides for a basic reasoning by which it may be determined which immunities and privileges a specific IO may need. The third issue deals with the *extent* of those privileges and immunities which the IO basically needs. This is the subject of the subsequent paragraph.

#### *The extent of immunities based on functional necessity*

As explained above, the third issue regards the extent of immunities. Based on one or more reasons as outlined in the previous paragraph, an IO may be attributed with certain privileges and immunities because it needs those in order to function effectively. For example, because of the need for political independence, an IO is granted immunity from jurisdiction of the host state. But as was already explained every IO is unique, so as a consequence what that IO needs to function effectively may also very well be unique. So the instrument of immunity from jurisdiction may for a specific IO extend to a wider range of acts of the organization and its personnel than it would for another.<sup>149</sup> This deals with the extent of the immunities. As a reference, it is interesting to note that diplomatic privileges and immunities are also accorded and interpreted because these are necessary to ensure the proper functioning of the mission and its agents.<sup>150</sup> However, in the case of diplomatic immunities it is not the principle of functional necessity that directly determines the extent of diplomatic privileges and immunities. Since all diplomatic missions should be considered equal, the immunities enjoyed by every mission must be the same. So functional necessity merely acts as an explanation why the immunities were granted in general. They do not provide for a yardstick on the extent of immunities for specific diplomatic missions. As such, the functional necessity principle as applicable in diplomatic law falls more within the previous described issue of *identification* than in the issue of *extent*.

One of the advantages of determining the extent of immunities on the basis of the functional necessity principle is that it can be applied to all international organizations, despite the large variety among them. It is a general rule which, when applied to a specific organization, provides a clear basis for the contents of certain privileges and immunities. This also accounts for the diversity of the contents of multilateral agreements and especially the seat agreements.<sup>151</sup>

It should be noted here that its flexibility is also what makes the principle such a complex one to apply in practice. In doctrine this is considered as the fundamental problem of functional necessity: its open texture. It means different and even contradictory things to different judges and states.<sup>152</sup> As Jenks notes, a particular assessment on the basis of functional necessity often is more a matter of judgment rather than a matter of principle.<sup>153</sup> Evidence of this fact can be

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<sup>148</sup> Bekker 1994, p. 106-107; Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), p. 13-14.

<sup>149</sup> Muller 1995, p. 151-153; also on the erroneous application of the *acta jure gestionis – imperii*.

<sup>150</sup> See chapter 3 paragraph 2 of this report on the legal basis of diplomatic immunities.

<sup>151</sup> Gerster/Rotenberg in Simma 2002, p. 1317.

<sup>152</sup> Reinisch 2000, p. 206, 331; Klabbers 2009, p. 134.

<sup>153</sup> Jenks 1961, p. 26; Klabbers 2009, p. 134.

found in case-law, where interpretations can be found which are stricter than what seems logical, as well as misinterpretations of the principle.<sup>154</sup>

#### *Concluding remarks regarding functional necessity*

In the previous paragraphs, an outline was given of the central legal foundation for organizational immunities: functional necessity. It is clear that it is a complex principle, which is intertwined with a wide range of issues of international institutional law. The consequences of application of the principle in determining the extent of privileges and immunities will also be further analyzed in this report, as will the different international instruments as mentioned in the previous paragraphs. What has become clear already is that while diplomatic immunities provide a strong indication for the scope and content of organizational immunities, the latter is not an extension of the former nor should the former be considered as authoritative on the extent of organizational immunities *per se*. For that, the differences between the underlying principles as well as between the (legal) reality of both are too strong.

#### **4.2.2. 'Sovereignty', or historically acquired rights**

As already indicated above, some of the reasons for the attribution of organizational privileges, such as prestige and equality of status between IO's, may be viewed as part and parcel of the functional necessity doctrine because these privileges should be viewed as necessary for the effective functioning of the International Organization. However, with regard to such reasons it is debatable whether these can actually be justified by the principle of functional necessity, since they may not be absolutely necessary for the effective and/or efficient exercise of the functions of the organization, let alone that they are necessary for the realisation of its purposes. When the relevant legal instruments of the organization leave little doubt as to the legal status of the organization and the obligations of the member states, why would issues like protocol and precedence be of any actual influence on giving status and obligations the necessary effect? Even more so when that effective exercise is ensured by the granting of immunities like inviolability of premises and jurisdictional immunity? It is submitted here that while it may very well be desirable in the international discourse to grant IO's specific privileges that seem based on concepts like 'sovereign' equality and prestige, this should not translate itself into a strained interpretation of the functional necessity theory. Instead, the justification for granting such privileges should be sought more in concepts resembling 'sovereign equality'. It must be noted that it usually concerns 'historically acquired rights', which could also be indicated as 'precedents' by virtue of which IO's consider themselves entitled to certain privileges, and to a lesser extent immunities.

First of all, it is important to make clear that international organizations do not enjoy 'sovereignty' in the same way as enjoyed by states under general international law. As has been discussed earlier, states are still the principal actors within international law, and international organizations, while endowed with legal personality, do not enjoy the full range of powers as sovereign states do. In addition, the concept of sovereignty is strongly connected to territory<sup>155</sup> and it was already mentioned that international organizations do not have sovereign rights over territory.<sup>156</sup>

As was noted earlier, international organizations were not viewed as 'super states' but their staff were nevertheless granted diplomatic privileges and immunities. Throughout the development of the organizational privileges and immunities, the system of diplomatic immunities continued to play a vital role. Because of this, the system of organizational immunities arguably still encompasses a significant aspect of the sovereign equality doctrine, or representational theory, which is one of the grounds for diplomatic privileges and immunities. It is conceivable that during the development of the organizational immunities, the benefits and status associated with privileges originating from the principle of sovereign equality became applied and

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<sup>154</sup> *FAO v. INPDAI*, 1982, 87 ILR 1-10; US District Court (Columbia) of 28/03/78, 63 ILR 162-3 and Court of Appeals 21/09/78, 63 ILR 191-4; see also *Spaans v. IUSCT* (Netherlands 94 ILR 321-30, ECommHR 107 ILR 1, at 5); Klabbers 2006, p. 134-135, specifically footnotes 15, 19.

<sup>155</sup> See for example what arbitrator Huber held in *Island of Palmas case* 1928, RIAA Vol II, p. 838.

<sup>156</sup> See also Klabbers 2009, p. 132; Sands & Klein 2009, p. 501.

appreciated within the system of international organizations as well. What one has, one wants to keep, so it became standard procedure to incorporate these privileges in the constitutional documents and seat agreements, even though it does not have a direct basis in the central legal foundation underlying organizational privileges and immunities, that of functional necessity. It must be pointed out that in the hierarchical system of staff members of an IO, it is only the top-level staff members (i.e. judges and the chief executive officer and its deputies) that are usually granted diplomatic P&I.

This does not mean that those related privileges, when accorded to international organizations, are without legal basis whatsoever. If for no other reason, the granting of these privileges have become a vital instrument in “winning the competition” between possible host states for the seat of a new international organization, especially the more important ones. Therefore, a host state will simply incorporate these privileges in a (draft) seat agreement and thus a legal basis is created for these privileges simply by the consent of the host state. This is also of importance when looked at from a different perspective, that of the historically acquired rights. Because of the longstanding practice of attributing certain privileges linked to equality and prestige, a validation has occurred of this practice, not through the existence of *opinio juris* but certainly through convincing state practice. These historically acquired rights seem now so embedded in the system of organizational immunities, that because of this historical factor they are inherent to the granting of organizational privileges and immunities.

In the previous paragraph the different foundations for organizational immunities were elaborated upon. It is clear that the central legal foundation is that of functional necessity, while the practical implementation of this theory, regarding the *extent* of specific privileges and immunities, seems to lack sufficient structuring when drafting instruments like seat agreements. At this point, I do not wish to assert that there is a solid legal foundation for attributing privileges and immunities other than the legal foundation of functional necessity, but I do want to illustrate that this foundation on itself is in some instances stretched further than would seem warranted at first interpretation. I believe that this is a result of the strong intertwinement of the system of diplomatic immunities and the system of organizational immunities: due to the incorporation of aspects of diplomatic law in that of international institutional law, not all privileges and immunities that are granted to IO's have a crystal-clear legal basis in the latter body of law, but seem to be inspired more generally on the former.

#### **4.3. Legal sources of organizational immunities**

The system of conventional sources for the legal position of the IO, the rights and duties of the host state and the related privileges and immunities consists of three different levels. The first level is formed by the constitutional document or documents of the international organization. In the vast majority of cases this is a multilateral treaty, in which the state parties agree to create an IO and invest it with certain powers. In some instances this may also be a resolution of another IO. This was the case with for example the ICTY which was created by the UN, by virtue of a resolution of the Security Council under Chapter VII of the UN Charter. In most constitutional documents the rights and duties of the member states are determined. Since the host state is most likely also to be a member state, this document forms part of the legal position with regard to the IO. More importantly, there are usually also basic provisions on the privileges and immunities of the IO in the constitutional document, as well as provisions on its legal personality.

The second level is formed by multilateral treaties which were drawn up by the member states of an IO or within the relevant organs of the IO itself with the purpose of creating a more elaborate foundation for the specific privileges and immunities of the organization. Not all organizations have such a multilateral treaty governing their privileges and immunities. A very important example of such a multilateral treaty is the ‘Convention on the Privileges and Immunities of the United Nations’ of 1946. This treaty, which elaborates on articles 104 and 105 of the UN Charter, was drafted separately from the Charter to provide a solid treaty basis for the organizational immunities of the UN. Since the treaty applies to all organs of the UN, it is part of the legal foundation for numerous different UN organs with more or less independent functioning, like the ICTY and the ICJ. Another example of such a multilateral treaty is the

Ottawa Agreement of 1951, which deals with the privileges and immunities of sections of the NATO organization.<sup>157</sup> Probably the most important example of a multilateral treaty dealing with the privileges and immunities of a whole group of organizations is the 'Convention on the Privileges and Immunities of the Specialized Agencies of the UN' of 1947. This convention aims to provide a solid framework of organizational immunities for all the specialized agencies of the UN, like the ILO, IMF, WHO and the UPU. The convention also has multiple annexes which specifically deal with individual specialized agencies.

The third level is formed by the vast amount of different seat agreements, headquarters agreements, host agreements etc. Although the labelling of such agreements differs considerably, there doesn't seem to be a fundamental legal difference between them. For the purpose of this report, the word seat agreement will be used. Such a seat agreement usually takes the form of a treaty under international law, concluded between the host state and the International Organization. In this seat agreement, most aspects of the legal relationship between the Host State and the IO are described. This means that it forms an additional source for privileges and immunities, besides and in addition to the other above-mentioned instruments. It is also specific for the relationship between the IO and the host State: third states can not derive any rights or obligations from it, since it is a bilateral treaty between the first two. With regard to organizational privileges and immunities, seat agreements are usually the most detailed and practical instruments of the three levels discussed. In its level of detail, all seat agreements differ from each other. However, it is interesting to realize that seat agreements of comparable IO's usually have remarkably similar wording, especially when they have the same host state. This points to some general acceptance of the basics of the seat agreement and the rights and duties that should be incorporated, but it also shows that the theory of functional necessity does not seem to have a strong influence on at least the conventional attribution of certain privileges and immunities.

As was described above, the system of organizational immunities was strongly influenced by the system of diplomatic privileges and immunities. This system was codified in 1961 in the Vienna Convention on Diplomatic Relations. There is both a direct legal connection between the two systems as an indirect connection, as was already discussed. When explaining the scope of specific immunities, recourse may subsequently be taken to the theory and practice of diplomatic immunities. This is not surprising, since this body of law is older, more substantial and less controversial. There is a lot of practice in this field and where relevant this will also be incorporated in the report.

#### *Organizational privileges and immunities as customary law*

Customary international law is, briefly described, law which exists and is applicable to all states, but which is not necessarily codified law. For a rule to be part of customary law, two elements must support this rule: state practice (*usus*) and *opinio juris*.<sup>158</sup> The relevance of the question, whether organizational P&I form part of customary law, becomes evident when one looks at practice. When an IO physically has its seat in a host state, but it does not yet have a seat agreement or other sources from which privileges and immunities flow, the legal situation is not directly clear. Since seat agreements take time to negotiate, this can easily occur. However, if it turns out that there are norms of customary international character which prescribe that an IO enjoys organizational immunities like inviolability, that is sufficient basis for the host state to respect and apply those immunities in practice, without the necessity for codification of those immunities. Examples of this are the possible fundamental (or customary) character of the rules on the duty to protect, the extent of so-called 'emergency clauses' or the mere existence of those clauses as customary international law. Later in this report, the rules relevant to the Secure Haven concept will be discussed in depth and the issue of customary international law will be dealt with further.

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<sup>157</sup> Agreement On the Status of the North Atlantic Treaty Organization, National Representatives And International Staff (Ottawa Agreement), 20 September 1951.

<sup>158</sup> See on the concept of customary international law Shaw 2008, p. 72-93; Cassese 2005, p. 153-170; Henckaerts & Doswald-Beck (ICRC-study) 2005, Vol. 1, p. xxxi-xlv. See also the judgements ICJ *North Sea Continental Shelf* 1969, para. 74; ICJ *Nicaragua* 1986, para. 186, 190.

## 5. Diplomatic Immunities vs. Organizational Immunities

Despite the clear differences between the legal foundations of the two regimes, it is beyond any doubt that a definite link exists between the two systems. The existence of this link was briefly explained earlier in this report. In this short chapter some considerations are given concerning the major difference between the two systems.

### *Reciprocity*

The most important difference between the two systems is the general principle of reciprocity, or more accurately the lack thereof concerning IO's. While there probably is a 'mirror' for every diplomatic mission in the Netherlands, obviously this can not be the case with regard to International Organizations. But what does this entail?

Firstly I would like to point out an advantage of a legal relationship devoid of reciprocity. In such a relationship, an important form of political/diplomatic 'coercion' is taken out of the equation: that of retaliation. For example, if a state refuses to provide for 'adequate' protection in the view of the sending state, the sending state may 'retaliate' by also providing only a minimum of protection. This action-consequence factor is not present in the relationship between a host state and an IO and therefore the granting of protection can be based more on practical assessments than political will and interests.

However, the lack of reciprocity also comes with disadvantages. Since the IO does not have to worry about difficult requests for protection in its 'sending state' (since there is none), it may find it tempting to 'over-ask' in given situation. In a sense it could be said that because there is no mirror situation, a 'braking mechanism' on the security policy of the IO is missing. This may result in an 'inflation' of security measures for IO's in general where this could result in employing more security measures than would objectively (or: according to the unilateral assessment of the host state) be necessary. It is interesting to note that traces of such a practice may be seen in the conduct of the NCTb and Dutch MFA with regard to the STL, Europol/Eurojust and ICC buildings.

Besides the disadvantage of 'over-asking', the lack of reciprocity in the relationship also entails that the host state need not worry about certain 'counter measures' by the IO against its own representations, since there are none. So with regard to the mechanism of over-asking when it comes to the protection of the IO, it must be borne in mind that an IO is indeed largely dependent on the host state for its protection. Therefore, it is in the interest of the IO to keep the relationship with its host state one of truly good faith and cooperation. This on itself provides for some sort of 'braking mechanism' on its conduct towards the authorities of the host state. Also, maintaining the relationship governed by the principles of good faith and cooperation is an international legal obligation for both host state and International Organization.<sup>159</sup> The importance of these principles will be discussed in the chapters on the duty to protect.

The practical result of the difference between the two systems is still difficult to ascertain. It seems that there is a tendency to come to agreement on the applied security measures together with the IO, whereby the IO plays an important part in the formulation of demands and necessities. Since it is only logical that the resolve of a question of adequacy on such a high political or diplomatic level is for a good part based on negotiation instead of objective threat analysis, the direct influence of the legal difference between the two systems is hard to discern.

### *Where state representation differs from international policy*

An interesting point may be observed. On the one hand, International Organizations were considered to be different from (or not as important as) states. It was specifically stated during the drafting of the UN Charter that the UN should not be seen as an entity forming some sort of 'super state'. In accordance with that view, staff members of organizations were and are not regarded as envoys with full diplomatic status as the staff of diplomatic missions. Indeed, for staff members of International Organizations there is a separate system of privileges and

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<sup>159</sup> ICJ *WHO – Egypt* 1980, para. 43.

immunities, created by the relevant constitutional documents, with another legal basis than their diplomatic counterparts. On the other hand, in numerous constitutional documents, (high-ranking or senior) staff members of organizations are nevertheless attributed full diplomatic privileges and immunities. What the reason for this is, is not entirely clear. One can speculate that it has something to do with the clarity of the diplomatic rules, which are declared applicable when this clarity is deemed necessary for the sake of protection of the staff members. This would be in accordance with the fact that only top-level staff members receive 'full' diplomatic privileges and immunities. Another reason which would be in accordance with this fact is that it is a convenient tool to provide those top-level staff members with a high status within international and diplomatic circles.

Although this report primarily deals with organizational immunities of the IO's themselves, it is interesting to note the important differences between diplomatic staff and international staff: the latter are not accredited to any state, nor are they representatives of one. They do not serve any state but an IO, and act in its name. The exercise of their functions is often not confined to any receiving state where they are accredited, they may need to exercise their functions in multiple states. That state may very well be their own, and thus it is very well possible that the official needs protection from its own national-state (especially against coercion or influence on his IO-work).<sup>160</sup> See in this respect for example the Advisory Opinions of the ICJ concerning experts on mission *Mr. Mazilu* and *Mr. Kumaraswamy*, where it became clear that especially protection from their national state has its benefits.<sup>161</sup> However, this might create a possible 'gap of impunity'. This lack of remaining jurisdiction is also a major difference between the two systems.<sup>162</sup> It may warrant a different (more restrictive) approach towards the granting of (personal) immunities.

Finally, regarding the theory of functional necessity, an important difference was seen. When it comes to organizational immunities, that what forms the purposes and functions of the organization and thus shapes the functional necessity requirements depends largely on the type of organization, as discussed briefly in a previous paragraph on classification of IO's. States may differ in their culture and politics, but not in their essence and/or powers, so the concept of functionality will be (and at least should be) the same for all states. This clearly cannot be said of international organizations. Interesting to note is that while for diplomatic missions the amount of receiving states is enormous, the amount of host states to IO's is fairly limited (to states like US, Austria, Switzerland, Belgium and the Netherlands).

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<sup>160</sup> Klabbers 2009, p. 142-145.

<sup>161</sup> ICJ *Mazilu* 1989; ICJ *Kumaraswamy* 1999.

<sup>162</sup> Sands & Klein 2009, p. 490.

## **PART II – LEGAL QUESTIONS CONCERNING THE PREMISES OF INTERNATIONAL ORGANIZATIONS IN A SECURE HAVEN**

The premises of an IO (its buildings and surrounding grounds) are the most important physical manifestations of an IO on the territory of a host state. In international law, these premises enjoy a specific legal status, by virtue of which they are considered 'inviolable'. What this means and what the consequences are for the host state are discussed in subsequent chapters.

In each chapter concerning the status of premises, a question is posed which underlines the practical relevance of the legal theory for the concept of Secure Haven. These questions deal with the exact meaning of the inviolability of premises, the consequences of this status for the powers of host state authorities concerning the premises in general, and especially concerning the premises in case of emergency situations. Whether the current status of premises must be altered in order to effectively implement the concept of Secure Haven is also discussed. The practical relevance of these questions is clear: IO premises are situated on Dutch territory, and that presence entails specific rights and duties for all Dutch authorities, including the municipalities, police and fire departments. When developing a Secure Haven, the presence and specific status of those premises must thus be taken into account, especially since both the concept of Secure Haven and the specific legal status of premises share the same objective: to facilitate the effective functioning of IO's.

### **6. What status do IO premises enjoy in the Netherlands?**

In this chapter the concept of inviolable premises will be explored. First, the definition of 'premises' will be discussed. This is of direct relevance to the Secure Haven concept, since it must be sufficiently clear where the IO ends and the 'regular' host state territory begins, or where the other IO begins, in the event that their premises are clustered or that the IO's reside in the same building. Secondly, the different facets of the inviolability of IO premises will be analyzed: what does it mean when premises are said to be inviolable? And why is such a status actually necessary? Thirdly, it is discussed whether all IO's in the Netherlands enjoy this inviolability of premises. The chapter is concluded by an overview of the practical consequences of that legal status of inviolability for the authority on IO premises; is it mainly conferred to the IO or does it remain with the host state?

#### **6.1. The legal construction of 'inviolable premises'**

##### **6.1.1. Physical boundaries; what encompasses 'premises'**

It is sufficiently clear from treaties and subsequent practice that IO premises may include land, buildings and parts of buildings.<sup>163</sup> The main question is which (parts of) lands and buildings? Muller distinguishes two main types of demarcation provisions: a 'functional' demarcation and a factual demarcation. The latter type consists of referring to physical locations with the help of for example maps, addresses, land registry numbers etc.<sup>164</sup> The most frequently encountered type of demarcation is however the functional one, probably because of the inherent flexibility of the concept.

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<sup>163</sup> Duffar 1982, p. 101; Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), para. 45; see for example art. 1(t) STL – NL seat agreement 2007, art. 1(x) ICC – NL seat agreement 2007, art. 1(e) EUROJUST – NL seat agreement 2006, art. 1(b) ICTY – NL seat agreement 1994, Art. 1(f) Europol – NL seat agreement 1998.

<sup>164</sup> Muller 1995, p. 122.

Below there are two examples of provisions containing a functional demarcation of premises.

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*Article 1(t) STL – NL seat agreement 2007*  
“premises” means buildings, parts of buildings and areas, including installations and facilities made available to, maintained, occupied or used by the Tribunal in the host State, in consultation with the host State, in connection with its functions and purposes, including detention of a person, or in connection with meetings of the Management Committee;  
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*Article 1(e) EUROJUST – NL seat agreement 2006*  
“Headquarters” means the area, any building, land or facilities ancillary thereto, irrespective of ownership, used on a permanent basis, temporarily or from time to time by Eurojust following mutual agreement between Eurojust and the Government, to carry out its official functions;  
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The functional definitions, as found in most seat agreements, strongly reflect the principle of functional necessity that forms the foundation of most privileges and immunities of IO’s: only areas that are actually used by the IO (and thus needed) deserve a specific legal status. Another important advantage is a practical one: if the IO would start using different or additional buildings, those buildings are fully covered by the seat agreement without the need for any exchange of notes between the IO and the host state confirming that those buildings should indeed be considered as IO premises.

Its origin can also be traced back to diplomatic law, which contains a similar provision:<sup>165</sup>

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*Article 1(i) VCDR 1961*  
“the ‘premises of the mission’ are the buildings or parts of buildings and the land ancillary thereto,[...] used for the purposes of the mission [...]”  
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In practical terms, when part of a building is used by several private companies as well as by an IO, the part used by the private companies cannot be considered as part of the premises of an IO. Also, parts of the shared property that are for common use are usually not considered as part of IO premises, like a common lobby, or a general staircase. Arguably, contrary to a factual demarcation, the functional demarcation may also encompass hotel rooms for the short period of time they are used by the organization.<sup>166</sup> There are also demarcation provisions where locations are explicitly mentioned to include premises, to avoid any dispute. This often concerns the more irregular locations like the rooms where ad-hoc meetings are held, or prisons. See for example the STL-provision quoted above, or article 1(x) ICC – NL seat agreement 2007.

Most seat agreements of IO’s in the region The Hague contain a definition of the concept of premises, or ‘headquarters’ as it is called in some seat agreements, which generally coincides with the definitions mentioned above.<sup>167</sup> There may also be some sort of combination between the two methods of demarcation, as is the case with ESA-ESTEC and EPO which have the

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<sup>165</sup> article 1(i) VCDR 1961; see also Duffar 1982, p. 101.

<sup>166</sup> Muller 1995, p. 122.

<sup>167</sup> See for example art. 1-b) ICTY – NL seat agreement 1994 (also applicable to ICTR and SCSL); art. 1-h) UNEP-GPA – NL seat agreement 1997; art. 1-f) OPCW – NL seat agreement 1997; art. 1-f) EUROPOL – NL seat agreement 1998; art. 1.6 PCA – NL seat agreement 1999; art. 1-e) Eurojust – NL seat agreement 2006; art. 1-x) ICC – NL seat agreement 2007; art. 1-t) STL – NL seat agreement 2007; art. 1-i) BOIP – NL 2007.

obligation to provide the host state with maps marking their premises.<sup>168</sup> Also, a duty to notify the host state when buildings are taken in use may be included in the seat agreement.<sup>169</sup>

Although there is a common core to every definition of 'premises', it is far from a standard provision; a quick glance at the several mentioned seat agreements show numerous nuances. Therefore, if a dispute about demarcation should arise, every seat agreement must be assessed on its own. If a seat agreement does not contain a specific definition of the concept of premises,<sup>170</sup> then the demarcation of premises is a functional one, flowing from the general principle of functional necessity. If discussion should arise about demarcation of premises, and especially the different nuances as found in theory and practice such as other seat agreements, this must then be resolved in cooperation and good faith between host state and IO.<sup>171</sup> Regardless of these nuances, it is apparent that buildings which are officially occupied by an organization, but of which it is not clear whether they are actually (or solely) being used for official purposes, should be assumed to actually be in use by the organization.<sup>172</sup> In general there do not seem to be many disputes about these issues.

#### *Ownership irrelevant*

It is clear that ownership of the premises is irrelevant.<sup>173</sup> Further proof for this may be deduced from the system of diplomatic immunities: both Vienna Conventions state that inviolability is granted to premises, irrespective of ownership thereof.<sup>174</sup> Although not directly applicable to International Organizations, it is an important indication since the privilege of inviolability in both systems may be considered similar in many ways.<sup>175</sup>

#### *Exclusive use necessary?*

In doctrine it is often held that immovable property only falls within the definition of premises if it is 'used exclusively for the exercise of the official functions of the organization' or similar wording.<sup>176</sup> The qualification of 'exclusive use' is also included in the Vienna Convention on Consular Relations 1963.<sup>177</sup> In a draft article on the inviolability of IO premises, the Special Rapporteur to the ILC proposed the following provision: '*The premises of international organizations used solely for the performance of their official functions shall be inviolable*'.<sup>178</sup>

The use of the word 'solely' strongly suggests support for the strict interpretation of the premises definition. This is relevant, since the draft articles intend to deal with international organizations of a universal character. This indicates that even IO's with such wide and possibly politically sensitive functions and purposes are only entitled to a strict definition of their premises. However, it is important to note that the qualification '*exclusively*', or any similar wording, is not included in the seat agreement provisions quoted above.<sup>179</sup> This suggests that at least by virtue of those provisions, parts of buildings which are not being *exclusively* used by the IO or diplomatic mission may also fall under the definition of IO or mission premises.<sup>180</sup> Whether

<sup>168</sup> Art. 1-j) ESA-ESTEC – NL seat agreement 2008 art. 17 EPO – NL seat agreement 2006.

<sup>169</sup> Muller 1995, p. 188. See also the proposed article 8.2 by the Special Rapporteur of the ILC: ILC Report on its 42<sup>nd</sup> Session, July 1990, para. 453 (f.n. 292).

<sup>170</sup> See for example IUSCT – NL seat agreement 1990; IOM – NL seat agreement 1990, Nederlandse Taalunie – NL 1990; NATO NC3A – NL 2004; EPO – NL seat agreement 2006.

<sup>171</sup> The concepts of cooperation and good faith are considered by the ICJ as 'the very essence' of the relationship between an IO and its host state; ICJ *WHO – Egypt* 1980, para. 43.

<sup>172</sup> Muller 1995, p. 147.

<sup>173</sup> 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 97; Gerster/Rotenberg in Simma 2002, p. 1318; Muller 1995, p. 138-139; Duffar 1982, p. 105. See for example art. 1(x) ICC – NL seat agreement 2007; art. 1(f) Europol – NL seat agreement 1998; art. 1(b) ICTY – NL seat agreement 1994.

<sup>174</sup> Art. 1(i) VCDR; Art. 1(j) VCCR 1963.

<sup>175</sup> Muller 1995, p. 185.

<sup>176</sup> Duffar 1982, p. 102; Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), para. 45.

<sup>177</sup> Art. 1(j) and 31(2) VCCR 1963.

<sup>178</sup> ILC Report on its 42<sup>nd</sup> Session, July 1990, para. 453 (f.n. 292).

<sup>179</sup> See also Duffar 1982, p. 102.

<sup>180</sup> Note that Denza in her commentary does not speak of this issue. See on the definition of embassy premises in general: Denza 2008, p. 20-23.

this poses a difficulty in practice depends of course on the factual situation within the buildings. Therefore, it cannot be maintained that the condition of *exclusive* use is a general rule in demarcating IO premises. It depends on the wording of the provision. As stated earlier, when no such provision exists, disputes arising about it must be settled in cooperation and good faith between IO and host state.

### 6.1.2. Duty to abstain; elements of inviolability of premises

In this paragraph, the different elements of inviolability of premises are briefly discussed. These elements are all duties for the host state to *not* interfere with the premises. This type of duties is also referred to as a negative obligation, or a duty to abstain (from interference).

In both systems of privileges and immunities, different objects are declared inviolable. Besides the premises of IO or diplomatic mission, inviolability may be granted to archives, funds and assets. In addition, inviolability may be granted to physical persons. The inviolability granted to the objects must be distinguished from each other, since legal rules differ in extent through the practical differences between those objects and the functional necessity behind granting those objects inviolability. This paragraph focuses specifically on the inviolability of premises.

Although there are numerous different ways in which inviolability of premises is described in seat agreements and multilateral treaties, inviolability *of premises* should be considered as a general concept, that applies to all IO's in the same way once it is granted.<sup>181</sup> It would seem logical that the extent of this inviolability varies, depending on the official functions of the IO in question. After all, it finds its origin in the principle of functional necessity.<sup>182</sup> But the principle of functional necessity does not prevent the different elements of inviolability of premises from applying fully and to the same extent to every IO. It is considered to be a fundamental privilege and is granted to every IO, because they need inviolability of premises to function effectively, regardless of their specific functions. Rather, the principle of functional necessity is applied to delimit the concept of premises that are inviolable, not the extent of that inviolability itself.

Below two examples are presented of a seat agreement provision on the inviolability of IO premises: article 6 of the ICC seat agreement of 2007, and article 3 of the Europol seat agreement of 1998.

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*Article 6. Inviolability of the premises of the Court (ICC – NL seat agreement 2007)*<sup>183</sup>

1. The premises of the Court shall be inviolable. The competent authorities shall ensure that the Court is not dispossessed and/or deprived of all or any part of its premises without its express consent.
2. The competent authorities shall not enter the premises of the Court to perform any official duty, except with the express consent, or at the request of the Registrar, or a member of staff of the Court designated by him or her. Judicial actions and the service or execution of legal process, including the seizure of private property, cannot be enforced on the premises of the Court except with the consent of and in accordance with conditions approved by the Registrar.
3. In case of fire or other emergency requiring prompt protective action, or in the event that the competent authorities have reasonable cause to believe that such an emergency has occurred or is about to occur on the premises of the Court, the consent of the Registrar, or a member of staff of the Court designated by him or her, to any necessary entry into the premises of the Court shall be presumed if neither of them can be contacted in time.

<sup>181</sup> Duffar 1982, p. 99; Muller 1995, p. 185-186.

<sup>182</sup> See Muller 1995, p. 188.

<sup>183</sup> Comparable provisions may be found in for example art. 5 ICTY – NL seat agreement 1994; SCSL – NL seat agreement 2006; ICTR – NL seat agreement 1996.

4. Subject to paragraphs 1, 2 and 3 of this article, the competent authorities shall take the necessary action to protect the premises of the Court against fire or other emergency.
5. The Court shall prevent its premises from being used as a refuge by persons who are avoiding arrest or the proper administration of justice under any law of the host State.

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*Article III. Inviolability of Headquarters (EUROPOL – NL seat agreement 1998)<sup>184</sup>*

1. The Headquarters shall be inviolable. Any person authorized to enter any place under any legal provision or on the strength of the law shall not exercise that authority in respect of the Headquarters unless permission to do so has been given by or on behalf of the Director.
2. The Host State authorities shall take whatever action may be necessary to ensure that Europol shall not be dispossessed of any part of the Headquarters of Europol without the express consent of Europol.
3. In case of fire or other emergency requiring prompt protective action, or in the event that the competent Host State authorities have reasonable cause to believe that such an emergency has occurred or is about to occur on the Headquarters of Europol, the consent of the Director, or an official designated by him, to entry into the Headquarters of Europol shall be presumed if neither of them can be reached in time.
4. Europol may expel or exclude persons from the Headquarters of Europol for violation of its regulations.
5. The Director shall prevent the Headquarters from being used to harbour persons who are avoiding arrest under any law of the Kingdom of the Netherlands, who are wanted by the Government for extradition to another country, or who are endeavouring to evade service of legal process.

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There are also seat agreements which have a very concise provision on the inviolability of their premises, sometimes only stating that 'the premises are inviolable'.<sup>185</sup> Sometimes it can only be found in legal instruments other than the seat agreement,<sup>186</sup> and some legal instruments

<sup>184</sup> Comparable provisions may be found in for example art. 6 STL – NL seat agreement 2007; art. 3 Eurojust – NL seat agreement 2006; art. 6.1 ESA-ESTEC – NL seat agreement 2008; art. 8.1 CFC – NL seat agreement 1991; art. 5 UNEP – NL seat agreement 1997; art. 4 IOM – NL seat agreement 1990; art. 3 UNU-MERIT – NL seat agreement 1989; art. 3 CTA – NL seat agreement 1984.

<sup>185</sup> Provisions of differing levels of detail on inviolability are for example art. 6 ESA-ESTEC – NL seat agreement 2008; art. 4 UNESCO – NL seat agreement 2003; art. 3 PCA – NL seat agreement 1999; Art. 7.1 OPCW – NL seat agreement 1997; IUSCT – NL seat agreement 1990. Compare also art. 22 VCDR 1961 concerning diplomatic premises. As submitted earlier, the two principles are much alike in practical aspects. In several multilateral treaties a concise reference to inviolability can be found: art. 1 Protocol P&I of EPO 1973, art. 2.3 UN P&I Convention 1946, art. 3.5 UN Specialized Agencies P&I Convention 1947, Art. 29 EUROCONTROL Consolidating Protocol 1997. Concerning the latter convention, special attention should be paid to art. 29.3, where a considerable exception to inviolability of premises is incorporated.

<sup>186</sup> See for example EPO – NL seat agreement (art. 17) jo. Art. 1 Protocol P&I of EPO 1973. For the NATO organizations, like the NATO C3 Agency (NC3A) the seat agreements are rather limited. The NC3A seat agreement concluded with the Netherlands deals with privileges and immunities of staff members of the organization and the legal position of those staff members. In addition some provisions on the fiscal privileges of NC3A are included, but no reference is made to the privileges of the organization itself. Such provisions can only be found in the 'Ottawa Agreement' of 1951, a multilateral treaty dealing with (civilian)

relevant to the P&I of an IO may not have any determination on the inviolability of its premises.<sup>187</sup>

#### *Not allowed to enter the premises*

The most straight-forward element of inviolability of premises is that the authorities of the host state are prohibited from entering inviolable premises. It can be found in both examples above: paragraph 6.2 ICC – NL seat agreement 2007 and article 3.1 EUROPOL – NL seat agreement 1998. Although both the wording of the two provisions and the placement of those words within the provision differ considerably, it refers to the same basic element of inviolability. This element of inviolability of premises is made up mostly by the rules on when host state authorities are in fact allowed to enter. As Jenks summarizes it: '*local authorities have access only by consent, for the purposes for which such consent has been given, and on any conditions subject to which such consent has been given*'.<sup>188</sup> In other words, the prohibition not to enter is a blanket prohibition to which there are no exceptions except those created by the IO itself, by way of permission or consent, or by requesting assistance of the host state.<sup>189</sup> Such permission can only be given by the IO, usually through the chief executive officer, like the Registrar, Secretary-general or Director(-general).<sup>190</sup> Usually seat agreements also determine that the chief executive officer may designate alternate staff members that are empowered to give such permission. This implies that not every staff member of an IO is automatically empowered to give permission to enter the premises. For example, a member of the administrative staff of the registry may not be legally entitled to give permission to enter the premises, since the person was not explicitly designated by the chief executive officer.<sup>191</sup>

#### *'Competent authorities on official duty' v. 'any person authorized under any legal provision'*

It shows from the two provisions quoted above that there are several ways in which inviolability of premises may be described in a seat agreement. But despite the textual differences, the scope and extent of the provisions are actually the same. The prohibition not to enter is absolute, and applies to all individuals, whether they are agents of the host state or not and whether they are on official duty or not.<sup>192</sup> This is easily explained when one takes into account the regular legal setting that applies for non-inviolable private property, like the office building of a multinational or the private residence of an individual. In such a setting, individuals can deny

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bodies of NATO and its personnel. In art. 6 of the Ottawa Agreement, it is provided that the organization (which refers to NATO, but by virtue of article 1(a) and (c) comprises NC3A as well) is inviolable. The representation offices of the European Parliament (EP) and the European Commission (EC) in the Netherlands do not have separate seat agreements governing their legal status. However, the Protocol on the Privileges and Immunities of the European Union is applicable to these two offices. In article 1 of the Protocol, the premises are declared inviolable.

<sup>187</sup> See art. 1 and 3 Nederlandse Taalunie P&I Protocol 1990: only the IO's archives are explicitly declared inviolable. This clear omission is evidence that the premises as such were not considered to be inviolable.

<sup>188</sup> Jenks 1961, p. 47.

<sup>189</sup> It may be held that it is technically incorrect to state that permission *lifts* inviolability; the inviolability of premises remains intact and fully applicable to the premises as a whole. As Jenks said, permission of the IO to enter the premises merely extends to a specific situation, for a specific purpose and possibly under specific conditions. For all other situations, whether or not they are comparable to the one for which permission was granted, inviolability prohibits the exercise of host state jurisdiction. As such, exercise of host state authority after permission/consent, or at the request of the IO, should be considered as being placed outside of the ambit of the principle of inviolability of premises, rather than that inviolability is lifted.

<sup>190</sup> Ahluwalia 1964, p. 81-84 (also on emergency clause); Brandon 1952, p. 103. See for other examples seat agreements STL – NL 2007 (article 6.2), Eurojust – NL 2006 (article 3.1) and ICTY – NL 1994 (article 5.2).

<sup>191</sup> Concerning the authority to give permission to enter, the ICTY – NL seat agreement 1994 provides for an interesting example. While in art. 7.2 of said agreement both the President and the Registrar of the Tribunal are given the authority to request the host state authorities to preserve (Dutch) law and order on the premises of the Tribunal, the President is not explicitly invested with the power to give consent to the host state authorities to enter the premises in art. 5.2. Instead, only the Registrar is designated as the staff member with this authority. Possible difference between the two situations is that the general inviolability provides for wider scope of protection than just the entry of host state authorities in order to preserve law and order on the premises. Nevertheless, the two situations have a considerable overlap. This peculiar construction is not found in for example the seat agreements of the ICC and STL.

<sup>192</sup> See Duffar 1982, p. 109-110.

access to their private property to other individuals: no-one is allowed to enter another person's property without consent. Exceptions to this rule are created by the national laws of the state, which prescribe that persons with a certain function may enter private property without permission under certain conditions. The basic example of this is a police officer that can be authorized by law to enter a house for the purpose of arresting someone, or for searching the property.<sup>193</sup> The point is that such functionaries are only allowed to enter those premises because they are exercising an official duty as granted to them by law, and the law specifically authorizes the entry.

It is the exercising of official duties, as recognized and granted by national law, against which the inviolability of premises envisages to protect the IO. This is where the rules on inviolability exceed the basic legal setting for any individual as described above. Naturally, the basic legal setting for any (legal) person also applies to IO's.

#### *Interference through legal and quasi-legal means*

Besides the very pragmatic prohibition to enter the premises, a more abstract element is also included in the principle of inviolability of premises. This element may be identified as the prohibition to interfere on the premises through legal or quasi-legal means, and is also an inherent part of inviolability.<sup>194</sup> Interference through legal or quasi-legal means can take different forms. Some of these forms are specified in different seat agreements, but it flows from the concept of inviolability that no interference is allowed, whether it is explicitly mentioned or not. The Special Rapporteur of the ILC stated that exemption from any form of search, requisition, attachment, confiscation, expropriation and any other form of interference, whether administrative, executive, judicial, or legislative, is inherent to the principle of inviolability of premises 'as a natural consequence'.<sup>195</sup>

Concerning legal and quasi-legal means, the most explicit provisions in legal P&I instruments deal not specifically with the premises, but with the property and assets of the IO in general.<sup>196</sup> Examples of such interference with the premises as specified in seat agreements are judicial actions and the service or execution of legal process.<sup>197</sup> Another example is that host state authorities should ensure that an IO is not dispossessed and/or deprived of all or any part of its premises.<sup>198</sup> This provision deals with the legal measure of dispossession, which not necessarily involves any physical entry of the premises that is being dispossessed. The reference to 'deprivation' however should be seen as more factual in nature, and may include both legal measures and physical measures. It is a functional criterion which applies here: whether the IO is actually deprived of part of its premises shall most likely depend on whether or not the IO can still use those parts of its premises for the exercise of its functions.<sup>199</sup> The provision of Eurojust for example mentions only inviolability in general, and a specification concerning the prohibition of entry as discussed above. Nevertheless, this second element is also considered to apply to Eurojust as well.

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<sup>193</sup> Other functionaries can also be discerned, like bailiffs and fire fighters under certain conditions.

<sup>194</sup> Muller 1995, p. 198.

<sup>195</sup> 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 104.

<sup>196</sup> See for example section 3 UN P&I Convention 1946 and section 5 UN Specialized Agencies Convention 1947.

<sup>197</sup> See for example art. 6.2 ICC – NL seat agreement 2007; art. 6.2 STL – NL seat agreement 2007; see also the CFC – NL seat agreement 1991, where an interesting exception is made concerning the service of legal process, due to exceptions on the immunity from jurisdiction of the CFC as laid down in its constitutional instrument (art 42 CFC Agreement 1980). For another rare exception to the inviolability of premises for the purpose of judicial enquiries and execution, see Art. 29.3 Eurocontrol Consolidating Protocol 1997.

<sup>198</sup> Art. 6.1 ICC – NL seat agreement 2007; art. 4 PCA – NL seat agreement 1999; Art. 3.2 Europol – NL seat agreement 1998; art. ICTY – NL seat agreement 1994 (see also ICTR – NL seat agreement 1997 and SCSL – NL seat agreement 2006).

<sup>199</sup> Muller 1995, p. 200.

*Jurisdiction of host state authorities*

The concept of inviolability of premises should leave no doubt as to the legal situation: the premises of an International Organization are still under the jurisdiction of the host state. As such, it is no different from any other part of the territory of the host state. The only significant legal difference is that the host state is not allowed to *exercise* (or enforce) this jurisdiction. It is like a 'blanket' of inviolability is laid over the relevant part of the territory of the host state: underneath that blanket there still is host state territory. This means that for example its criminal laws remain applicable, but its executive authorities (police) are not allowed to enforce these laws on the 'inviolable' premises. An example to illustrate this: when a participant in a demonstration in front of an IO manages to climb over the fence and commits a crime there (for example vandalism), the police has the full authority to arrest that person for the acts committed on IO premises, but they are not automatically allowed to enter the premises to actually make that arrest. Only if the person enters 'regular' Dutch territory again, or when the IO gives explicit consent for the police to arrest the person on IO premises, is such an arrest possible. In short, the Dutch law enforcement officers are not authorized to enter the premises to arrest the person but do have jurisdiction over what happens on the 'inviolable' territory. For a more elaborate discussion about control and authority on the premises of an IO, see paragraph three of this chapter.

*Duties of the IO related to the inviolability of premises*

The inviolability of premises entails a considerable limitation on the authority of the host state as well as on the methods of exercising its jurisdiction. Sometimes this has inspired the drafters of seat agreements to incorporate provisions in the seat agreement that are intended to balance the scale between the interests of the host state and the interests of the IO. These provisions usually impose an obligation on the IO, but it must be pointed out that failing to meet these obligations does not entail a lifting of the inviolability of premises. A good example of such a provision is article 16 of the IOM – NL seat agreement 1990, which reads as follows:

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"The Organization shall cooperate at all times with the appropriate authorities in order to facilitate the proper administration of justice, to ensure the observance of police regulations and regulations concerning the handling of inflammable material, public health, labour inspection and other similar national legislation, and to prevent any abuse of the privileges and immunities and facilities provided for in this Agreement. The right of the Government to take all precautionary measures in the interests of its security shall not be prejudiced by any provision in this Agreement".  
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Such provisions are also incorporated in other P&I instruments.<sup>200</sup> However, concerning the IOM the reference is more elaborate: art. 4 of this seat agreement provides that the premises are inviolable, but this inviolability is declared "*subject to the provisions of article 16 of this agreement*".<sup>201</sup> This would seem to suggest that article 16 is construed as an exception to the general inviolability of premises, but careful reading of the rest of article 4 shows that this is not the case. Therefore article 16 is a strong obligation upon the IO, but not one that forms an exception to inviolability. This is confirmed by other such provisions.<sup>202</sup> In general, it can be stated that every international organization has to maintain a positive and cooperative attitude towards assisting the local law enforcement authorities. Considering the principle of good faith and cooperation, as stressed by the ICJ in the WHO-Egypt Advisory Opinion,<sup>203</sup> it is under a legal obligation to adopt such an attitude. However, this also does not suggest any curtailment of the inviolability of IO premises. As Jenks notes, an organization should remain independent and make its own judgement on the facts of a given case where host state authorities requests

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<sup>200</sup> Art. 18 CTA – NL seat agreement 1984; Art. 12 of Annex 1 to the ESA Convention; art. 30 Eurocontrol Consolidating Protocol 1997; art. 20 EPO P&I Protocol 1973.

<sup>201</sup> Art. 4 IOM-NL seat agreement 1990.

<sup>202</sup> See especially art. 2 jo art 12 of Annex 1 to the ESA Convention.

<sup>203</sup> ICJ *WHO – Egypt* 1980, para. 43.

cooperation of the IO. An IO 'cannot allow itself to become the instrument of any one state in matters relating to crime any more than in any other respect'.<sup>204</sup>

Another provision placing an obligation on the host state that is sometimes incorporated, is the duty to prevent its premises from being used as a refuge by persons who are avoiding arrest or the proper administration of justice,<sup>205</sup> and the obligation to make suitable arrangements for the exercise of necessary inspections and maintenance public utilities on the premises.<sup>206</sup>

Only the PCA and the OPCW seem to have some limitation of inviolability of premises for the purpose of 'reasonable application of fire protection regulations'; see art. 5.2 of the PCA – NL seat agreement 1999 and 7.5 OPCW – NL seat agreement 1997. These provisions should be seen separate from the possibility of assuming consent in case of emergency, as will be discussed in the next chapter.

#### *Practical advice concerning the issue of consent to entry*

Host state authorities should be thorough in ensuring that permission is obtained from the persons designated to give such permission. Keeping in close contact with the different IO's on this subject is highly recommendable. Also, the creation of standard databases with contact data of the staff members that are designated to give permission may contribute to ensuring adherence to this rule of international law. There are plenty of likely situations in which host state authorities may believe that they are requested to render assistance in a legally sufficient way, but the request is actually coming from a non-designated person. For example, one of the desk clerks of an IO consents to police entry when he or she encounters an incident in the lobby. In this respect, it should also be kept in mind that the principles of cooperation and good faith may provide a balance between the strict rules of consent and the functional necessity principle of the inviolability of premises. After all, the inviolability of premises is intended to secure the effective, independent functioning of the IO. This purpose is not served with a very formalistic approach of the rules on consent, for example when the police would refuse to render assistance until the 'correct' staff member consents to their presence.

#### *Other objects enjoying inviolability*

Although it is often provided for in the same provision that deals with the inviolability of premises, the inviolability of 'objects' like archives, property, funds and assets of an IO must be seen as separate privileges. Accordingly, the inviolability of property, funds and assets forms a separate article or paragraph in several seat agreements.<sup>207</sup> Of course there may be considerable overlap between these objects, since archives are usually located within the premises, and the premises may very well be part of the property of an IO (but not necessarily). Nevertheless, there is no such thing as one encompassing principle of inviolability, including all of the objects mentioned above as well as premises. They should be attributed separately. But as is shown by the very fragmented and diverse ways in which these privileges are dealt with in different seat agreements, there is some obscurity in theory and practice concerning these privileges. Since this report primarily deals with the physical location of an IO, its premises, these other privileges are not specifically dealt with further.<sup>208</sup>

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<sup>204</sup> Jenks 1961, p. 50-51; see also Ahluwalia 1964, p. 80; Brandon 1952, p. 99.

<sup>205</sup> See for example art. 6.5 ICC – NL seat agreement 2007; art. 6.5 STL – NL seat agreement 2007; art. 3.4 Eurojust – NL seat agreement 2006; art. 5.4 PCA – NL seat agreement 1999; art. 3.5 Europol – NL seat agreement 1998; art. 7.7 OPCW – NL seat agreement 1997.

<sup>206</sup> See for example Art. 9.4 ICC – NL seat agreement 2007; art. 9.4 STL – NL seat agreement 2007; art. 5.3 Eurojust – NL seat agreement 2006; art. 7.3 Europol – NL seat agreement 1998; art. 9.3 OPCW – NL seat agreement 1997; art. 12.4 ICTY – NL seat agreement 1994 (see also ICTR – NL seat agreement 1997 and SCSL – NL seat agreement 2006).

<sup>207</sup> Art. 11 and 12 ICC – NL seat agreement 2007; art. 11 and 12 STL – NL seat agreement 2007; art. 3.3 PCA – NL seat agreement 1999.

<sup>208</sup> See for further reading on the subject Muller 1995, p. 185-209; Amerasinghe 2005, p. 330-335; Denza 2008, p. 156-159, 189-204.

## 6.2. Why do they have such a special status?

The inviolability of premises as discussed above is a wide privilege with far-reaching consequences for the host state. This may sometimes lead to complex situations, in which it would seem that the host state is not sufficiently able to ensure its own interests. For example, the host state may not be able to exercise its jurisdiction to apprehend suspects of a crime who fled onto IO premises. To ensure a good understanding of the necessity of inviolability of premises, below the legal argument is briefly discussed.

In his 4<sup>th</sup> Report to the ILC on the subject, Special Rapporteur Díaz-González submits that the inviolability of premises is '*a most important privilege, and one which, in the practical life of international organizations, is essential to their full functioning. [...] [It] vouchsafes an international organization its autonomy, its independence and its privacy*'.<sup>209</sup>

Jenks states that inviolability is '*designed to protect the dignity and freedom of formal deliberations; to preserve the confidential character of the informal consultations [...], to permit international officials to discharge their daily duties with complete independence; and to make effective the inviolability of international archives*'.<sup>210</sup>

Inviolability of premises is thus stated to be an '*essential condition for securing effective independence of international organizations*'.<sup>211</sup> From the quotes above it becomes abundantly clear that it is the functional necessity theory which forms the foundation for inviolability. It is a cardinal principle that helps secure for any international organization its independence and its unhampered functioning. This principle ensures that not only the IO is *in fact* not hampered in fulfilling its purposes, but also that all other member states have the guarantee that the host state can not use its particular role concerning the IO to influence the work of the IO. That of course requires that the discretionary power of the host state to determine whether inviolability applies is kept to a minimum and are very strictly regulated and adhered to. Otherwise, a sliding scale would be created and confidence in the effectiveness of the principle may quickly fade.

Although the legal basis for inviolability of premises of an international organization clearly is the principle of functional necessity, it can also be traced back to the inviolability of diplomatic missions, as codified in article 22 VCDR 1961.<sup>212</sup> The inviolability of diplomatic premises has had a strong influence on the development of the IO-privilege, and the privilege in both systems are often considered identical.<sup>213</sup> This can easily be explained. As was stated in part I of this report, the privileges and immunities of diplomatic missions often had a strong dual legal basis: not only the principle of sovereign equality provided grounds for the receiving state to refrain from exercising jurisdiction, but also the necessity of this inviolability for the daily unhampered functioning of diplomatic missions, free from coercion or disturbance. In other words: functional necessity. Still, there are legal differences between the two systems as well as practical differences in the workings of an IO versus an embassy.

## 6.3. What consequences does this status have for the authority on IO premises?

### *Introduction; territorial sovereignty of the state*

In previous paragraphs the issue of inviolability of premises was discussed. An issue connected to that special legal status of inviolability is the issue of law and authority within those premises. As mentioned earlier it is popular public belief that the premises of embassies are foreign territory, and connected to that is the idea that laws and regulations of the host state ('receiving state') do not apply on embassy premises.<sup>214</sup> This is far from the truth. In the VCDR 1961, no provision explicitly determines that the laws of the receiving state are inapplicable within

<sup>209</sup> 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 88. Interesting to note is that, according to Díaz-González, justification for inviolability was sought in the extritoriality theory: para. 90.

<sup>210</sup> Jenks 'International Headquarters' (1945), p. 41; see also Jenks 1961, p. 46.

<sup>211</sup> Ahluwalia 1964, p. 81. See also Duffar 1982, p. 99-100.

<sup>212</sup> Ahluwalia 1964, p. 81.

<sup>213</sup> 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 89; Duffar 1982, p. 101.

<sup>214</sup> Muller 1995, p. 130.

embassy premises. On the contrary, in article 41 paragraph 1 of the VCDR 1961 it is determined that the laws and regulations of the receiving state must be respected.<sup>215</sup> Admittedly, this provision is aimed at the diplomatic staff in general and does not focus on applicability of laws on the premises, but it is nevertheless an important indication for the relationship between privileges and immunities and the laws of the receiving state. Accordingly, the provisions on inviolability of premises determine only that officials may not enforce their authority on the premises, not that they have no legal authority at all.<sup>216</sup> Embassy premises remain an integral part of the sovereign territory of the receiving state and as such all laws and regulations of the receiving state remain applicable, although the receiving state may not freely exercise its authority on those premises.<sup>217</sup>

The same framework can be recognized with regard to the premises of international organizations. No international organization has its own 'sovereign' territory, instead organization premises are always located within the territorial sovereignty of the host state.<sup>218</sup> In effect, the basic legal situation is that all laws and regulations of the host state apply in full to all premises of international organizations in that state.<sup>219</sup> However, seat agreements may contain provisions which impose limitations on applicability and enforceability of those laws and regulations, as will be discussed below.

#### *Relationship between IO authority and host state sovereignty*

In conformity with the general rule as described above, several seat agreements determine that the laws and regulations of the host state are applicable on the premises of the IO.<sup>220</sup> It is apparent that even without a provision to that effect, Dutch laws and regulations would apply to the premises since this is inherent to the customary rule of territorial sovereignty of a state. The explicit provisions in seat agreements are simply a clarification on the matter. However, a lot of seat agreements also contain a provision on the law and authority within the premises, which provides limitations to the applicability of host state laws and regulations. As an example of such a provision, article 8 of the ICC seat agreement of 2007 is quoted in full below.<sup>221</sup>

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#### *Article 8. Law and authority on the premises of the Court (ICC – NL seat agr. 2007)*

1. The premises of the Court shall be under the control and authority of the Court, as provided under this Agreement.
2. Except as otherwise provided in this Agreement, the laws and regulations of the host State shall apply on the premises of the Court.
3. The Court shall have the power to make rules, operative within its premises, as are necessary for the carrying out of its functions. The Court shall promptly inform the competent authorities upon the adoption of such rules. No laws or regulations of the host State which are inconsistent with rules of the Court under this paragraph shall, to the extent of such inconsistency, be enforceable within the premises of the Court.

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<sup>215</sup> Article 41.1 VCDR 1961 reads as follows: *Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.*

<sup>216</sup> Art. 22 VCDR 1961; See also Denza 2008, p. 135-136, 147-150.

<sup>217</sup> Denza 2008, p. 135-136; Muller 1995, p. 129-130.

<sup>218</sup> Muller 1995, p. 129; See also Amerasinge 2005, p. 406; Klabbers 2009, p. 138. This is also discussed in earlier chapters.

<sup>219</sup> Muller 1995, p. 134; Ahluwalia 1964, p. 73, 80; Brandon 1952, p. 99. This rule is laid down in for example Section 7 of the UN – USA Headquarters Agreement.

<sup>220</sup> See for example art. 8.2 ICC seat agreement 2007, art. 8.2 STL seat agreement 2008, art. 6.2 Eurojust seat agreement 2006, art. 6.2 ICTY seat agreement 1994.

<sup>221</sup> A strong reason for choosing the ICC-provision as example is that the seat agreement between the ICC and the Netherlands has been drafted with considerable care and deliberation, and has been subject of extensive negotiations. As such, it can be considered as a balanced example of the relationship between an IO like the ICC and its host state. This statement is reinforced by the fact that the seat agreement between NL and the STL, the latest addition to the group of IO's in the Netherlands, is almost identical to that of the ICC.

4. The Court may expel or exclude persons from the premises of the Court for violation of its rules and shall inform in advance the competent authorities of such measures.
5. Subject to the rules referred to in paragraph 3 of this article, and consistent with the laws and regulations of the host State, only staff of the Court shall be allowed to carry arms on the premises of the Court.
6. The Registrar shall notify the host State of the name and identity of each staff member of the Court who is entitled to carry arms on the premises of the Court, as well as the name, type, calibre and serial number of the arm or arms at his or her disposition.
7. Any dispute between the Court and the host State as to whether rules of the Court come within the ambit of this provision or as to whether laws or regulations of the host State are inconsistent with rules of the Court under this provision shall promptly be settled by the procedure set out in article 55 of this Agreement. Pending such settlement, the rule of the Court shall apply and the law and/or regulation of the host State shall be inapplicable on the premises of the Court to the extent that the Court claims it to be inconsistent with its rules.

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The first question that is raised by this provision is the scope and extent of the 'control and authority' that an International Organization enjoys under this article. After all, laws and regulations of the host state apply and host state authorities do have jurisdiction over the premises. The only limitation is that this jurisdiction may only be *exercised* with the consent of the Organization. It seems that this latter point is the primary reason for incorporating such a provision. It intends to clarify the complex relationship between IO and host state on this matter: there should be no doubt about the inviolability of premises and the factual control to which the organization is entitled over those premises, although there also should be no doubt about the sovereign title of the host state over the premises that still lays at the foundation of the status of those premises. Interesting to note that nowhere in the VCDR 1961 any provision can be found granting the sending state 'authority and control' over the diplomatic premises. Nevertheless, the basic assumption of *de facto* control of the sending state combined with *de jure* sovereignty of the receiving state over the premises can be considered equal to that of International Organizations.<sup>222</sup> Not all seat agreements have an explicit provision on control and authority of the organization, but this does not entail that the IO's concerned are devoid of such *de facto* control and authority over their premises, since it is provided by the inviolability of premises.

*Power to issue regulations applicable on the premises*

The provisions of various seat agreements on the matter of applicability of local laws of the host state on IO premises have primarily been derived from customary international law as applicable to diplomatic premises.<sup>223</sup> The applicability of local laws on both diplomatic and IO premises is widely accepted, since the contrary situation would suggest the direct applicability of the theory of extritoriality.<sup>224</sup> This entails that both the civil law and the criminal law system of the host state is fully applicable.<sup>225</sup> Nevertheless, in several seat agreements the IO's themselves are also granted the power to issue regulations concerning their premises.<sup>226</sup> This is a power which is strongly connected to the 'control and authority' of the organization over its premises, but the explicit provision may extend the scope of that authority. This extension of scope is due to the possible effect of such regulations 'overruling' applicable laws and regulations of the host state. This 'overruling' entails that the laws and regulations are no longer

<sup>222</sup> See for inviolability of diplomatic premises in general Denza 2008, p. 135-179, specifically p. 140 on the Netherlands.

<sup>223</sup> Ahluwalia 1964, p. 72.

<sup>224</sup> Brandon 1952, p. 96-97.

<sup>225</sup> Ahluwalia 1964, p. 73, 80; Brandon 1952, p. 99.

<sup>226</sup> See for example art. 8.3 STL – NL seat agreement 2007; art. 8.3 ICC – NL seat agreement 2007; Art. 6.2 Eurojust – NL seat agreement 2006; art. 5 UNESCO – NL seat agreement 2003; art. 6.2 Europol – NL seat agreement 1998; art. 7.2 OPCW – NL seat agreement 1997; art. 6.3 ICTY – NL seat agreement 1994 (see also SCSL – NL seat agreement 2006 and ICTR – NL seat agreement 1996).

applicable, if and insofar these are inconsistent with the regulations of the IO.<sup>227</sup> This thus goes one step further than the basic legal situation where the laws are *applicable*, but not *enforceable* without the explicit permission of the IO due to the inviolability of its premises.

In this respect, the ICC-provision quoted above provides for a very interesting example. In paragraph 3 of that article it is provided that the Court may make rules and regulations to be applied within its premises, and that Dutch laws and regulations which are inconsistent with the IO regulations shall not be 'enforceable' within the premises. This seems merely a confirmation of the inviolability of premises, but it is submitted that it is intended to have the effect of 'inapplicability' of the laws as well.<sup>228</sup> At least, it is strong evidence that when such an inconsistency exists, the Court will not consent to enforcing the relevant law of the host state, and also does not seem to be under a moral obligation to do so. In this respect, it is interesting to note that the seat agreement of the STL, in many respects an exact copy of the ICC seat agreement, does state in article 8.3 that Dutch laws are *inapplicable* instead of *unenforceable*.<sup>229</sup>

As stated earlier, not all IO's are explicitly granted the power to set aside the laws and regulations of the host state. There is no evidence that this power is a standard prerogative of any International Organization. In other words, it does not seem accepted that this is a power which, on the basis of the principle of functional necessity, may be implied. Of course every International Organization is empowered to issue such regulations for its premises if necessary for the effective exercise of its functions. This flows from the general principle of functional necessity and is in accordance with the *de facto* control and use of the premises by the organization. This functional necessity is reinforced by the inviolability of premises, making host state rules and regulations unenforceable on the premises without permission of the IO. However, it is submitted that IO regulations can only derogate from the laws and regulations of the host state (making them 'inapplicable') if that power is explicitly granted in the seat agreement. The main argument for this is that the basic protection provided by the inviolability of premises can be deemed sufficient to ensure the effective functioning of the IO, so no 'heavier' limitation on host state jurisdiction is warranted.<sup>230</sup> This statement implies that all regulations, which are issued by International Organizations which are devoid of the power to issue derogating regulations, must be consistent with the laws and regulations of the host state. It is not clear whether this assertion is supported by practice, since there is no evidence of any formal dispute resolution concerning such matters.

#### *When are laws and regulations of the host state inapplicable?*

Article 8.3 ICC seat agreement provides two criteria on issuing regulations that may derogate from the laws and regulations of the host state. First, they must fall within the principle of functional necessity; the Court is only empowered to adopt regulations which are in some way necessary for carrying out its functions. Second, Dutch laws and regulations can only be set aside insofar they are inconsistent with the rules issued by the Court.

The first criterion is a logical consequence of the principles of international institutional law, specifically the principle of functional necessity. It must be determined on a case-to-case basis whether this criterion is met. If any dispute exists concerning this determination, it should be resolved in accordance with the general provisions on dispute settlement in the seat agreement,

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<sup>227</sup> In all the examples provided earlier of provisions which explicitly contained the power to issue regulations, the wording used is consistent with host state laws being *inapplicable* instead of merely not being *enforceable*. The only exception is art. 8.3 ICC – NL seat agreement 2007, as will be discussed below.

<sup>228</sup> This assertion is confirmed by article 8.7 ICC seat agreement, which speaks of *inapplicability* of Dutch laws. This suggests that the wording of article 8.3 is not completely in line with what was intended: the inapplicability of the laws of the host state.

<sup>229</sup> Art. 8.3 STL – NL seat agreement 2007.

<sup>230</sup> Interesting to note is that no explicit provision on issuing regulations on embassy premises can be found in the VCDR 1961, let alone regulations which may derogate from the laws of the receiving state. It must be assumed that for diplomatic missions the same reasoning applies: it is empowered to issue regulations, but not to the extent that they are inconsistent with the laws and regulations of the host state.

as is often pointed out in the provision on control and authority itself.<sup>231</sup> It must also be pointed out that IO's powers and competence are also limited by functional necessity, so the power to issue regulations knows this same limitation.<sup>232</sup> Besides this criterion of functional necessity, there is no general exception to the regulating power of the organization. Thus, although it is unlikely that core laws and principles of Dutch law are actually set aside by an IO, there is no minimum set of Dutch law that must apply on IO premises regardless of any IO regulations to the contrary. This may create difficulties concerning host state laws on fire protection and safety regulations for the work environment.<sup>233</sup>

The second criterion, that Dutch laws and regulations can only be set aside insofar they are inconsistent with the rules issued by the IO, does not seem to pose any principal difficulties. Disputes concerning whether or not host state laws are inconsistent must be settled through the general procedure for dispute settlement as provided in the seat agreement. In article 8.7 ICC seat agreement it is determined that while such a settlement is pending, the disputed IO regulation takes preference over the laws and regulations of the host state: the latter are inapplicable to the extent the Court deems them inconsistent with its own regulations. According to Muller, most regulations that were adopted by International Organizations and with which the laws of the host state were deemed inconsistent, only pushed aside the mechanisms for supervising and enforcing the law, not the content of the legal rule itself.<sup>234</sup> The issues of safety regulations concerning fire prevention and work environment mentioned earlier are also illustrative in this respect. Usually, such laws have some form of control mechanism through obliged inspections etc. which are hard to reconcile with the inviolability of premises. Such control and enforcement mechanisms may thus also be put aside by IO regulations.

In conclusion, only when explicitly determined may IO regulations deviate from Dutch laws and regulations. If such deviation occurs, the Dutch laws and regulations are inapplicable insofar they are inconsistent with IO regulations. This means that for all practical purposes, those specific parts of Dutch law do not exist for the premises. In that sense, IO regulations may set aside Dutch law. However this power only encompasses regulations necessary for the exercise of functions of the IO, so a 'functional necessity' criterion applies. Besides this limitation, there does not seem to be any presupposed limit as to what part of Dutch law should apply.

#### *The carrying and use of weapons on IO premises*

An interesting issue is how the carrying of weapons by IO staff is regulated. Most IO's do not have any reference to the subject, but the ICC and the STL do have an explicit provision concerning fire arms. See articles 8.5 and 8.6 of both seat agreements (quoted above). However, these provisions specifically mention that carrying arms must be 'consistent with the laws and regulations of the host state'.<sup>235</sup> It seems that on this specific subject the IO is not empowered to deviate from Dutch laws on the use of fire arms. In addition to the existing laws of the host state, the ICC and STL are also obliged to provide information concerning the carrying of weapons on the premises. In principle, every IO may regulate as long as it is not

<sup>231</sup> See for example article 8.7 ICC – NL seat agreement 2007.

<sup>232</sup> See Part I of this report on the competence of IO's.

<sup>233</sup> It is difficult to give an example of a IO-regulation which would be contrary to the functional necessity criterion. But it can be argued for example that when an IO-regulation determines that police officials of the host state do not have *de jure* jurisdiction over crimes committed on the premises, this is contrary to functional necessity for the following reasons: the customary rule of inviolability of premises entails that the host state is dependent on explicit permission from the organization before it can exercise its jurisdiction, so this should provide sufficient protection against host state actions. Excluding *de jure* jurisdiction *per se* would thus be unnecessary for ensuring independence, and will not be a strong enough legal basis to set aside the principle of territorial sovereignty of the host state. But most importantly, the fact that host state authorities *do* have jurisdiction, that they can exercise when the IO wants to, also contributes to the effective functioning, for example by restoring order on the premises. See also Part III of this report on the duty to protect an IO.

<sup>234</sup> Muller 1995, p. 134, 137. This practice seems to be aimed more at the enforceability of the laws of the host state, while this is also dealt with by the inviolability of the premises. See for an example where substantive host state laws were set aside Muller 1995 p. 136, where the issue of the applicability of US tort law on the premises of the UN is discussed.

<sup>235</sup> Art. 8.5 ICC – NL seat agreement 2007, art. 8.5 STL – NL seat agreement 2007.

inconsistent with host state laws and regulations. So in principle every IO should be able to entertain such a construction as laid down in art. 8.5 ICC seat agreement. This entails that as long as an IO follows the rules about the carrying of fire arms of the host state, it poses no problem. The question becomes more complex when the host state has very strict repressive laws on the possession and carrying of fire arms, like the Netherlands. It is clear that several IO's in the Netherlands are in need of armed staff members, or so it seems from the practice of armed UN guards at the ICTY and armed security personnel at the ICC building, where also Eurojust resides. The seat agreement of the ICTY only states the following concerning the carrying of weapons by ICTY staff members:

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*Article 22 Notification (ICTY – NL seat agreement 1994)*  
1. [...]  
2. The Registrar shall also notify the Government of the name and identity of each official of the Tribunal who is entitled to carry fire arms on the premises of the Tribunal, as well as the name, type, caliber and serial number of the arm or arms at his or her disposition.  
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While this provision employs the same wording as article 8.6 of the ICC – NL seat agreement, the absence of any provision like 8.5 ICC – NL seat agreement places it in a completely different light. After all, article 22.2 ICTY – NL seat agreement now seems to be the general rule on fire arms on ICTY premises, and in this provision no mention is made about any need for approval of the host state, or any link to the Dutch laws and regulations on the carrying and use of fire arms. It merely tries to establish a balance between the interests of the IO and the interests of the host state, by providing the latter with information. But this is not the same as the power of regulation. In short, it seems that the ICTY seat agreement leaves the IO with a more broad scope of powers than the ICC seat agreement does, when it comes to carrying weapons on its premises.

When an IO has the power to make regulations it presumably has the power to issue regulations on the authority and powers of its own security force. The substantive rules of engagement for IO security guards, especially when they are using weapons, shall presumably be based on Dutch law. But do these guards have the same powers as regular police officials outside IO premises, due to their authority on premises? Or are they more restricted by general criminal law on use of force and self-defence? What are their 'rules of engagement'? These questions can unfortunately not be answered on the basis of sources of doctrine, or on the basis of existing seat agreements or multilateral treaties, since it is (primarily) for the IO itself to regulate these issues internally.

**6.4. Are IO premises inviolable even without a treaty provision to that effect?**

In the paragraphs above, multiple aspects of the inviolability of premises were discussed. In this final paragraph, the question is discussed whether this fundamental privilege of International Organizations is applicable to all IO's, whether this is laid down in a treaty provision or not. If the principle would apply even without the presence of an explicit provision concerning the inviolability of premises then there wouldn't even have to be a seat agreement or other legal instrument specifying privileges and immunities at all. As discussed below, there are two lines of argument which could be followed in order to give a positive answer to this question.

*Inviolability as customary international law*

If the principle of inviolability of IO premises would be part of customary international law, it would apply even without an explicit treaty provision since rules of customary international law are applicable without any codification. The formation of a rule of customary international law generally requires two elements: state practice that suggests the existence of such a rule, and *opinio juris* concerning that rule, which means that the adherence to the rule by states apparently flows from the notion that they are under a legal obligation to respect that rule.

Arguing that a rule forms part of customary law is thus essentially a factual line of reasoning, for which evidence should be provided.<sup>236</sup>

#### *Inviolability as inherent to international legal personality*

However, another possible line of argument that can be considered is the following: because of the basic legal status of an IO, that of being an international legal person, the IO enjoys certain rights and powers that flow directly from, or are inherent to, its international legal personality. If these rights would include the inviolability of its premises, this would apply when international legal personality is established, regardless of any codification of inviolability.<sup>237</sup> This seems to closely resemble the concept of customary law, but it is not necessarily the same. In contrast, this second option is essentially a theoretical line of reasoning: although evidence of existence of such a rule may also be sought in state practice, it relies more on the theoretical legal construction that lies at the basis of the rule. This has one distinct advantage, namely that the matter is approached from a more normative perspective, or in other words from a perspective that formulates how the law must or should be construed.

#### *Inviolability of IO premises as discussed in doctrine*

In this section, several quotes from distinguished scholars are presented, which all deal with the legal character of the rule of inviolability of IO premises.

The inviolability of premises is clearly a key privilege for any international organization. Muller is very explicit about the importance of inviolability, stating that “*the principle of inviolability is widely recognized as a fundamental privilege. [...] In many ways, the inviolability is the guardian of the degree of confidence states have in the use of international organizations as for a for international cooperation.*”<sup>238</sup> The same view is also expressed by Ahluwalia.<sup>239</sup>

The paramount importance of the principle is also confirmed by Díaz-González, Special Rapporteur of the ILC, when he states that the immunity is ‘*of course embodied in almost all the legal instruments*’.<sup>240</sup> Amerasinghe states that “*the inviolability of premises and archives is provided for in all relevant agreements*”.<sup>241</sup> Numerous sources of doctrine confirm this.<sup>242</sup> Zacklin states that the principle of inviolability of IO premises “*has been universally respected*”.<sup>243</sup> Klabbers refers to the possibility that the abundant amount of treaties covering P&I provides evidence of both state practice and the necessary *opinio iuris*. He subsequently states that it may be the case that there is a customary duty to grant privileges and immunities, but stays silent on the issue whether specific privileges or immunities, like the inviolability of premises are a customary rule on itself.<sup>244</sup>

Schermers and Blokker however state that both the host state and the IO have general obligations towards each other, even in the absence of a relevant seat agreement. They thereby specifically refer to the inviolability of premises as such an obligation upon the host state.<sup>245</sup>

Iain Scobbie states that “*it is apparent that organizations have a customary entitlement to the inviolability of their premises*”, as a customary implication of the principle of functional

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<sup>236</sup> See on the concept of customary international law Shaw 2008, p. 72-93; Cassese 2005, p. 153-170; Henckaerts & Doswald-Beck (ICRC-study) 2005, Vol. 1, p. xxxi-xlv. See also the judgements ICJ *North Sea Continental Shelf* 1969, para. 74; ICJ *Nicaragua* 1986, para. 186, 190.

<sup>237</sup> As stated in Part 1 of this report, international legal personality does not necessarily have to be explicitly granted by the creators of the IO, it may also be implied.

<sup>238</sup> Muller 1995, p. 185.

<sup>239</sup> Ahluwalia 1964, p. 81.

<sup>240</sup> 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 88.

<sup>241</sup> Amerasinghe 2005, p. 330.

<sup>242</sup> Sands & Klein 2009, p. 500; Scobbie in Dupuy 1998, p. 842; Zacklin in Dupuy 1998, p. 300; Beresford 2002, p. 100; Ahluwalia 1964, p. 81.

<sup>243</sup> Zacklin in Dupuy 1998, p. 300.

<sup>244</sup> Klabbers 2009, p. 148-149.

<sup>245</sup> Schermers & Blokker 2003, p. 1073.

necessity.<sup>246</sup> And, importantly, Scobbie holds that no challenge of that proposition has been found in either doctrine or jurisprudence.<sup>247</sup>

Duffar states that "*l'inviolabilité absolue des locaux est un droit particulier aux personnes de droit international*".<sup>248</sup> Thus, Duffar views the inviolability of premises as a specific right for all entities with international legal personality. Díaz-González referred to the principle as "*a most important privilege, and one which, in the practical life of international organizations, is essential to their full functioning*".<sup>249</sup> He also expresses the view that the right of every international organization to the respect and inviolability of its privacy, which he considers to be the foundation for inviolability of premises, is "*a right inherent in personality*".<sup>250</sup>

However, the Special Rapporteur also acknowledges the fact that inviolability is not always accepted by states, referring explicitly to the report of the European Committee on Legal Cooperation of the Council of Europe, in which the view is put forward that "*the need for inviolability of premises was not readily apparent in the case of all organizations with pure technical or administrative functions and in some cases inviolability of archives may be sufficient*".<sup>251</sup>

#### *Status of inviolability of premises in international law*

In discussing the issue of custom regarding certain organizational privileges and immunities, it is also relevant to look at the status of corresponding privileges in the diplomatic P&I system. Concerning the inviolability of diplomatic premises, there can be no doubt as to status of the principle: it was stated by the ICJ that the inviolability of diplomatic premises is part of customary international law.<sup>252</sup> While recognizing the difference between the two principles, diplomatic and organizational, the statement made by the ICJ can still be seen as support for the assertion that inviolability of premises is part of customary law, due to their identical content and the concurrently wide acceptance.<sup>253</sup> It may also be construed as theoretical support for the notion that inviolability of premises is an inherent part of the legal position of an international legal person, be it states or IO's. A counter-argument may be that the functional needs may differ for every IO depending on its purposes and functions, while embassies are at least in theory the same in their functions and purposes. The differences between IO's may be construed as grounds for not granting an IO inviolability of premises.

It is submitted here that the widespread overwhelming state practice of recognizing the inviolability of premises as a necessary privilege of an IO can be seen as convincing evidence for the existence of a general rule to that effect. The existence of corresponding *opinio iuris*, the second fundament of a rule of customary international law, is difficult to ascertain since it cannot be said for certain that this state practice originates from the notion that they are under a legal obligation to respect that rule. However, since the state practice vis-à-vis IO's in seat agreement negotiations is so uniform both within states (one state vis-à-vis several different IO's such as in the Netherlands) as throughout the state community (all states that are host to IO's), it makes for a convincing argument that inviolability of premises is indeed part of customary international law. This is strengthened by the number of multilateral treaties on IO privileges and immunities, which all determine that IO premises are inviolable. There is much evidence of states explicitly confirming the inviolability of premises in legally binding documents, while at the same time there is no real evidence at all that states contest this granting of inviolability, or make it subject

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<sup>246</sup> Scobbie in Dupuy 1998, p. 841.

<sup>247</sup> Scobbie in Dupuy 1998, p. 842.

<sup>248</sup> Duffar 1982, p. 100.

<sup>249</sup> 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 88.

<sup>250</sup> 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 91. See for support of this view also Duffar 1982, p. 51 *et seq.*

<sup>251</sup> Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), p. 27. See 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 94.

<sup>252</sup> ICJ *Tehran hostages* 1980, para. 62.

<sup>253</sup> See for some support of this view: 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 89; Duffar 1982, p. 101.

to political negotiation. On the contrary, it seems that every (host) state directly accepts the notion of inviolability of premises of an International Organization. This leads me to the conclusion that, through either of the lines of argumentation as specified above, the inviolability of IO premises is applicable to all IO's in the Netherlands.

## 7. Are there exceptions to the status in specific cases, like emergencies and issues national security?

In the previous chapter, the inviolability of premises was discussed. It was shown that in principle entry of premises of an IO is only possible when the IO explicitly consents to that specific entry. In this chapter, deviations from this basic rule are discussed. First, attention will be paid to the possibility to *assume* consent in case of an emergency like a fire on the premises or another calamity requiring host state authorities to enter the premises in order to fulfil their duties. Second, a possible exception to the inviolability is discussed.

### 7.1. Emergencies; assuming consent

All emergency clauses have the same purpose: to enable the host state to assume consent to enter IO premises when an emergency situation occurs in which immediate action is required.

#### 7.1.1. Emergency clauses of the IO's in the Netherlands

An example of the basic emergency clause can be found in the seat agreement of the IUSCT:

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*Art. 1.1 IUSCT – NL seat agreement 1990*  
“The premises of the Tribunal shall be inviolable. The Netherlands authorities may not enter them, except with the consent of the President of the Tribunal or of his designee. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action, and only in the event that it has not been possible to obtain the express consent of the President or of his designee”.  
=====

This type of emergency clause is incorporated in several of the Dutch seat agreements, although the exact wording may differ.<sup>254</sup> Three basic criteria for assuming consent can be discerned. First, an emergency must have occurred; a fire, a disaster of some sort, but it can be assumed that medical emergencies are not excluded. Indeed the other seat agreements generally refer to the more abstract ‘emergency’ situation, instead of a ‘disaster’.<sup>255</sup> The second criterion concerns the severity of that emergency: it must require prompt protective action from the part of the host state.

For both the first and second criterion, there is a considerable discretionary power for the host state. After all, if a situation occurs, the authorities of the host state are the primary party to make a determination whether it qualifies as an emergency and whether that emergency requires the prompt protective action. *Post facto* it becomes a more objective criterion, but then the judgment and expertise of the host state authorities should be presumed adequate, unless there is clear evidence to the contrary. This flows from the principle of good faith that governs the legal relationship between IO and host state.<sup>256</sup>

The third criterion is that a serious effort must have been made to contact the chief executive officer, or a designated staff member, to obtain explicit consent as is prescribed in the regular situation of inviolability of premises. Thus, even in cases of an emergency requiring prompt protective action, it is required of the host state authorities that they follow regular procedure flowing from the inviolability of premises. However, there are also several seat agreements which incorporate the first two criteria mentioned above, but a reference to the effort to obtain explicit consent from the chief executive officer has been omitted.<sup>257</sup> For these IO's, host state authorities may more easily decide not to ‘waste’ time trying to contact the chief executive

<sup>254</sup> Besides the IUSCT these are: art. 2.2 BOIE – NL seat agreement 2007; art. 4.2 UNESCO – NL seat agreement 2003; Art. 5.2 PCA – NL seat agreement 1999; art. 3 UNU-MERIT – NL seat agreement 1989.

<sup>255</sup> Art. 5.2 PCA – NL seat agreement 1999 refers to ‘any situation posing an immediate threat to life or property’ instead of a reference to fire, disaster or general emergency.

<sup>256</sup> See for the principle of good faith: ICJ *WHO – Egypt* 1980, para. 43.

<sup>257</sup> Art. 6.1 ESA-ESTEC – NL seat agreement 2008; Art. 3 CTA – NL seat agreement 1984; art. 5.1 UNEP – NL seat agreement 1997; art. 8.1 CFC – NL seat agreement 1991; art. 4 IOM 1990; Art. 1.2 EPO P&I Protocol 1973.

officer, and immediately proceed with the prompt protective action that is necessary. However, if there is any time to spare it is still highly recommendable to attempt obtaining explicit consent. In any case, notification of the chief executive officer as soon as circumstances permit is warranted, due to the principles of cooperation and good faith.<sup>258</sup>

In some other Dutch seat agreements, an even more elaborate version of an emergency clause can be found. It is interesting to note that these IO's all concern the tribunals and 'judicial' IO's.<sup>259</sup> The most important addition to this clause, as compared to the basic version, is that it places a considerably larger emphasis on the discretionary power of the host state in determining whether there is an emergency; it also applies when the host state has 'reasonable cause to believe that an emergency has occurred or is about to occur':

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*Art. 6.3 STL – NL seat agreement 2007*<sup>260</sup>  
In case of fire or other emergency requiring prompt protective action, or in the event that the competent authorities have reasonable cause to believe that such an emergency has occurred or is about to occur on the premises of the Court, the consent of the Registrar, or a member of staff of the Court designated by him or her, to any necessary entry into the premises of the Court shall be presumed if neither of them can be contacted in time.  
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This phrasing not only strengthens the importance and primacy of the host state's discretionary role in such circumstances, it also seems to extend the scope of the emergency clause somewhat: it explicitly includes situations where the actual emergency has not yet taken place, thereby enabling the authorities of the host state to act pre-emptively or even preventively. This has of course clear benefits in cases of imminent terrorist attacks etcetera. Due to the purpose of emergency clauses in general, it may be argued that this preventive action can also be read into the 'basic' emergency clauses in certain circumstances.

Another 'emergency provision' that is worth quoting is the one incorporated in the seat agreement of the OPCW:

=====  
*Art. 7.5 OPCW – NL seat agreement 1997*  
This Article shall not prevent the reasonable application of fire protection regulations of the appropriate authorities of the Kingdom of the Netherlands. The consent of the Director-General to entry into the headquarters shall be presumed if he or his authorised representative cannot be reached in time.  
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Besides the fact that there is no requirement for the effort to obtain explicit consent, the reference to the 'reasonable application of fire protection' stands out. As was stated earlier in this report, this must be seen as separate from the emergency clause that is formed by the subsequent sentence. After all, the occurring of an emergency is not logically related to protection regulations. The provision concerning fire protection regulations seems to be an exceptional limitation on the inviolability of premises. This provision can also be found in the

<sup>258</sup> See for these principles ICJ *WHO – Egypt* 1980, para. 43.

<sup>259</sup> Art. 5.3 ICTY – NL seat agreement 1994 (see also ICTR – NL seat agreement 1997 and SCSL – NL seat agreement 2006); 6.3 ICC – NL seat agreement 2007, 6.3 STL – NL seat agreement 2007; 3.2 Eurojust – NL seat agreement 2006; art. 3.3 Europol – NL seat agreement 1998.

<sup>260</sup> Underlining added by the author. The IO's mentioned in the footnote infra all have the same provision. Only in the Eurojust- and Europol-provisions there is a slight difference: instead of 'necessary entry' it only refers to 'entry'. It seems clear that this does not create any practical difference, since it flows from the character, purpose and content of the emergency clause as a whole that it only deals with entry by the host state that is necessary to address the emergency situation. It thus does not cover unnecessary entry.

seat agreement of the PCA.<sup>261</sup> Interesting to note is that the seat agreement of UNU-MERIT contains practically the same text, but due to a slight difference in the construction of the sentences, this provision is only limited to the occurring of emergencies.<sup>262</sup>

There are also several IO's that do not have any emergency clause incorporated in their relevant legal instruments. These are Eurocontrol, NATO C3 Agency, NATO- JFC Brunssum, the Nederlandse Taalunie, and the representation offices of the European Parliament (EP) and the European Commission (EC). The EP and EC do not have separate seat agreements governing their legal status. This has the apparent disadvantage that no detailed provisions exist regarding the premises of the offices. The EC P&I Protocol does not provide for any explicit emergency clause, nor does it refer to the way in which consent can be obtained by host state authorities. The general declaration that the premises are inviolable<sup>263</sup> is apparently supposed to cover all the bases. The NT's lack of emergency clause is easily explained by the fact that it also lacks any provision concerning the inviolability of premises.

*The inherent friction between the inviolability of premises and the duty to protect the premises*  
In the third part of this Report, extensive attention will be paid to the duty of a host state to protect the IO against threats of different kinds.<sup>264</sup> It will be shown there that this duty to protect can actually be separated into two phases: the preventive protection and the reactive protection. At this point it is sufficient to point out that emergency clauses primarily deal with the *reactive* protection by the host state: the actions of the host state authorities in response to a threat that has manifested itself, in order to prevent and/or limit the negative effects of that threat. While this reactive duty to protect is applicable to all IO's, it does not necessarily entail that the host state is automatically allowed onto IO premises in order to take preventive measures. Here there is an inherent friction between the duty to protect and inviolability of premises (duty to abstain). The duty to protect is not limited to actions on the premises of the IO, so the two obligations are not principally conflicting. However, for any act on the premises of the IO, it is necessary to obtain permission for this of the IO itself. The emergency clauses, as incorporated in most seat agreements of the Netherlands, are intended to bridge the gap between the two obligations: they enable the host state to assume consent when the IO cannot be contacted in time.

### 7.1.2. Assuming consent in emergencies as a general rule?

Since there are considerable differences in wording and scope of the different seat agreements, and there are also several seat agreements which do not provide for an explicit emergency clause, the issue is raised whether there is some sort of generally applicable emergency clause, for example being inherent to the very notion of inviolability of IO premises. In this paragraph this issue will be discussed. As a starting point, we look at the law and practice of the system of diplomatic privileges and immunities, specifically the Vienna Convention of Consular Relations 1963:

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*Art. 31(2) Vienna Convention on Consular Relations 1963*  
"2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action."  
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<sup>261</sup> Art. 5.2 PCA - NL seat agreement 1999.

<sup>262</sup> art. 3 UNU-MERIT – NL seat agreement 1989. The text here is even more clear about it being two separate issues, by virtue of the use of the wording 'In addition...' between the reasonable application-passage and the emergency-passage.

<sup>263</sup> Art. 1 Protocol on the privileges and immunities of the European Communities.

<sup>264</sup> See chapters 10 and 11 of this Report. The current subparagraph contains assumptions on international law that are discussed more extensively in these subsequent chapters.

Clearly the basic emergency clause is incorporated in the legal situation pertaining to consular premises. However, in the Vienna Convention on Diplomatic Relations 1961 no similar provision is included. Denza makes clear that incorporation of an emergency clause in the diplomatic version was debated intensively and ultimately rejected. It was deemed as too much of a limitation on the inviolability of premises. As such it can be concluded that an emergency clause is not an inherent part of the principle of diplomatic inviolability of premises.<sup>265</sup> This seems to reflect current state practice concerning diplomatic premises. However, can it also be concluded that for the inviolability of IO premises the emergency clause is a too severe limitation of the principle to be inherent to it?

Other sources of doctrine provide for different views. According to the report of the European Committee on Legal Cooperation of the Council of Europe, agreements on inviolability *should* contain provisions similar to art. 31 (2) of the VCCR 1963.<sup>266</sup> However, it is suggested that this may not be necessary in certain circumstances, for example when the IO has its own emergency services.

Muller states that “*for all practical purposes, these [...] provisions would seem to be an expression of the general rule that is applicable in emergency situations.*”<sup>267</sup> However, he also refers to several seat agreements where such an emergency clause is not incorporated. The most notable example is the seat agreement between the UN and the USA. However, concerning this agreement, Brandon states that there is an exception implied: consent may be implied involving an act of god, *force majeure*, and bona fide belief on the part of the authorities that ‘a crime’ is about to be committed within the premises.<sup>268</sup>

Duffar suggest that the right of entry onto the premises of an IO could be implied for “*pour toutes les organisations internationales qui poursuivent des activités dangereuses et pour les organisations qui ne disposeraient pas d’un service de sécurité suffisant.*”<sup>269</sup> However, he acknowledges the controversy surrounding this statement.

#### *Obligation to provide reactive protection; cooperation and good faith*

As stated above, the duty to protect (or at least the reactive aspect of that duty) corresponds with the possibility to assume consent in case of emergencies. However, this duty to protect cannot be construed as entailing an (implicit) emergency clause. The obligation to provide reactive protection flows from inviolability of premises so it is not in conflict with it. Inviolability is the general rule, from which active duties for the host state flow without affecting that general rule. Of course, if the host state refrains from entering while it would seem necessary for the protection of the IO, a very unwanted situation is created.<sup>270</sup> This fuels the importance to cooperate and communicate efficiently with the IO at all times: matters like host state action in case of emergency must be discussed and ideally regulated in side letters or exchange of notes before any threat has manifested itself. Also assistance protocols could be concluded and databases concerning contact information of the designated staff members of the IO should be created. This enables the efficient acting in good faith when the situation requires it.

#### *Conclusion*

While the majority of IO’s in the Netherlands contain some form of an emergency clause, the issue is not clear cut or uncontroversial. Therefore it must be assumed that the possibility of assuming consent in case of an emergency remains an exception, which only applies when it is explicitly provided for in relevant legal instruments. Where this is not the case, it should be discussed and laid down in a side letter or other form of agreement in cooperation with the IO. If this entails that there is no such exception applicable between IO and host state, then at least

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<sup>265</sup> See on the emergency clause and the VCDR, Denza 2008, p. 144-145; see also Duffar 1982, p. 127.

<sup>266</sup> Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), para. 47.

<sup>267</sup> Muller 1995, p. 192.

<sup>268</sup> Brandon 1951, p. 104.

<sup>269</sup> Duffar 1982, p. 143.

<sup>270</sup> Muller 1995, p. 193.

there is clarity on the legal issue and host state authorities can be informed accordingly. Since the majority of IO's in the Netherlands has some form of emergency clause, the matter is rather well regulated. However, also because of the differences in wording between the several treaties, it is highly recommendable that the host state discusses thoroughly such issues, and preferably lays the different steps to be taken down in protocols concerning emergency assistance.

## 7.2. National security and public order

In some host states, so-called 'national security clauses' are incorporated into the seat agreements and other relevant legal instruments. There are no seat agreements applicable in the Netherlands containing such clauses, but an example of such a clause which is applicable to an IO in the Netherlands can be found in the EPO Protocol concerning Privileges and Immunities of 1973.

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### *Article 21 EPO P&I Protocol 1973*

Each Contracting State retains the right to take all precautions necessary in the interests of its security.

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As becomes clear from the wording, the provision permits the host state (and all other member states of EPO) to take measures when it deems this necessary for preserving its national security. The fact that it is incorporated in seat agreements and P&I treaties entails that technically a host state would be permitted to 'violate' the inviolability of premises as laid down in those same instruments.<sup>271</sup>

This sort of provision is intended to create a balance between the interests of the host state versus the interests of the IO. However, it would seem contrary to the whole idea of inviolability as based on functional necessity, when a host state would retain the right to ignore this inviolability when it unilaterally decides that its 'national security' is in jeopardy. After all, 'national security' potentially entails a very wide category of different threats and situations. The concept is not only subject to a different interpretation of every host state, but it also has a tendency to be strongly influenced by the changing political and social environment of the state concerned, and also developments in the international arena may play its part. Thus, a national security clause introduces a factor of uncertainty and possible unilateral limitation of inviolability by the host state into the IO - host state relationship.

As stated, there are no seat agreements concluded by the Netherlands which have such a provision. This is strong evidence that it is considered as not necessary to strengthen the position of the Netherlands as host state vis-à-vis the multiple IO's. In doctrine, not much is said about such provisions. The European Committee on Legal Cooperation stated that a host state should retain the right to take measures necessary for its own national security, however those should principally be taken in consultation with the IO and with due regard to its interests.<sup>272</sup> Muller merely touches on the subject, recalling the existence of such provisions.<sup>273</sup> He too advises to cooperate and consult with the IO in instances where such provisions are applied. Some examples of other host states incorporating a national security clause in their seat agreements are Switzerland (see for example article 25 ILO – Switzerland seat agreement and art. 25 WIPO – Switzerland seat agreement) and Canada (see art. 36 ICAO – Canada seat agreement). It is submitted that such clauses remain an anomaly in the system of organizational privileges and immunities. In addition, it is an anomaly that can seriously threaten the effectiveness and reliability of those privileges and immunities. It is not considered necessary to incorporate such provisions more often in seat agreements concluded by the Netherlands.<sup>274</sup>

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<sup>271</sup> Muller 1995, p. 193.

<sup>272</sup> Explanatory Report of European Committee on Legal Cooperation to Res. (69)29 of Committee of Ministers, Council of Europe (26/09/1969), para. 46.

<sup>273</sup> Muller 1995, p. 193.

<sup>274</sup> See for a plea in favour of the exception on grounds of national security: E. Zoller, *The National Security of the United States as the Host State for the United Nations* Pace YBIL Vol. 1 (1989), at 127.

## 8. Possibilities for altering the status of premises under international law

When discussing the legal status of premises of IO's in the context of innovative city development, it is logical to also look at alternatives for the current legal status of premises as discussed above. Currently, the legal status can be summarized as follows: located on host state territory while enjoying inviolability of premises, which may be subject to certain exceptions like emergency situations and national security. This legal construction will hereinafter be referred to as the *status quo*.

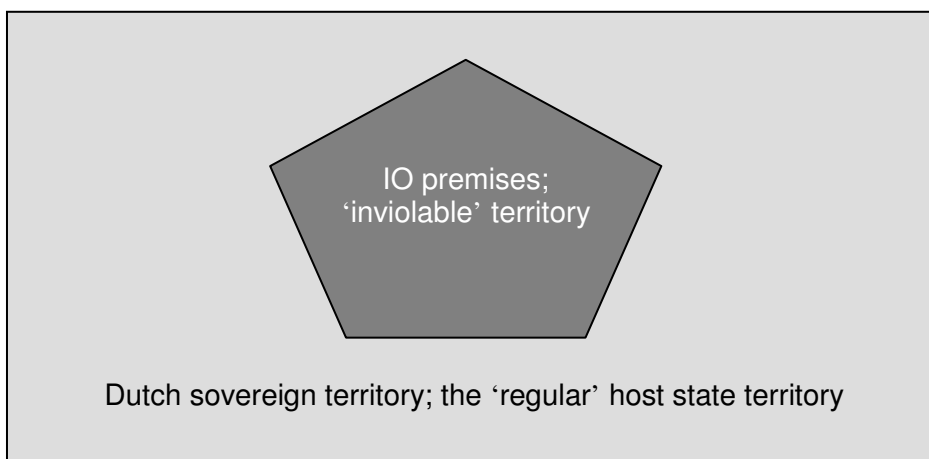


Figure: 'status quo' of IO premises on host state territory; IO premises is Dutch territory covered by a 'blanket' of inviolability

In previous chapters, the nuances of this *status quo* have been discussed. In this chapter, the attention will shift to the possibility of a fundamentally different legal status for the premises itself, or for the territory surrounding those premises. Two basic alternatives may be discerned:

- a) IO premises as situated on *internationalized* territory instead of on host state territory;
- b) the territory surrounding the premises of IO's remains part of the sovereign territory of the host state, but it is legally structured as separate from 'regular' host state territory. This creates a 'buffer zone' around the premises. Concerning the second alternative, we can assume that the *status quo* remains applicable to the actual IO premises.

### 8.1. IO premises as situated on internationalized territory

Through the development of international institutional law and the proliferation of IO's, the question as to what status IO territory should enjoy has of course been subject of discussion. As we now know, this has developed as the *status quo* discussed extensively in earlier chapters of this report. However, some have posed the argument that IO's should rather possess their own territory, instead of being present on the territory of one host state. The most extensive and notable argument has been made by C.W. Jenks, in his 1945 publication "*The Headquarters of International Institutions*".<sup>275</sup> In this document he discusses the need for an internationalized territory specifically intended as a location for all or most international organizations.<sup>276</sup> Needless to say that subsequent developments did not conform to his ideas: there has never been any internationalized territory specifically for the purpose of locating IO's.<sup>277</sup> Also, several of his arguments have been either disproven by subsequent practice or technological developments. Nevertheless, it forms an interesting example of a plea for internationalized territory. Another important side note should be made before discussing this further. While

<sup>275</sup> C.W. Jenks, *The Headquarters of International Institutions. A study of their Location and Status*. London: Royal Institute of International Affairs, 1945.

<sup>276</sup> Jenks 1945, p. 6.

<sup>277</sup> Muller 1995, p. 130-131.

Jenks envisioned a territory where at least the majority of all IO's in the world would be located,<sup>278</sup> the scope of this report is necessarily more limited: it deals with the situation in the Netherlands, more specifically in The Hague. Therefore, it involves not the majority of all IO's, but merely those IO's located here plus any IO that may be located here in the future. This is a totally different scale, which may be an important factor in judging the different arguments pro and con. However, it is submitted here that there is no real merit anymore in the idea of an internationalized territory for IO's. For sake of argument, pragmatic and/or political considerations concerning probability of constructions like an 'internationalized territory' are considered to be subsidiary.

*Basic legal construction*

The basic legal construction of internationalized territory for the purpose of locating IO premises is presented as follows. Instead of using sovereign state territory as location for the premises of an IO, a piece of territory is separated from the sovereignty of a state (the 'facilitating state') with the purpose of locating an IO on that piece of territory.<sup>279</sup> By legally separating this piece of territory from the sovereign territory of the facilitating state, a (more or less) independent territorial unit is created, which needs a controlling authority other than the facilitating state. This controlling authority will be discussed later. On this territorial unit, one or more IO's may be located. Depending on the exact legal construction, these IO's may have their own demarcated premises, that may even also be inviolable as in the *status quo*, once again depending on the exact legal construction, more specifically on the way in which the new controlling authority takes shape.<sup>280</sup> Below, this basic legal construction is schematically pictured, with the new territorial unit resembling and island locked in by the sovereign territory of the Netherlands as 'facilitating state'.<sup>281</sup>

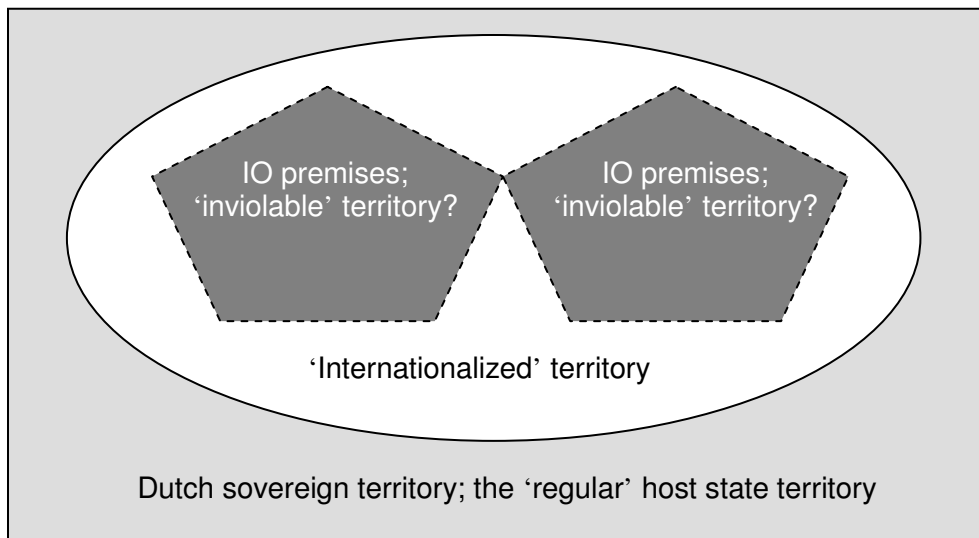


Figure: schematic of internationalized territory, here as an 'island' within a state.

<sup>278</sup> Jenks 1945, p. 6.

<sup>279</sup> In today's world there are no pieces of territory that are not part of any sovereign state territory and fit for inhabitation or effective settlement of an IO. Therefore a piece of territory must be separated from the sovereign territory of one state.

<sup>280</sup> See further below, under the heading 'new authority with effective control'.

<sup>281</sup> Naturally it would be possible to create such a new territorial unit on the border of the facilitating state and one or more other states (analogous to the geographical situation of for example Luxembourg).

If this separation is realised, a piece of territory is created with the following fundamental characteristics:

- 1) It no longer falls within the sovereign territory of one single state;
- 2) The authority of the 'facilitating state' is replaced by another authority with effective control;
- 3) All regular elements of the facilitating state are either transferred to the new authority or removed from the territory.

This last characteristic flows logically from the first two, since the facilitating state plays no formal role on the new territorial unit. Therefore its instruments of authority, like police, fire department, public administration etc. no more have a role to play within the territorial unit. Below the first two characteristics are discussed in more detail.

#### *Falling outside the sovereign territory of one single state*

This has far-reaching consequences for the practical situation of the new territorial unit. In short, all elements and duties that a sovereign state has are now largely transferred to the new controlling authority. These include, but are not limited to:

- An applicable system of civil, criminal, and administrative law;
- some form of legislative system to draft rules and regulations when necessary;
- maintenance of courts of law and magistrates;
- executive authorities like law enforcement, public prosecutors, prisons and bailiffs;
- Medical facilities like pharmacies, ambulances and hospitals;
- Emergency services like the fire department;
- Continuity of vital infrastructures like gas, water, electricity and telecommunication;
- Maintenance of construction works in the 'public space' (roads, public buildings, etc);
- The duty to preserve public order, security and safety for all present within the territory.

Several of the above may be effectively taken care of by the new controlling authority (like medical facilities and emergency services), and several may still be transferred to the responsibility to one or more of the sovereign states surrounding the new territorial unit (like construction works and the continuity of vital infrastructures). But it is important to emphasize the consequences of taking the full force of a sovereign state out of the equation. The most fundamental problem is illustrated by the first three elements mentioned in the list above: the lack of jurisdiction of a settled legal order. After all, if the new territorial unit is legally separate from sovereign territory of a state, then the laws of that state will not automatically apply to the new territorial unit, the state's courts will not have jurisdiction over disputes or crimes originating from the territorial unit, and so there is a need for a controlling authority taking up some form of legislation and adjudication. Or at least some very thorough agreements concerning these issues between the new controlling authority and the facilitating state or another state adjacent to the new territorial unit.

#### *A new controlling authority with effective control*

Because internationalizing a specific area means that the 'facilitating state' relinquishes jurisdiction over that area, it must be transferred to some form of 'international authority'. This international authority replaces the host state authority as the primary responsible actor for the facilitation of the IO's, since the latter is located on the 'territory' of this international authority. This has far-reaching consequences for the relationship between the Dutch authorities and the IO. This will be elaborated upon below.

For all practical purposes, the legal setting and the complexity of the relationship between the IO, the Netherlands and the internationalized territory could be regarded as that between the Netherlands, an IO and another sovereign state in which this IO is located. For sake of example, say the internationalized zone is Belgium. The Netherlands does not have jurisdiction in Belgium and it does not have any authority over its emergency services and law enforcement instrument. Consequently but also most importantly, it does not have any legal responsibility over the internationalized territory. With this, the duty to protect is reduced to practically zero, only meeting the level of that of other member states of the IO. It has no due diligence obligations towards the IO because it does not have a direct legal host relationship with the IO: after all the IO is not on Dutch territory to begin with. So the IO shall not have any form of seat

agreement with the Netherlands, but instead with the authorities of the internationalized territory. Another question is whether the IO will still maintain its 'inviolable territory', even within the internationalized zone. The answer is most likely yes, because otherwise the independence and thus effective functioning will probably become endangered. This is logical because an IO should be protected against outside interference, be it a host state, a member state, or some authority of an internationalized zone.

There are of course different ways in which an international authority could be set up. First of all, it largely depends on the (number of) parties involved in creating the internationalized zone. If the zone is only created for one IO, or for several (large) parts of an IO like the UN or the EU/EC, it is logical that the chief executive level of that IO forms the authority. However, this would equate with giving one IO its own territory as being sovereign, without any support from additional authorities (like in the *status quo* the host state) in facilitating and protecting its territory.

More probable would be to create some form of hybrid authority, in which both the executive level of the IO is represented as well as the authorities of the facilitating state. This results in an altered IO – host state relationship, in which the balance between the two is even more focussed on cooperation. If the internationalized territory would house several IO's, the internationalized authority should consist of representatives of at least every IO. An analogy could be made with the Coalition Provisional Authority, a 'joint' authority of the occupying states involved in governing Iraq (USA and UK).<sup>282</sup> However, it is difficult to see how decision making should be structured and how for example issues like budget, allocation of means and the providing of facilities like telecommunication and electricity should be dealt with. In short, it dilutes the rights and duties of the host state, while these are not replaced or covered by any other obvious party. In addition, it may very well disturb the balance between the role of host state and the role of member state vis-à-vis the IO's, more than it is now in the *status quo* relationship between IO and host state.

It may also be possible that the internationalized authority consists only of representatives from the different IO's present on the territory, but then there is no state to play some form of (altered) host state role. A possibility to counter this unwanted effect would be to involve several of the member states of the IO's. For example, this could be the member states in the region or surrounding the internationalized territory, which as such undertake to become a collective of 'good neighbourship'. Another selection criterion could be to let the major contributors to the territory and/or the IO's take up seat in the authority, but this would entail an enforcement of the power of finances within an international organization. Yet another possible construction is some form of international government where both the relevant IO's and (several of) their member states play a role.

#### *Variations on 'internationalized territory'*

What may also be envisioned is a territorial unit where the territory itself remains part of the sovereign territory of a (host) state, but the controlling authority is for example a joint effort of the facilitating state and another 'international' element like the IO itself or a consortium of the IO's located in the territorial unit. This could for example be legally constructed as analogy to municipalities in national law. This may have the advantage that the authorities of the facilitating state can remain fulfilling their role on the territory, as long as clear rules and agreements are concluded on this. However, the major disadvantage is a strong increase in the complexity of the authority structure, adding to, rather than diminishing the disadvantages of a new controlling authority as discussed above. Nevertheless, there are probably numerous constructions possible between the internationalized territory on the one hand and the sovereign host state territory on the other, all with a different balance in power, authority and complexity. It is

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<sup>282</sup> See S. Talmon, "A plurality of responsible actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq" University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 25/2007 (September 2007). It is clear from the facts that USA played a much larger role in the CPA than the UK did.

submitted here that for all possible forms of internationalized territory, the basic disadvantages as discussed above will present themselves in some manner.

*Effective functioning of the IO: better insured by internationalized territory?*

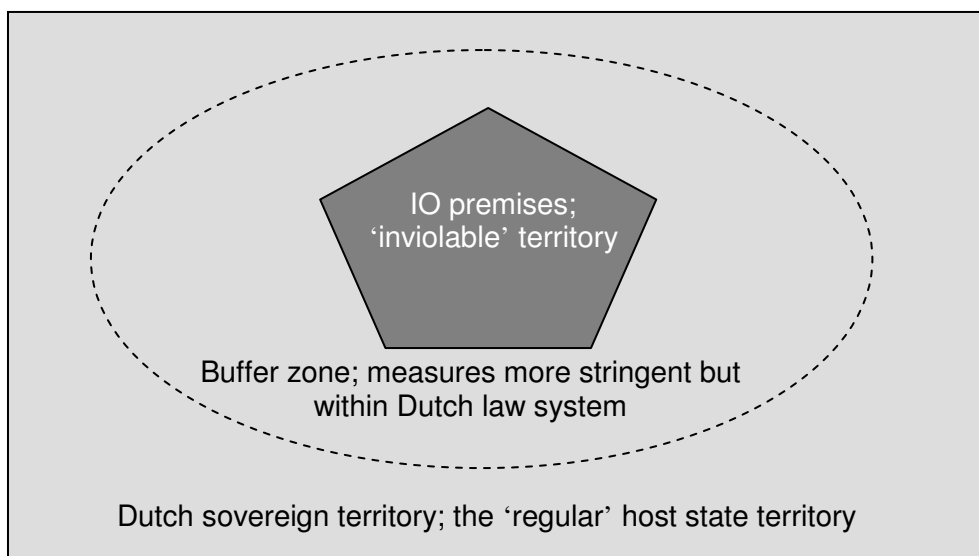
In weighing the pro's and con's of an internationalized territory, the main goal should be to ensure the effective and independent functioning of the relevant IO's in the best way possible. And it must be stressed that there are considerable disadvantages for the certainty of effective functioning in creating an internationalized territory. In this respect, one important observation must be made. Besides all the difficulties concerning developing a viable authority on the internationalized territory, there are some active duties of a host state towards an IO in the current legal system, and those are transferred to the controlling authority as well. The most important of those active duties is the duty to protect the IO. This duty will be elaborated upon in Part III of this report, but at this point it is sufficient to state that the duty to protect is a reasonable and logical obligation to impose on a host state, but not to impose on (only) the facilitating state. The advantages of the status quo, that will be lost when creating an international territory, are the following:

- host state authorities maintain regulatory powers over the territory;
- host state authorities have discretionary power in, and responsibility over, arranging infrastructure in and around the premises;
- Dutch law enforcement officers, when granted permission to do so by the IO, may act fully under Dutch law when exercising their jurisdiction on the premises;
- because of the clear boundaries between inviolable territory and host state territory there is no misunderstanding over responsibilities on either side of that boundary. Outside: public area under direct control and thus responsibility of the host state; Inside: private area (premises) under direct control and thus responsibility of the IO.

One of the main disadvantages of the *status quo* is probably the communication and cooperation between the IO and the host state, whereby possible conflicting interests and lack of efficiency are causes of a deteriorated relationship. However, one cannot hope to counter these disadvantages by creating yet another authority and legal regime, in which the relationships between IO's, member states and facilitating/host states becomes even more complex. In the Secure Haven project, several recommendations are made to ameliorate the communication and cooperation between the two parties (host state and IO) from the perspective of the *status quo*. This must be considered as potentially far more effective than the creation of any form of internationalized territory.

**8.2. A 'buffer zone' on host state territory surrounding the premises of an IO**

Following more along the line of the subparagraph '*Variations on internationalized territory*' in the previous paragraph, it may be submitted that to create a different legal setting concerning IO premises does not require sovereign territory to be separated, or to create some form of international authority or hybrid national/IO authority. A *status quo* situation combined with a buffer zone based on national law would for example be a more practical way of creating a special security zone around IO premises. For an illustration, see the following diagram.



In this example, there is no international legal alteration of the status of IO premises. Instead, the measures are taken within the national (Dutch) legal system. The buffer zone would be a zone where surveillance measures and other forms of 'situational awareness' are more stringent and more infringing on the society than in general on the rest of the 'regular' host state territory. Such a buffer zone may be compared to the areas in some of the major Dutch cities, where a policy of preventive frisking may be employed, or where additional camera observation of the public spaces is employed. This method of creating a security zone falls outside the scope of WP 1110 since it does not concern international law. Instead it falls within the scope of WP 1120, dealing with privacy, human rights and national law.<sup>283</sup>

<sup>283</sup> Another method that may be employed for making the security measures for IO's more efficient and effective, and which touches on devising an altered setting of IO premises, is the method of clustering IO's in designated areas. This will increase the possibilities of effective area-focussed protection as opposed to IO-focussed protection. However, this does mean that IO's will be very close to each other and may even reside on the same premises, which raises questions concerning authority and control, and issues concerning the duty to protect and abstain. In any event it also requires extensive cooperation and good will between the IO's involved. See for further reading on the subject of clustering IO's for security purposes the Secure Haven Report on "*Gebiedsgerichte Beveiling & Parkmanagement*", which can be found on <[www.securehaven.eu](http://www.securehaven.eu)>.

## **PART III – QUESTIONS CONCERNING THE DUTY TO PROTECT INTERNATIONAL ORGANIZATIONS**

### **9. The duty to protect in the relationship between the Netherlands and the IO's**

In the Secure Haven project, security is defined as one of three main goals. Consequently, an important part of the international legal framework concerns the protection of IO's, more specifically the role of the host state in that protection. In this third part, the host state's duty to protect will be analyzed, and its practical consequences for the Dutch authorities are discussed. An important goal of this analysis of the duty to protect is to distil some general rules concerning the duty to protect. The benefits of such general rules are clarity on the scope of the duty, and uniformity in the duties which a host state has towards different International Organizations. Both will greatly help the development of clear and effective host state policy on the protection of IO's. One way in which it is assessed whether any general rule exists is by comparing the different elements of the codified duties on protection, thereby determining common factors. Another way is determining whether any rule of customary international law exists, and what this rule entails.

As was discussed earlier in this report, the structure of legal documents governing the privileges and immunities of most International Organizations is threefold: the constitutional document, a multilateral treaty specifically governing the legal status, privileges and immunities of the Organization and last but not least the seat agreement concluded with the host state. Below, the existence and scope of the duty to protect is discussed on all three instrument-levels.

#### **9.1. Constitutional documents and multilateral treaties**

To the author's best knowledge, no constitutional document contains a duty to protect, and neither do the most commonly known multilateral treaties containing privileges and immunities. The *Convention on the Privileges and Immunities of the UN* (1946), the *Convention on the Privileges and Immunities of the UN Specialized Agencies* and its various Annexes (1947), the *Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff* ('Ottawa Agreement', 1951), the *Protocol on the Privileges and Immunities of the European Communities* (1965), the *Agreement on the Privileges and Immunities of the International Criminal Court* (2002): all contain clear provisions on the inviolability of premises of the Organization, but none contain any reference to a duty to protect those premises. However, as will be seen in the subsequent paragraphs, several seat agreements do contain a duty to protect. The reason for this seems obvious: the multilateral treaty is broader in scope than just the legal relationship between the host state and the IO, and while it provides a solid basis for the privileges and immunities that an IO should enjoy in the host state, these P&I principally apply vis-à-vis all member states (or at least all that are party to the multilateral treaty). The duty to protect however is a specific duty which only applies to the (member) state acting as the host of the IO. The seat agreement is thus the instrument of choice for these specific provisions on the privileges and immunities of an IO.

#### **9.2. The duty to protect in seat agreements concluded with the Netherlands**

A seat agreement has been concluded with (or for the benefit of) the majority of IO's in the Netherlands. In this paragraph, an analysis is made of those seat agreements, specifically the provisions of those seat agreements dealing with the duty to protect the IO.

##### **9.2.1. Seat agreements with a 'due diligence'-duty to protect**

Of the thirty-two IO's in the Netherlands, eight IO's have a provision on the duty to protect in their seat agreements which amounts to a duty of 'due diligence'.<sup>284</sup>

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<sup>284</sup> This thus makes up for 25% of the IO's in the Netherlands. Seven of these eight IO's are seated within the municipality of The Hague (CFC is located in Amsterdam).

A standard example of such a provision can be found in article 7 of the seat agreement concerning International Criminal Tribunal for the Former Yugoslavia (ICTY):<sup>285</sup>

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*Article 7 Protection of the premises of the Tribunal and their vicinity*

1. The competent authorities shall exercise due diligence to ensure the security and protection of the Tribunal and to ensure that the tranquility of the Tribunal is not disturbed by the intrusion of persons or groups of persons from outside the premises of the Tribunal or by disturbances in their immediate vicinity and shall provide to the premises of the Tribunal the appropriate protection as may be required.
2. If so requested by the President or the Registrar of the Tribunal, the competent authorities shall provide adequate police force necessary for the preservation of law and order on the premises of the Tribunal or in the immediate vicinity thereof, and for the removal of persons therefrom.

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As can be seen, the competent host state authorities must exercise due diligence to ensure two different elements: “security and protection” and “tranquillity”. For the latter element, two methods are specified by which the tranquillity can be ‘disturbed’: either by the intrusion of persons or by any disturbance in the vicinity of the premises. Thirdly, the host state must provide ‘appropriate protection’. These different elements may also be structured as an enumeration, which provides a good insight in the scope of the provision. Thus, the provision contains the following elements:

1. due diligence to ensure the security and protection;
2. due diligence to ensure that the tranquillity is not ‘disturbed’:
  - a. disturbance by intrusion of (groups of) persons from outside premises;
  - b. disturbances in immediate vicinity of premises.
3. provide appropriate protection to the premises, as may be required.

The meaning of ‘due diligence’ and the two elements regarding which due diligence must be exercised will be analyzed later.<sup>286</sup>

As has been pointed out, the seat agreements of the International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL) can be considered as similar to the seat agreement of the ICTY with regard to contents, so the ICTR and SCSL also have this provision incorporated in their seat agreements.

Besides the ‘due diligence’ provision as found in the seat agreements of the ICTY, ICTR and SCSL, another commonly used ‘standard’ provision containing a ‘due diligence’-duty to protect can be identified. It is comparable to the ICTY-version, although it contains some specific features which alter the scope of the provision. Seat agreements containing (a variation on) this other provision are EUROPOL, EUROJUST, the Common Fund for Commodities (CFC), the Permanent Court of Arbitration (PCA) and the Organization for the Prohibition of Chemical Weapons (OPCW).<sup>287</sup>

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<sup>285</sup> Art. 7 ICTY – NL seat agreement 1994.

<sup>286</sup> See further Chapter 11 of this Report.

<sup>287</sup> Art. 5 Europol seat agreement 1998; art. 4 Eurojust seat agreement 2006; Art. 7 CFC seat agreement 1991; art. 6 PCA seat agreement 1999; Art. 8 OPCW seat agreement 1997.

The provision in the EUROPOL seat agreement reads as follows:<sup>288</sup>

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*Article 5 Protection of the Headquarters*

The Host State authorities shall exercise due diligence to ensure that the security and tranquillity of the Headquarters are not impaired by any person or group of persons attempting unauthorized entry into the Headquarters, or creating disturbances in its immediate vicinity. As may be required for this purpose, the Host State authorities shall provide adequate police protection on the boundaries and in the vicinity of the Headquarters.

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When structured as an enumeration, this provision contains the following elements:

1. due diligence obligation to ensure that security and tranquillity are not impaired by any (groups of) persons, either by:
  - a. attempting unauthorized entry into premises;
  - b. creating disturbances in immediate vicinity.
2. provide adequate police protection:
  - a. on the boundaries of the premises;
  - b. in the vicinity of the premises.

The most remarkable difference with the ICTY-provision is that the EUROPOL-provision explicitly states that both the security and the tranquillity of the premises only have to be protected against impairment by (groups of) persons. In the ICTY-provision there is no specification of against who or what the security should be protected, and the disturbances in the immediate vicinity are also not limited to those created by (groups of) persons. Another interesting aspect of the way in which this specific provision is phrased, is that the basic situation is understood to be one of security and tranquillity. Consequently, the duty to protect extends to this basic situation not being impaired. In the ICTY-provision the phrasing does not suggest such a basic situation of security and tranquillity: it constructs the duty to protect as to ensure that such a situation exists, or comes into being. It seems that this textual difference does not create any practical differences concerning fulfilling the duty to protect.

The provision in the EUROJUST seat agreement is identical to the EUROPOL provision.<sup>289</sup> The CFC seat agreement is virtually identical regarding the due diligence obligation, containing no legally significant differences. There is however a difference in the phrasing on the duty to provide police protection.<sup>290</sup>

The PCA and OPCW seat agreements are also virtually identical regarding the due diligence obligation, containing no legally significant differences.<sup>291</sup> Regarding the duty to provide police protection both the PCA and the OPCW contain a more elaborate paragraph in their relevant provisions, which provides that, if so requested by the Chief executive officer of the IO, the host state authorities must provide “a sufficient number of police for the preservation of law and order in the Headquarters”.<sup>292</sup>

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<sup>288</sup> Art. 5 Europol seat agreement 1998.

<sup>289</sup> art. 4 Eurojust – NL seat agreement 2006.

<sup>290</sup> Art. 7 CFC – NL seat agreement 1991; it obliges the host state to provide police “in the vicinity [...] and within [...] headquarters.” In addition, it is explicitly stated that this form of police protection must be requested by the Managing Director.

<sup>291</sup> Art. 8 OPCW seat agreement 1997, art. 6 PCA seat agreement 1999. Both provisions do contain an anomaly regarding the placement of a colon, which may lead to misunderstanding. However, it is submitted that this is merely an anomaly, not intended to create any legal differences between these provisions and for example the EUROPOL provision.

<sup>292</sup> Paragraphs 2 of Art. 8 OPCW seat agreement 1997 and art. 6 PCA seat agreement 1999. These paragraphs mirror an important part of the deviation in the CFC provision on police protection. As has been discussed in part II on the inviolability of premises, the assistance of the host state authorities on IO premises may be requested by all IO's.

### 9.2.2. Seat agreements with ‘effective & adequate’-duty to protect

Of the thirty-two IO’s in the Netherlands, two have a provision on the duty to protect in their seat agreements which amounts to a duty to provide ‘*all effective and adequate*’, or ‘*all appropriate*’ measures.<sup>293</sup> This formulation of the duty to protect is hereinafter referred to as the ‘effective & adequate’-duty to protect. A standard example of such a provision can be found in article 7 of the seat agreement concerning the International Criminal Court (ICC):<sup>294</sup>

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#### *Article 7. Protection of the premises and their vicinity*

1. The competent authorities shall take all effective and adequate measures to ensure the security and protection of the Tribunal and to ensure that the tranquillity of the Tribunal is not disturbed by the intrusion of persons or groups from outside the premises or by disturbances in their immediate vicinity, and shall provide to the premises the appropriate protection as may be required.
2. If so requested by the Registrar, the competent authorities shall, in consultation with the Registrar, to the extent it is deemed necessary by the competent authorities, provide adequate protection, including police protection, for the preservation of law and order on the premises or in the immediate vicinity thereof, and for the removal of persons therefrom.
3. [...]

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As with the duty to protect the premises of the ICTY, the competent authorities of the host state are under a duty to ensure two elements: the security and protection of the Court, and the tranquillity of the Court. But instead of the obligation to exercise ‘due diligence’ in ensuring these elements, the duty to protect consists of an obligation for the host state to take “*all effective and adequate measures*” to ensure the two elements. The question rises whether there is any legal (or practical) difference between exercising ‘due diligence’ and taking ‘all effective and adequate measures’. This question will be dealt with later.<sup>295</sup>

This provision contains the following elements:

1. all effective and adequate measures to ensure security and protection;
2. all effective and adequate measures to ensure that the tranquillity is not ‘disturbed’:
  - a. disturbance by intrusion of (groups of) persons from outside premises;
  - b. disturbances in immediate vicinity of premises.
3. provide appropriate protection to the premises, as may be required.

The obligation for the host state to provide police protection on the premises – and in the vicinity thereof – is identical to the duty to provide police protection in the ICTY seat agreement.<sup>296</sup>

The provision in the seat agreement of the Special Tribunal for Lebanon (STL) is identical to the ICC provision.<sup>297</sup>

### 9.2.3. Seat agreements with a ‘diplomatic’ duty to protect

As has been stated earlier in this report, the diplomatic and organizational privileges and immunities have many parallels. These will be further discussed in next chapters. It is however important to point out that the duty to protect as it is incorporated in the diplomatic system (art. 22.2 Vienna Convention on Diplomatic Relations), has been adopted into one seat agreement of an IO in the Netherlands: that of the Iran – United States Claims Tribunal (IUSCT). As also will be discussed later, the provision in this seat agreement is comparable to the ICC and STL

<sup>293</sup> Both IO’s are located within the greater The Hague region.

<sup>294</sup> Art. 7 ICC – NL seat agreement 2007.

<sup>295</sup> See further Chapter 11 of this Report.

<sup>296</sup> Art. 7.2 ICTY seat agreement 1994; see previous paragraph.

<sup>297</sup> art. 7 STL seat agreement 2008; The seat agreement with the STL is (at the time of writing this report) the latest seat agreement concluded by the Netherlands.

agreements from a legal perspective, although there are considerable textual differences. In other words, specifically concerning the duty to protect in the diplomatic system and the organizational system, there are also considerable parallels. The seat agreement provision reads as follows:<sup>298</sup>

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*Article 1.2 IUSCT – NL seat agreement 1990*

The Netherlands Government is under a special duty to take all appropriate steps to protect the premises of the Tribunal against any intrusion or damage and to prevent any disturbance of the peace of the Tribunal or impairment of its dignity.

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This provision contains the following elements:

1. special duty to take all appropriate steps:
  - a. to protect the premises against any intrusion or damage;
  - b. to prevent any disturbance of the peace of Tribunal;
  - c. to prevent any impairment of its dignity.

Other functional elements may be discerned in this provision than in the provisions of ICC and STL, but legally the differences are not as large as it would seem. The duty to take ‘*all effective and adequate measures*’ is replaced by ‘*a special duty to take all appropriate steps*’. Ensuring the ‘*security and protection*’ is replaced by protecting against ‘*any intrusion or damage*’, and the ‘*tranquillity*’ is replaced by ‘*any disturbance of the peace*’. One element that is not directly comparable to functional elements in other provisions is the duty to prevent ‘*impairment of [IUSCT’s] dignity*’. Since the IUSCT-article, which was drafted in 1990, follows the duty to protect as found in diplomatic law one-on-one, this latter difference may be a remnant from that system. The fact that the other standard provisions make no more reference to the ‘dignity’ of the IO may point to progressing insight into international institutional law by the drafters of the seat agreements. Further analysis of the differences and commonalities of these functional elements will be provided later.<sup>299</sup>

#### **9.2.4. Seat agreements without an explicit duty to protect**

Of the thirty-two IO’s in the Netherlands, twenty-one IO’s have no explicit provision on the duty to protect in their seat agreements.<sup>300</sup>

The representation offices of the European Parliament (EP) and the European Commission (EC) do not have separate seat agreements governing their legal status. This has the apparent disadvantage that no detailed provisions exist regarding the premises of the offices. As already stated in paragraph 9.1.1 the EU P&I Protocol, which is applicable to both the EP and EC office, does not provide for any explicit duty to protect the premises.

There are three NATO related IO’s in the Netherlands: NATO Airborne Early Warning & Control Programme Management Agency (NAPMA); NATO Joint Force Command Headquarters Brunssum (NATO- JRC Brunssum); and NATO C3 Agency (NC3A). All three are governed by the 1951 Ottawa Agreement, a multilateral treaty on the status of NATO.<sup>301</sup> This treaty does not contain a provision on the duty to protect.<sup>302</sup> None of the three seat agreements contains any reference to the duty to protect the premises.

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<sup>298</sup> As stated, this provision on the duty to protect is identical to the provision on the protection of diplomatic missions as found in article 22 para. 2 of the Vienna Convention on Diplomatic Relations 1961.

<sup>299</sup> See further chapter 11 of this Report.

<sup>300</sup> This amounts to approximately 66% of all IO’s in the Netherlands.

<sup>301</sup> Agreement on the Status of the North Atlantic Treaty Organization, National Representatives And International Staff (Ottawa Agreement), 20 September 1951.

<sup>302</sup> However it is interesting to note that in article 7 para. 11 of the London Agreement 1951 (NATO Status of Forces agreement) it is determined that “*Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment,*

The following IO's in the Netherlands also do not have an explicit provision on the duty to protect in their seat agreements (s.a.) or any other relevant treaty:  
the ESA European Space Research and Technology Centre (ESA-ESTEC), s.a. 2008;  
the Benelux Office for Intellectual Property (BOIP), s.a. 2007;  
the European Patent Office (EPO), s.a. 2006;  
the UNESCO Institute for Water Education (UNESCO-IHE), s.a. 2003;  
the Office of the High Commissioner on National Minorities of the OSCE (HCNM/OSCE), which does not have a seat agreement but is covered by a national law of the Netherlands (2002);<sup>303</sup>  
the UNEP Global Plan for Action for Protection of Marine Environment (UNEP-GPA), s.a. 1997;  
the International Organization for Migration (IOM), s.a. 1990;  
the Nederlandse Taalunie (NT), protocol 1990;  
African Management Services Company (AMSCO), s.a. 1989;  
the UN University Maastricht Economic and Social Research Centre (UNU-MERIT), s.a. 1989;  
the Centre for Agricultural and Rural Cooperation (CTA), s.a. 1984;  
ITC – UNESCO Centre for Integrated Surveys (ITC-UNESCO), s.a. 1978;  
EUROCONTROL, s.a. 1975;  
the EC Joint Research Centre – Institute for Energy (JRC-IE; located in Petten), s.a. 1961;  
the Hague Conference on Private International Law (HCPIIL), s.a. 1959;  
the International Court of Justice (ICJ), which has only a very concise exchange of notes concerning its legal status in its host state (ICJ is present in the Netherlands since 1945).

In view of the fact that there are several seat agreements in this list which have been concluded in recent years, it cannot be maintained that the absence of a duty to protect is a remnant of earlier days. It is very clear that the duty to protect is still far from standard in a modern seat agreement. Whether there is still some form of the duty to protect applicable even without such a provision will be discussed in later chapters.

### 9.3. The duty to protect in other seat agreements

In this paragraph, only one 'foreign' seat agreement is discussed: the seat agreement between the UN and the USA of 1947.

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Article 6 *Police Protection of the Headquarters District*<sup>304</sup>  
Section 16  
(a) The appropriate American authorities shall exercise due diligence to ensure that the tranquillity of the headquarters district is not disturbed by the unauthorized entry of groups of persons from outside or by disturbances in its immediate vicinity and shall cause to be provided on the boundaries of the headquarters district such police protection as is required for these purposes.  
(b) [...]  
=====

This article contains the following elements:

1. due diligence to ensure tranquillity is not 'disturbed':
  - a. disturbance by intrusion ('unauthorized entry') of (groups of) persons from outside premises;
  - b. disturbances in immediate vicinity of premises.
2. provide appropriate police protection to the premises, as may be required for the purposes mentioned under element 1.

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*property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.*" This clearly is no regular provision on the duty to protect, since it is limited to, and focussed on seeking legislation protecting property etc. of member states rather than undertaking actions in order to protect premises.

<sup>303</sup> 'HCNM-wet 2002'. Provisions concerning the legal personality, privileges and immunities of the high commissioner on national minorities (HCNM act); October 2002.

<sup>304</sup> Art. 6 UN – USA seat agreement 1947.

It is clear from the provision that it falls within the category of 'due diligence' provisions. The most remarkable difference with the ICTY-provision is probably the absence of any reference to the 'security and protection' of the premises, or any similar elements. It is nevertheless clear that the provision deals with the protection of premises, also clearly illustrated by the 'appropriate police protection' which is to be provided by the host state. The meaning of the absence of any explicit reference to the security of the premises is discussed later.

It is noticeable that this provision closely resembles later provisions on the duty to protect, as also incorporated in seat agreements with the Netherlands. It is not unlikely that an important seat agreement like that between the UN and the USA concerning the former's principal headquarters has had some influence on the further development of the duty to protect in seat agreements with other host states.

#### **9.4. Relevant numbers; conclusion**

Of the thirty-two IO's in the Netherlands, 17 are located within the Hague region: 53% of all 'Dutch' IO's. Of the IO's in the Netherlands, 11 have an explicit provision on the duty to protect in its seat agreement (34%), while 21 IO's have no such provision in its relevant legal documents (66%). But almost all IO's with an explicit provision on the duty to protect are located in the The Hague region: the percentage of IO's in this region which have an explicit provision on the duty to protect in their seat agreements comes to 47% (10 IO's).<sup>305</sup> These numbers merely provide an illustration of the reality surrounding the duty to protect IO's, but it also warrants one conclusion: that the implementation of the duty to protect IO's in the Netherlands primarily takes place within the Hague region.

The overview of different provisions to protect in the Netherlands provides an interesting set of criteria. Below these criteria are summed up again.

##### **"ICTY" duty to protect:**

1. due diligence to ensure the security and protection;
2. due diligence to ensure that the tranquillity is not 'disturbed':
  - a. disturbance by intrusion of (groups of) persons from outside premises;
  - b. disturbances in immediate vicinity of premises.
3. provide appropriate protection to the premises, as may be required.

##### **"EUROPOL" duty to protect:**

1. due diligence to ensure that security and tranquillity are not impaired by any (groups of) persons, either by:
  - a. attempting unauthorized entry into premises;
  - b. creating disturbances in immediate vicinity.
2. provide adequate police protection:
  - a. on the boundaries of the premises;
  - b. in the vicinity of the premises.

##### **"ICC" duty to protect:**

1. all effective and adequate measures to ensure security and protection;
2. all effective and adequate measures to ensure that the tranquillity is not 'disturbed':
  - a. disturbance by intrusion of (groups of) persons from outside premises;
  - b. disturbances in immediate vicinity of premises.
3. provide appropriate protection to the premises, as may be required.

##### **IUSCT duty to protect:**

1. special duty to take all appropriate steps:
  - a. to protect the premises against any intrusion or damage;
  - b. to prevent any disturbance of the peace of Tribunal;
  - c. to prevent any impairment of its dignity.

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<sup>305</sup> The CFC is located in Amsterdam. It may be debatable whether it is warranted to maintain that the STL is located in the Hague region, while it officially falls within the municipality of Leidschendam-Voorburg.

As can be seen in the enumerations above, there is considerable diversity in the provisions incorporating the duty to protect IO's in the relevant seat agreements. After all, there is no single multilateral treaty like the Vienna Convention on Diplomatic Relations (1961), which lays down the duty to protect embassies for all receiving states (art. 22.2). As has been discussed earlier in this report, there are always differences between the IO's, pertaining mostly to their subject matter and their seize. The subject matters of for example the ICTY and the ICC prescribe that these IO's are involved in complex international/political situations, in which violence and controversy are common factors. By definition these IO's, and other IO's with comparable subject matter, have an increased security risk than for example the International Organization of Migration (IOM) or the Technical Centre for Agriculture (CTA). As will be discussed in the next chapters, the differences in the seat agreement provisions are sometimes merely textual, without entailing any real legal difference. However, these differences do not facilitate an easy, uniform practice concerning implementation of the duty to protect. It is also important to point out that there is a considerable amount of IO's without any provision on the duty to protect. The seat agreements of several of these IO's have been concluded in recent years, thus it cannot be maintained that the absence of a duty to protect is a remnant of earlier days. It is very clear that the duty to protect is still far from standard in a modern seat agreement.

## 10. Fundamental questions concerning the duty to protect

When discussing the duty to protect, there are multiple questions that arise. In this chapter, four fundamental questions are analyzed and answered.

### 10.1. Obligation of effort or obligation of result?

An important question when discussing any obligation is whether it is an obligation of effort (*inspanningsverplichting*), or whether it is an obligation of result (*resultaatsverplichting*). The latter entails that the party is obliged to establish a specified result, and when this result is not established the party is automatically in breach of his obligation. The obligation of effort however is not so much concerned with the established result as it is with the efforts that the party has made to try and establish that result. In other words, the obligation requests a party to make his 'best efforts' (or 'regular' efforts) to establish a specified result, but the obligation is not automatically breached when the result is eventually not established. Only if it can be determined that the party did not make his 'best effort', the obligation is breached.

For the duty to protect an International Organization, it has convincingly been argued in doctrine that it is a obligation of effort. Duffar recognizes the duty to protect as '*une obligation de moyens*'.<sup>306</sup> This has been confirmed in case law, most notably in the *Tehran Hostages* judgment of the ICJ, which will be discussed later. So when we attempt to analyze the duty to protect we need to primarily concern ourselves with the question what constitutes a host state's 'best efforts'. As will become clear, this is a highly pervasive concept, since the circumstances of a specific case play a paramount role in that assessment. However, some conclusions can be made. Further, analyzing what exactly is the result that needs to be established by those 'best efforts' will contribute considerably to charting the contents of the duty to protect. And as will be seen, an obligation of effort will in some instances come very close to actually being an obligation of result.

### 10.2. Are both the 'security' and 'safety' of the IO included?

In general studies on security and protection of vital infrastructures and the public safety, two separate categories are discerned: the category of *security* and the category of *safety*. The former principally deals only with conscious human actions, like for example terrorist attacks, burglary, vandalism etc. The latter category (safety) includes all other elements that may form a threat to vital infrastructures and public safety: technical failures, human errors, accidents, natural disasters, etc.<sup>307</sup> While these two categories are not legal categories (i.e. defined in legal instruments), they do provide a guideline in determining what kind of threats are included in the duty to protect and IO.

It is submitted that there do not seem to be any specific areas which are by definition excluded from the host state's duty to protect an IO. When one looks at the standard provisions as discussed in the previous chapter, it becomes clear that there is a potentially very large range of potential threats brought under the duty to protect. Both the ICTY-provision and the ICC-provision refer to 'security and protection'. While the word 'safety' is omitted here, one must remember that the difference between security and safety is not a legal one. Besides the ordinary meaning of the text, the provision must also be read in the light of the object and purpose of the seat agreement.<sup>308</sup> Ensuring the effective functioning of an IO entails that the IO is enabled to function continually. This is also intended by the provision on the duty to protect. It can be argued convincingly that there is no logic to limiting the duty to protect to only conscious human actions: it is possible and even more likely that an IO is hampered in its effective functioning by an accident (for example an accidental explosion of LPG-transport on the public road), or by technical failure (for example the breakdown of a construction crane, damaging the

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<sup>306</sup> Duffar 1982, p. 123.

<sup>307</sup> See for further elaboration on the scope and content of the two categories the Secure Haven Report of WP 1200 "Vitale Infrastructuur".

<sup>308</sup> Art. 31.1 Vienna Convention on the Law of Treaties between States and International Organizations 1986 (VCLTIO). See also article 31 of the VCLT 1969. See also the respective articles of ICC, STL and ICTY seat agreements.

premises). This reasoning is supported by the IUSCT-provision (which is identical to art. 22.2 VCDR 1961), which refers to the protection of premises 'against [...] any damage'. It must however be pointed out that the EUROPOL-provision specifically refers to methods which are limited to the impairment of *security*. It only sees on conscious human action since the duty to protect is limited by a method against which the premises should be protected: that of attempting unauthorized entry into the premises. This will also be discussed in the next chapter.

Even when a situation occurs in which only 'internal issues' of an IO present themselves, the host state should respond with a sufficient effort level and in conformity with the principle of cooperation on any requests for assistance made by the IO. For example, if a group of staff members of an IO organize a 'wild strike' on the premises of that IO, it is clear that the situation primarily relates to internal issues of the IO: employment issues, its own (international) staff and on their own premises. But if the IO requests assistance from the host state to address the situation and to prevent escalation, the host state should respond as outlined above.

### **10.3. Preventive or reactive protection?**

The structure of this paragraph is two-fold: firstly there is a short introduction into the question at hand, providing the reader with a basic understanding of the matter. Secondly, the question is analyzed and answered further. In this analysis, knowledge of the next chapter (which provides an in-depth analysis of content of the duty to protect) is sometimes anticipated on. Therefore it may be advisable to read the introduction first, then the next chapter, and then the analysis.

#### *Introduction*

It is submitted that generally two main categories of protection measures can be discerned: preventive measures of protection and reactive measures of protection.

The basic characteristic of a reactive measure is that it is taken in response to a 'threat' which has already manifested itself or which is imminent. Reactive measures are generally intended to limit the consequences of the threat (like damages and casualties), to take away the source of the threat (to end its manifestation) and to restore the situation as it existed before the manifestation of the threat. It may also entail measures directed at seizing the individuals responsible for the threat and exercising criminal justice.

The characteristic of a preventive measure is that it is directed at preventing the manifestation of threats and limiting possible consequences of a threat, should it manifest itself. Examples of such measures are general police surveillance, body scans when entering premises, installing sprinkler installations and fire hydrants etc. Preventive measures are usually precautionary measures taken not in relation to a specific actual threat, but directed at categories of threats (i.e. fire, explosion, attempted intrusion) in general. Since precautionary measures can also be taken in reaction to information that a specific threat is imminent, the difference between preventive and reactive measures may not always be clear. As stated before, the measures taken to prevent or contain an imminent threat must be seen as reactive measures, for reasons explained below.

The difference between these two categories of measures is that the legal obligations of a host state differ considerably, as will be shown in the next chapter. In short, it can be stated that when, to the parties' best knowledge, there is no specific threat, the required effort level of the host state for the protection of an IO is considerably lower than when a specific threat has manifested itself and the host state is required to respond to that specific threat.

The question at hand is not only what these different effort levels prescribe, but also whether the duty to protect an IO under international law requires both preventive *and* reactive protection measures by the host state authorities. If the explicit provisions as discussed in the previous chapter provide for certain IO's the duty to enact preventive measures, this does not necessarily entail that this obligation is the same regarding every IO in the Netherlands. Nevertheless, clarity about this issue is necessary to draft adequate host state policies.

### *Analysis*

The duty to protect may contain both a reactive duty to protect and a preventive duty to protect. Difference must be made here between the legal framework which in principle applies to all IO's<sup>309</sup> and the specific relationship between one IO and the host state as created by legal instruments like the seat agreement. As part of the general legal framework which applies to all IO's, a reactive duty to protect can be discerned, but not a preventive duty to protect. The preventive duty to protect is only incorporated into the legal relationship between the host state and the IO when there is an explicit provision in the seat agreement (or other relevant instrument) providing a duty to protect. In other words: IO's without an explicit provision on the duty to protect in their seat agreement, or without a seat agreement at all, still are entitled to reactive protection provided by their host state. This includes preparative measures concerning each IO. When an IO does have an explicit provision on the duty to protect in its seat agreement or other relevant instrument, then the duty to protect can be considered to exist of both preventive and reactive protection.

As explained above, a separation can be made between a duty to provide only reactive protection and the more comprehensive duty to provide preventive protection as well. Reactive protection can be seen as the basic level of protection which should be granted to every international organization, while preventive protection measures are always in addition to the basic reactive protection measures and only have to be provided for International Organizations with an explicit duty to protect in their seat agreements. Below, both forms of protection are discussed in more detail.

### PREVENTIVE PROTECTION

These measures are always taken before the manifestation of an incident<sup>310</sup> and have an anticipatory character. The following subcategories can be discerned:

- **Pro-active measures:** these measures are aimed at removing structural causes of risks, i.e. prohibiting the transport of dangerous substances on specific routes (in proximity of IO's).
- **Preventive measures:** these are measures with the intention of diminishing the risk connected to incidents. This is effectuated through preventing that a threat – by virtue of a vulnerability – leads to a disruption (or 'negative effect') of some kind, or through reducing the potential effects of an incident. Placing back-up systems, regulating the maximum size of storage facilities of incendiaries, placing robust fences and using reliable locks are all examples of such measures.
- **Detection measures:** these measures are aimed at detecting an incident in the earliest stage possible, in order to be able to timely respond to the incident with for example repressive measures (see below -> reactive protection). Examples are the placement of camera's and smoke detectors.

### REACTIVE PROTECTION

These measures are taken in response to the manifestation of an incident, or in order to facilitate an adequate response to the manifestation of incidents. The measures can be taken both before and after the manifestation of the incident, but are all directed at dealing with the manifestation. The following subcategories can be discerned:

- **Preparative measures**<sup>311</sup>: these are aimed at preparing as thorough as possible for taking repressive measures (see below), or facilitating those repressive measures.

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<sup>309</sup> or at least those with international legal personality.

<sup>310</sup> An incident is understood to not only encompass intentional human actions ('*bewust menselijk handelen*') like terrorist attacks, but also incidents concerning safety like fires, accidents and natural disasters. Also threats which are not specifically aimed at an IO must be taken into account when devising the protective measures.

<sup>311</sup> This subcategory is placed under reactive protection, since it is of paramount importance for providing adequate reactive protection. Thus, it must be incorporated in that duty from a legal point of view. However, from a chronological point of view, these preparative measures are taken before any incident

Examples are the drafting evacuation plans, the placing of fire hydrants, providing education and training to relevant government and civilian personnel and supplying information to civilians and expats on actions to be taken in case of an incident. By definition, these measures are taken before manifestation of the incident.

- **Repressive measures:** these are aimed at minimizing the negative effects of an incident once it has manifested itself. If pro-active and preventive measures have been taken, repressive measures act in coherence to those measures and are implemented when those measures were not able to prevent the incident or the disruption. An example is deploying an adequately equipped and trained trauma and/or law enforcement team. The link with preparative measures is self-evident, but repressive measures may fall outside the scope of, and are not limited to, the preparative measures that are taken.
- **Corrective measures:** generally, these measures are aimed at restoring objects which are damaged in the course of the incident. A basic example is maintaining a supply of spare parts of vital machinery. In a legal context however, these measures must be understood to encompass all measures aimed at restoring the situation as it existed prior to manifestation of the incident. More specifically this entails at least two elements: restore and to investigate. The first is comparable to the general meaning of corrective measures; it deals with facilitating the repairs and restoring of objects and infrastructure which are vital to the functioning of the IO. The second element deals with the actions taken by the host state to investigate the reasons and causes of the incident. In case of conscious human actions directed at inflicting damage or disruption of some kind, it may also entail adequate state action aimed at apprehending and prosecuting those responsible for the incident. Corrective measures can be taken before manifestation of the incident (i.e. redundancy of infrastructure) or after (investigation and prosecution).

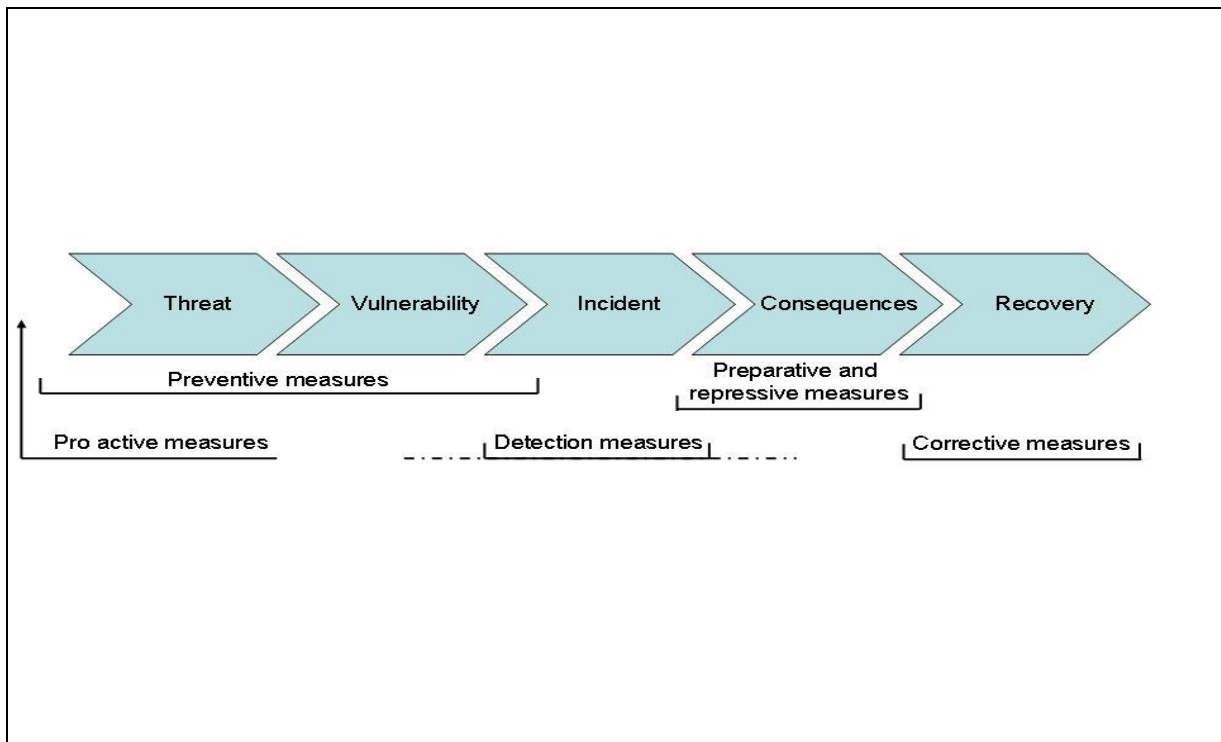


Diagram of the 'veiligheidsketen' (security chain of events) with the chronological placement of the different subcategories.

has manifested itself. This is the main reason why WP 1200 discusses these measures in a preventive setting in their Secure Haven Report "Vitale Infrastructuur"..

In specifying and analyzing the categories and subcategories as set out above, it is important to keep the role of the host state authorities clear. In general it can be said to be twofold. Firstly, the host state authorities have a direct duty to take measures from their position as territorial authority. These measures may consist of material (or: physical) measures, measures relating to procedures and logistics, and measures relating to personnel.<sup>312</sup>

Secondly, the role of the host state may be of an enabling (or: supporting) character. This entails providing funds to IO's so that they can set up their surveillance of premises, but also providing information and expertise to IO's to enable them to take their own security and safety measures. The enabling role of the host state is usually focussed on the security within the premises of an IO, while the direct duty to take measures primarily focuses on security and safety of an IO as dealt with from outside and on the boundaries of the IO premises.

One important consideration must be made with regard to providing funds to IO's for the benefit of their security. If funds are provided to the IO with the purpose of enabling measures which would normally fall within the scope of the host state's duty to protect, the responsibility for taking those measures is not automatically transferred to the IO. In other words, the host state may remain responsible for ensuring that those measures are actually and adequately taken, even though the IO itself was entrusted with the task of taking those measures and was provided the funds to do it. This must be assessed on the basis of the facts of a specific case.

The same reasoning applies to the situation where a host state mandates the authority to take security measures to private companies. In such an instance, it must be assumed that the international responsibility for adequately taking those measures remains with the authorities of the host state. This entails that the host state must employ sufficient methods of control and oversight with regard to those private companies.

#### *Reactive protection*

As was stated above, the basic characteristic of a reactive measure is that it is taken in response to a threat of any kind which has already manifested itself. Because of the fact that a threat has already occurred, it can be stated as a general rule that the obligation of due diligence is raised to a very high level. The level of due diligence to employ when dealing with already manifested threats falls short of an obligation of result only very little. Yet, it stops short of an obligation of result, but only to the extent that it is clear that the host state exhausted all available means and methods and that basic security infrastructure was in place and operational. This means i.e. clear communication with all parties involved and especially with the IO, all necessary safety and emergency procedures in place, clear agreements with the IO on the effective application of the joint responsibility (premises should meet local/national safety requirements), and arguably a structural intervention buffer of (specially trained) police forces or emergency forces.

In case of force majeure, like for example a flooding or earthquake, this level of due diligence is lowered considerably.<sup>313</sup> In such circumstances, with regard to the level of preventive action due diligence is comparable to that of a state towards its citizens. But with regard to reactive measures this differs. Fixing the infrastructure of an IO must have the same priority as that of state organs.<sup>314</sup>

With regard to reactive protection, the emergency clause contained in seat agreements becomes very relevant. As explained Dutch authorities are in principle not allowed to enter the premises of IO's. The emergency clause is designed to facilitate a legitimate entry of the premises in cases of emergency and when the executive head of the IO was unavailable to grant permission. When a threat manifests itself, it is very likely that assistance of law enforcement, fire department and medical aid is necessary on the premises of IO's.

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<sup>312</sup> These three forms of measures is developed and applied by WP 1200. They refer to it as 'materiële/fysieke maatregelen', 'procedurele/organisatorische maatregelen' en 'personeelsmaatregelen'.

<sup>313</sup> See Chapter 11, para. 1 of this Report.

<sup>314</sup> See Chapter 12 of this Report.

It is clear that with respect to the reactive protection required of the host state, there is no real difference created by the different standard provisions (i.e. *due diligence v. effective/adequate*). Even if situations can be construed where there is no breach of the due diligence obligation, but there is a breach of the 'effective/adequate' obligation, this difference is largely irrelevant for devising a practical system for fulfilling the reactive protection-duty of the host state. Such anomalies, being specific facts of the case, do not provide for a reliable guideline in that respect. Instead, devising the system of reactive protection measures based on a stringent 'best efforts' concept, aimed at achieving the desired effect, is not only in conformity with the majority part of the legal obligation, but also a clear signal on the professionalism in conducting the business of the host state. That this approach may in some exceptional cases entail being 'on the safe side' can only be seen as a welcome side effect.

#### *Preventive protection*

Because of the general character of the protective measures, the most important issue for preventive protection is that enough effort is made to ensure that threats which may overall be expected are met. This means that the protective measures should be both proportionate and necessary when one takes into account the assessed threat level of the specific IO. For every IO, the 'effort level' of this obligation may differ.

The category of preventive measures entails a large discretionary power for the host state. Since it is the jurisdiction, responsibility and authorities of the host state that are primarily concerned with the protection of the IO, it is not the IO which has the authority to determine for the host state what amounts to adequate protection. Instead it is the host state which may primarily determine what preventive protective measures are needed. Nevertheless, here the principles of good faith and cooperation, two fundamental principles in the relationship between the host state and the IO, are also of vital importance.<sup>315</sup> Good faith means in this instance practically the same as the due diligence principle: that the host state in fact is actively and adequately taking care of the preventive protection of the IO. But also that it should be presumed by both parties that both are acting in good faith. So this principle may also be construed as such that it enforces the discretionary power of the host state in determining what is adequate. On the other hand, when an IO requests protection or informs the host state of possible threats that have come to the attention of the IO, the host state must presume that the IO is making these requests out of good faith and thus the requests should be taken seriously and dealt with in a clear and efficient manner. This does not mean however that the host state is obliged to provide all measures that the IO requests, but it does mean that it should explicitly deal with those possible threats in its (ad-hoc) threat analysis.

The principle of cooperation entails that in the dealings with the IO the host state should always be open in communication, it should be easily and directly approachable/reachable and, of course, it should employ a cooperative attitude. This also strengthens the obligation of the host state to explicitly respond to requests of an IO with regard to its protection.

An interesting question with regard to the extent of the preventive protection by a host state, is whether or not there is a legal obligation of a host state to have its intelligence agencies and comparable security services do research on possible threats to the IO's in a proactive manner. In other words, should the host state make it a regular task of its intelligence to do counter-terrorism research for the benefit of the IO's it hosts. This question is of course closely interrelated to the thorough threat analysis that every host state should make periodically. When may this threat analysis be considered thorough and in accordance with the principle of due diligence? While the technical and practical aspects of what exactly constitutes a sufficient or 'complete' threat analysis may be a (policy) issue to be decided by experts on the matter of the host state authorities (AIVD/BZK/NCTb), the legal obligations may provide for some important guidelines for this assessment. For example, it is submitted that to really be able to assess what measures of protection are necessary and adequate, a sample taken at the random is not (legally) sufficient for a thorough analysis of the development of threats for an IO. It should be supported by proactive research by a host state, in order to be able to 'fill in the blanks'. It

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<sup>315</sup> According to the ICJ; ICJ *WHO – Egypt* 1980, para. 43.

should also be kept in mind that it cannot be the IO itself that is solely responsible for its own 'intelligence'. To fulfil the preventive duty to protect in accordance with the due diligence principle, the host state's use of its intelligence agencies in designing the protection policies of IO's is most likely indispensable.

#### *The policy perspective*

Finally, from a national policy perspective, it may be recommendable to construe the 'due diligence'-obligation in such a way that it amounts to a preventive security policy focussing on taking 'all adequate and effective measures' to prevent threats from manifesting itself, applicable to all IO's hosted by the Netherlands. This would entail a levelling of security and protection levels for all IO's (with and without explicit provisions on the duty to protect in their seat agreements), and thus a commitment to provide preventive and reactive protection to every IO. Benefits of such policies may lie in simplification of rules and procedures, better presentation of host state professionalism and efficiency in the development of safety and security policies.<sup>316</sup> However, this is a policy decision to be made, since it goes beyond what is principally required of a host state under international law. It is at this point not explicitly recommended by the author.

#### **10.4. Does the duty to protect apply to all IO's in the Netherlands?**

As was seen in the previous chapter, there is a considerable amount of codified law on the host state's duty to protect an IO. The question remains whether this duty to protect also exists in some form with regard to IO's which do not have such a provision in their seat agreement, or don't have a seat agreement at all.

#### *Customary international law*

In international law, the first question asked when there is no explicit rule is whether the rule is part of customary international law.<sup>317</sup> However, as has been seen in the previous chapter, only a minority of the seat agreements contains some explicit provision on the duty to protect. The fact that also in several recent seat agreements, the duty to protect was not incorporated seems to be a strong indication that the duty to protect lacks both the necessary state practice and *opinio juris* to be considered as a separate rule of customary international law.

However, (some form of) the duty to protect may be part of a rule of customary international law, due to the fact that (a form of) the duty to protect is inherent to a rule that is part of customary international law. It has been argued that the duty to protect is actually an inherent part to the inviolability of premises of an IO.<sup>318</sup> As discussed earlier in this report a convincing argument can be made that the inviolability of premises of an International Organization is a rule of customary international law.<sup>319</sup> Accepting both arguments leads to the conclusion that even when there is an IO without a seat agreement, it enjoys inviolability of premises *and* benefits from a basic form of the duty to protect.<sup>320</sup> Whether this can be maintained, and whether this then applies for the duty to protect as a whole (both preventive and reactive protection), is discussed below.

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<sup>316</sup> See most notably the Secure Haven Report of WP 1200 "Vitale Infrastructuur" and the report "Gebiedsgerichte beveiliging en parkmanagement" <[www.securehaven.eu](http://www.securehaven.eu)>.

<sup>317</sup> Generally, for a rule of customary international law to exist this rule must be confirmed in state practice (*usus*) as well as by *opinio juris*. See on the concept of customary international law Shaw 2008, p. 72-93; Cassese 2005, p. 153-170; Henckaerts & Doswald-Beck (ICRC-study) 2005, Vol. 1, p. xxxi-xlv. See also the judgements ICJ *North Sea Continental Shelf* 1969, para. 74; ICJ *Nicaragua* 1986, para. 186, 190.

<sup>318</sup> This would for example imply that intrusion of the premises of an IO by non-state actors (or 'third parties') may thus create a violation of the host state's obligations vis-à-vis that IO flowing from the inviolability of premises, because of the lack of sufficient protection by the host state against the acts of non-state actors; inviolability is not limited to host state interference alone.

<sup>319</sup> See Part II of this report, chapter 6 para. 4.

<sup>320</sup> Logically, the argument also benefits IO's which do have a seat agreement and which contains a provision on the inviolability of premises. Because a basic form of the duty to protect is inherent to this inviolability, that IO benefits from that basic form even without any explicit provision to that effect.

### *Duty to protect as inherent to inviolability*

The argument in favour of the duty to protect as inherent to the inviolability of premises can be construed as follows. By providing the premises with inviolability, the member states (and specifically the host state) envisage a physical location where the IO enjoys all the freedom necessary to effectively exercise its functions in order to fulfil its purposes. In short, the inviolability is granted on the basis of the functional necessity theory. As discussed above, this presupposes independence, more specifically independence from the host state.<sup>321</sup> But for an IO to function effectively and efficiently, independence from the host state is not the only relevant factor. It also presupposes a secure and tranquil environment, free of disturbance, threat and coercion, from whatever source such influence may originate. The latter submission flows logically from the functional necessity theory. Based on this theory, the member states endowed the IO with the legal right to such an environment, through the instrument of inviolability of premises. This must thus be construed broader than merely abstention from the host state. After all, for such an environment to be effectively realized, it should be actively prevented that third parties successfully attempt to disturb, threaten, coerce or in any other way physically interfere with the IO. This should not be seen as an additional obligation for a host state, but as a consequence for the host state of accepting the entity's status of international legal person, which is endowed with inviolability of premises, in combination with, as a host state, accepting a special responsibility towards the organization because of its admittance of the organization within its territory. All member states have an obligation to ensure the inviolability of the IO, and thus principally have the duty to protect. Only the host state, because of the IO's presence within its sovereign territorial jurisdiction, has that primary and direct responsibility for the protection of the IO.

As C. Wilfred Jenks pointed out in 1961, there were at that time some seat agreements which provided for due diligence in the exercise of (police) protection of the premises of an IO, however it had not been codified in 'an instrument of general application'.<sup>322</sup> Nevertheless, Jenks considered that the duty to protect "*would appear to be implicit in the relationship between a host government and an international organization even in the absence of a specific provision. [...] An obligation to accord any protection reasonably necessary for this purpose must be regarded as implicit in all of the existing arrangements governing international immunities*".<sup>323</sup>

Jenks views the duty to protect as one of the detailed implications of the inviolability of premises, and explains the absence of any explicit provision in for example the two UN P&I conventions on the ground that with the experience up until that time, the subject never had any special importance.<sup>324</sup>

Duffar submits that the inviolability of premises in general is '*un droit particulier aux personnes du droit international*'. Duffar thereby recognizes two different aspects of that right: "*l'inviolabilité – abstention*" and "*l'inviolabilité – protection*".<sup>325</sup> Clearly he sees inviolability as a privilege with two inherent sides. A passive duty to abstain from interference and a positive duty to protect that inviolability, and thus the premises.<sup>326</sup> A similar view is proposed by Brandon.<sup>327</sup> Ahluwalia

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<sup>321</sup> See chapters 1 and 6 of this report.

<sup>322</sup> Jenks 1961, p. 47.

<sup>323</sup> Jenks 1961, p. 48. In the context of inviolability and protection, Jenks also remarks that even if the premises remain non-violated (in a strict sense), this does not necessarily mean that the obligation to respect the inviolability is sufficiently fulfilled. For example, this does not seem to be the case when the accessibility or amenities of the organization are seriously interfered with by occurrences in their immediate vicinity. This suggests a wider scope of the inviolability of premises than merely the host state's duty to abstain from interference.

<sup>324</sup> Jenks 1961, p. 48, 49.

<sup>325</sup> Duffar 1982, p. 109, 119.

<sup>326</sup> Duffar 1982, p. 109-112, 114, 119-125. Duffar recognizes within the duty to protect two specific rights of the IO: the right to tranquillity of the premises (*droit a la tranquillité*) and the right to special protection (*protection spéciale*). The former deals with tranquillity in general and extends also outside the premises of the organization. It refers to for example demonstrations or other disturbances in the public space. The

simply recognizes that *'it is incumbent upon a host state to see that nothing is done which disturbs the peace and tranquillity of the headquarters of the international organization'*.<sup>328</sup> She points out that only few seat agreements explicitly provide for such duties, but nevertheless refers to it as a general obligation.<sup>329</sup>

As stated above, the inviolability of premises of a diplomatic mission is *mutatis mutandis* similar to the inviolability of premises of an international organization.<sup>330</sup> Therefore it is relevant, as a starting point, to look at the setting and extent of the duty to protect in that system as well. The system of diplomatic immunities clearly encompasses a duty to protect the premises of the mission in article 22.2 VCDR (1961). Denza, when discussing the concept of inviolability, speaks of two obligations related to the concept: a duty of abstention as laid down in article 22(1) VCDR 1961 and the positive duty of protection, as codified in 22(2) VCDR 1961.<sup>331</sup> This would suggest that at least with respect to diplomatic missions, the duty to protect is seen as part and parcel of the inviolability. However, the inviolability and the special duty to protect are still provided for separately in the VCDR 1961.

When one accepts the argument that the duty to protect is indeed inherent to the inviolability of premises, this duty should be considered as widely applicable since (practically) all IO's have a provision on inviolability of premises in their seat agreement. In addition, it may be argued that the inviolability of premises is a rule of customary character, itself inherent to the status of international legal person. In accepting that argument as well, it seems only logical that every international organization, by virtue of its basic legal status under international law, is entitled to inviolability of premises and with that to protection of those premises by whichever state the IO will establish those premises.<sup>332</sup> In short, a host state's duty to protect exists without an explicit provision to that effect and even without *any* explicit provision on the inviolability of premises. So for those duties, no seat agreement is required. But can it be maintained that the duty to protect as a whole, as laid down in the relevant explicit provisions in several seat agreements, is inherent to inviolability? Or is that a unwarranted expansion of the principle of functional necessity?

#### *The principle of functional necessity*

In arguing that a duty to provide reactive protection is inherent to the concept of inviolability, the principle of functional necessity plays a key role. As has also been discussed in previous chapters, this principle is of a fundamental character to international institutional law and organizational privileges and immunities. For this convincing evidence can be presented. Regarding state practice, it suffices to refer to all relevant bilateral and multilateral treaties concluded on the subject. The UN P&I Convention,<sup>333</sup> UN Specialized Agencies Convention<sup>334</sup> and the NATO Ottawa Agreement<sup>335</sup> all speak of the underlying reasoning of functional necessity. The former two are of course consistent with the UN Charter, which also confirms the theory.<sup>336</sup> In addition, several seat agreements make mention of the theory as the basis for the privileges and immunities accorded therein.<sup>337</sup> This may not only be construed as state practice,

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right to special protection deals with the protection of the actual premises, and refers to for example attacks aimed at the premises.

<sup>327</sup> Brandon 1952, p. 101. He also suggests that the positive duty to protect corresponds to the *'right enjoyed by the Organization to immunity from disturbance'*.

<sup>328</sup> Ahluwalia 1964, p. 86.

<sup>329</sup> Ahluwalia 1964, p. 87.

<sup>330</sup> 4<sup>th</sup> Report Díaz-González, YILC 1989, Vol II(1), para. 89; Duffar 1982, p. 101. See also Part II of this report, chapter 6.

<sup>331</sup> Denza 2008, p. 135-136.

<sup>332</sup> It is evident that establishment of premises on the sovereign territory of a state is not a unilateral act of the organization, but an agreement between both parties.

<sup>333</sup> Preamble, UN P&I Convention 1946.

<sup>334</sup> See for example Section 16, UN Specialized Agencies Convention 1947.

<sup>335</sup> Preamble, NATO Ottawa Agreement 1951.

<sup>336</sup> Art. 104 and 105, UN Charter.

<sup>337</sup> See art. 2 ICC – NL seat agreement 2007; art. 2 STL – NL seat agreement 2007; art. 22 Eurojust – NL seat agreement 2006; art. 17 PCA – NL seat agreement 1999; art. 20 Europol – NL seat agreement 1998; Section 27, UN – USA HQ Agreement 1947.

but also *opinio juris* since it is evident from the uniform wording that the host states are of the view that they are under a positive obligation to provide international organizations with these rights and duties. In accordance with the statement made above, a vast amount of doctrine confirms the view that the inviolability of premises is a general principle of the law on organizational immunities.<sup>338</sup> The ICJ has referred to the functional necessity principle, and has recognized it as a foundation and scope of organizational privileges and immunities, on several occasions.<sup>339</sup>

In order to make a successful argument to be that the duty to protect is inherent to inviolability, it must be made clear that the foundation for the principle of inviolability of IO premises can only be ensured by some form of host state protection linked to that inviolability. As discussed in chapter 6 of this report, inviolability is of paramount importance to the effective and independent functioning of the IO. This is in conformity with the principle of functional necessity. For the IO to be able to function effectively (and independently), it also needs to be able to function on a continuing basis, without disturbance or interruption.

#### *Preventive and reactive protection as inherent to inviolability*

Now that the framework for seeing some form of the duty to protect as inherent to inviolability has been clarified, the question remains whether this inherent duty to protect is as elaborate as the codified versions, being the provisions in the seat agreements. As stated above, only a minority of the IO's have such explicit provisions on the duty to protect in their seat agreements. To state that the rest of the IO's should also enjoy this protection due to their inviolability of premises, would be an extensive stretch of the concept. After all, the principle of functional necessity leaves it for the drafters to decide what an IO needs to effectively function. Inviolability is considered to be paramount for this, but the fact that the duty to protect is omitted in many seat agreements shows that this obligation on the host state is not as a whole considered as always necessary for the effective functioning of an IO. It is submitted that the duty to provide **preventive protection**, as flows from those explicit provisions, may fall outside of the scope of functional necessity of IO's.

So it cannot be maintained that the duty to protect as a whole is inherent to the inviolability of premises. The duty is too elaborate to be seen as a logical consequence of the inviolability of premises. However, it is submitted that the duty to provide **reactive protection** can in fact be seen as a logical consequence of the inviolability of premises. After all, if a threat to the premises of the IO has manifested itself, it is certain that the (continued) effective functioning of the IO is in direct jeopardy. It flows from the principle of functional necessity, as well as the general principles of cooperation and good faith that govern the legal relationship between an IO and its host state, that a host state provides assistance to the IO as much as possible to restore the effective functioning of an IO when this has been compromised. This duty to provide reactive protection must also be viewed in the context of the more general duty of a state to maintain and restore public order on its territory. The fact that IO premises still remain host state territory is of paramount importance in this regard. Additional support for this interpretation can be found in provisions in several seat agreements providing an obligation for the host state to ensure *and restore* basic facilities (or 'vital infrastructures') like electricity, gas and telecommunication. This obligation is briefly discussed in chapter 12 of this report.

One of the practical advantages is that a clear moment in time marks the application of the duty to provide reactive protection: only after the manifestation of a threat the host state is obliged to respond. This is in strong conformity with the principle of functional necessity: only when it becomes clear that the IO needs assistance of the host state in order to be able to keep functioning effectively, or restore its effective functioning, there is a duty upon the host state. So while functional necessity does not prescribe a preventive duty for every IO since many IO's are

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<sup>338</sup> Sands & Klein 2009, p. 500; Gerster & Rotenberg in Simma 2002, p. 1315; Scobbie in Dupuy 1998, p. 833; Muller 1995, p. 151; Bekker 1994, p. 111-112; Jenks 1961, p. 18; see already Kunz 1947, p. 841.

<sup>339</sup> ICJ *Reparations* 1949, p. 179; ICJ *Mazilu* 1989, para. 47, 52; ICJ *Cumaraswamy* 1999, para. 42 and 43.

not exposed to great threats, if by any unforeseen chance there is a threat, the host state must respond.

One important point must however be stressed: while the duty to provide reactive protection is primarily aimed at responding to a manifested threat, it has been explained in the previous paragraph that the reactive duty to protect also requires host state action *before* manifestation of the threat: the preparative protection measures. These may include policy protocols concluded with the IO on evacuation and emergency procedures, as well as close structural cooperation between the host state authorities and the IO security authorities when it comes to fire drills and determining sufficient emergency measures like fire hydrants and communication information. These preparative protection measures must be seen as not specifically directed at conscious human behaviour like terrorist attacks, but more to the general *safety*-aspect.

This assertion leads to the conclusion that through the inviolability of premises, all IO's benefit from the reactive duty to protect and the host state should take appropriate measures to ensure that this duty is fulfilled. It also leads to the conclusion that the preventive duty to protect, as discussed extensively above, is not inherent to the inviolability of premises and as such only applies to IO's which have an explicit duty to protect in its seat agreements. At this point this seems only reserved for the IO's with significant threat levels like the international tribunals, or with considerable (politically) sensitive subject matter.

## 11. Analysis of the content of the duty to protect an IO

### 11.1. State responsibility and the duty to protect

#### *Introduction*

If applicable,<sup>340</sup> the duty to protect amounts to an international obligation of the host state. Therefore the *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001* (hereinafter ILC Articles on State Responsibility) are of paramount relevance for analyzing a host state's duty to protect.<sup>341</sup> As clarified in the Commentary to the ILC Articles on State Responsibility, the articles deal with the 'whole field of state responsibility'.<sup>342</sup> In other words, it is not limited to international obligations towards other states, but can also include international obligations towards International Organizations. This is not altered by the frequent mentioning of the 'injured state' in Part III of the ILC Articles on State Responsibility.<sup>343</sup>

If the host state omits to fulfil the duty to protect (an international obligation), this constitutes an internationally wrongful act if the omission is attributable to the host state under international law and if that omission actually constitutes a breach of an international obligation.<sup>344</sup> If those conditions are fulfilled, the omission constitutes an internationally wrongful act, unless any circumstances precluding wrongfulness can be invoked.<sup>345</sup>

#### *Primary and secondary rules of international law*

It is important to distinguish between primary and secondary rules of international law. The latter are formed by 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.<sup>346</sup> The former are made up by the whole range of a state's substantive obligations flowing from treaties and customary international law, the breach of which gives rise to responsibility.<sup>347</sup> The ILC Articles on State Responsibility prescribe secondary rules of international law, while the primary rules of international law on the host state's duty to protect are prescribed by the treaty provisions dealing with that duty, and – arguably – relevant customary international law. In this respect, reference can be made to article 12 of the ILC Articles on State Responsibility, where it is determined that a breach of an international obligation occurs "*when an act of that state is not in conformity with what is required of it by that obligation*". Thus, the answer to the question of what constitutes a breach must be sought in the primary rules of international law: the obligation itself.

The distinction between primary and secondary rules seems clear-cut, but for determining what must be done to fulfil the duty to protect it becomes less clear due to the incorporation of a due diligence concept and the (related) concepts of effective and adequate measures. Because these concepts encompass a duty to make 'the best efforts', the question arises when a certain outcome is the result of *not* making the 'best efforts', or whether it perhaps is due to circumstances precluding wrongfulness. Of course, the circumstances precluding wrongfulness are not a tool designed for anticipation. But it does help in creating an extensive review of what

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<sup>340</sup> See Chapter 10 of this report on the applicability of the duty to protect to all IO's, and the difference between the general duty to provide reactive protection and the specific duty to provide preventive protection.

<sup>341</sup> The articles are not binding on states as a treaty, but for a large part the articles represent existing (customary) law. It can be considered as a very influential (non-binding) source of international law. See generally Shaw 2008, p. 780-781; Cassese 2005, p. 243-244.

<sup>342</sup> ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 32.

<sup>343</sup> The ILC has also worked on the responsibility of International Organizations. See for example ILC Report of the 55th session (2003), chapter 4. However, since we are dealing here with the responsibility of the *host state*, and not that of the IO involved, these draft articles are less relevant.

<sup>344</sup> Ex. article 2 ILC Articles on State Responsibility 2001, an internationally wrongful 'act' can consist of an action or an omission. Neglecting to act (sufficiently) on a duty to protect is an omission.

<sup>345</sup> See artt. 20-26 ILC Articles on State Responsibility. These circumstances will be discussed in more detail below.

<sup>346</sup> Paragraph (1) of the general commentary (ILC Report 53<sup>rd</sup> Session, p. 31).

<sup>347</sup> Cassese 2005, p. 244; paragraph (1) of the general commentary (ILC Report 53<sup>rd</sup> Session, p. 31).

efforts are necessary, and what efforts may not be necessary in fulfilling the duty to protect. This will be illustrated later in a brief discussion of the different circumstances precluding wrongfulness.

#### *International responsibility v. being a good host*

As was shown above, there are numerous situations possible in which an incident takes place with regard to an International Organization, while no international responsibility is incurred by the host state because there is no violation of the conventional (or customary) obligation to protect the premises. Of course there is a big difference between the question whether or not there is international responsibility and the question whether or not the relationship between an IO and its host state can be considered as good or mutually satisfactory. For example, the slow or non-responsive attitude of host state authorities towards the IO may not necessarily be a direct breach of the host state's treaty obligations, but nevertheless may be the cause of an organization's dissatisfaction with the host state. Especially with regard to security measures, an issue which is connected to strong emotional arguments, the ways of communicating and cooperating with the IO should receive due notice. In this respect, the paramount importance of the principles of cooperation and good faith becomes clear.<sup>348</sup> The relationship between an IO and the host state arguably consists of more than the state responsibility that may be invoked when the duty to protect is violated. When it comes to the protection of an IO, especially cooperation between the IO and the host state and good communication between the agents of both is of great importance to maintain a good relationship between the two. Also, cooperation and communication are effective instruments in ensuring that the host state's due diligence obligation to protect an IO is fulfilled. This will be discussed in the context of the due diligence obligation in subsequent paragraphs.

#### **11.1.1. Secondary rules: circumstances precluding wrongfulness**

In chapter V of the ILC Articles on State Responsibility, a number of circumstances that may preclude the wrongfulness of an act (or omission) of a state are defined. Naturally, these circumstances are also relevant when determining when a host state breaches its obligations under international law, flowing from the duty to protect. While these circumstances may preclude wrongfulness, the existence of these circumstances are without prejudice to the duty to comply with the duty to protect if and to the extent that the circumstance no longer exists.<sup>349</sup> For example, the ICJ stated with reference to necessity as a circumstance precluding wrongfulness that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives".<sup>350</sup> Also, it is without prejudice to the question of compensation for any material loss caused by the act or omission.<sup>351</sup> This compensation should not be read in context of reparations (ex art. 34 ILC Articles on State Responsibility), but rather if the (host) state should pay the IO for the material losses it has sustained due to an act or omission of the host state, despite the existence of a circumstance precluding wrongfulness.<sup>352</sup> Below, the articles that codify the different circumstances precluding wrongfulness are briefly introduced. Please note that while reference is made to states only, the provisions also apply to states vis-à-vis international organizations.<sup>353</sup>

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<sup>348</sup> See on these principles ICJ *WHO – Egypt* 1980, para. 43.

<sup>349</sup> This flows from article 27 ILC Articles on State Responsibility.

<sup>350</sup> ICJ *Gabčíkovo-Nagymaros* 1997, para 101. See also ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 86.

<sup>351</sup> Article 27 ILC Articles on State Responsibility.

<sup>352</sup> ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 86.

<sup>353</sup> See ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 32.

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*Article 20 – Consent*

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

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The circumstance of consent should, in the light of the duty to protect, be seen as applicable when an IO specifically states that it does not want the host state to take certain measures. When an IO is itself responsible for the fact that a host state does *not* take certain measures, this will preclude a breach of the due diligence-obligation with regard to the absence of those measures. The notion of consent obviously also plays an important role in shaping the duty to abstain from interference by the host state: the inviolability of IO premises prevents the host state from entering, except when the IO consents to the action of the host state.<sup>354</sup>

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*Article 21 – Self-defence*

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

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In the context of the duty to protect, the circumstance of self-defence does not seem to be of any practical value. It is simply not conceivable that a host state *neglects* to take certain measures out of self-defence *against* the International Organization. After all, the notion of self-defence is construed in the context of the use of force by one state vis-à-vis another state, and the use of force by an IO versus its host state is highly unlikely. It must also be pointed out that while it may be possible that a host state does not have the means to fulfil a due diligence obligation due to the fact that all its security forces are deployed to defend the host state, this does not fall within the scope of article 21, but perhaps within the scope of other circumstances precluding wrongfulness like necessity and distress.<sup>355</sup>

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*Article 22 – Countermeasures in respect of an internationally wrongful act*

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

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Taking countermeasures against an International Organization cannot be construed as precluding a breach of the due diligence obligation to protect. As is clear from the ILC Articles on State Responsibility, measures regarding the inviolability of diplomatic missions are excluded from the array of legitimate countermeasures.<sup>356</sup> According to the commentary this includes other obligations of the receiving state that flow from the system of diplomatic relations. The main argument for this exclusion is a functional one: if countermeasures could legally be taken against diplomatic missions and staff, then this would undermine the whole diplomatic system of inviolability and protection.<sup>357</sup> Accordingly, the ICJ stated in the *Tehran hostages* case that the diplomatic system is a self-contained one, specifying its own various measures against violation or abuse.<sup>358</sup> It is submitted that this functional reasoning also extends to the organizational

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<sup>354</sup> See generally the commentary on article 20: ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 72-74.

<sup>355</sup> See generally the commentary on article 21: ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 74-75.

<sup>356</sup> See art. 50.2 (b) ILC Articles on State Responsibility.

<sup>357</sup> ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 133-134.

<sup>358</sup> ICJ *Tehran Hostages* 1980, para. 83, 86.

system of privileges and immunities, including the duty to protect an International Organization.<sup>359</sup>

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*Article 23 – Force majeure*

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The State has assumed the risk of that situation occurring.

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This is probably one of the most important circumstances precluding wrongfulness when it comes to the duty to protect an International Organization. Because of the wide scope of most provisions on the duty to protect the security of the premises, the concept of force majeure is necessary to provide some limitation as to what may breach the due diligence obligation, especially with regard to the preventive part of the obligation. Basic examples of *force majeure* in the light of the duty to protect are storms, floodings, etc. Nevertheless, if a host state has the means to increase the resilience of an IO in such situations, or is able to take reactive protection measures, it should employ those means: article 23 is directed at acting, or more importantly *not being able to act* because of force majeure. It does not in principle relieve the host state of its obligations to protect an IO against the effects of a circumstance that qualifies as *force majeure*.<sup>360</sup> Specific issues that do not fall within the definition of *force majeure* are for example a strike by police officers, or the lack of adequate and effective basic material of for example the fire department.<sup>361</sup> Both issues could result in insufficient means to protect the IO's, but the main reason that this falls outside the definition of article 23 is that it is not inherently beyond the control of the state. Of special relevance in this regard is paragraph 2 of this article, where the role of the (host) state in the circumstance of *force majeure* is explicitly declared relevant. The notion of *force majeure* differs itself from other circumstances like distress or necessity, because the conduct or lack of action of the (host) state, "*which would otherwise be internationally wrongful, is involuntary or at least involves no element of free choice*".<sup>362</sup>

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<sup>359</sup> See generally the commentary on article 22: ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 75-76.

<sup>360</sup> For example, if The Hague should flood, it qualifies as *force majeure* that host state authorities are not able to protect the IO against the water. However, this does not relieve those authorities from doing everything they can to assist and protect the IO after the occurrence of the flood against threats like looting, fire, etc.

<sup>361</sup> Accordingly, the commentary states that a political or economic crisis does not lead to a situation of *force majeure*; p. 76 para. (3).

<sup>362</sup> See generally the commentary on article 23: ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 76-78. The quote is from p. 76 para. (1).

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*Article 24 – Distress*

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.

2. Paragraph 1 does not apply if:

- (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The act in question is likely to create a comparable or greater peril.

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As the commentary to this article states: “*Unlike situations of force majeure dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril. Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25.*”<sup>363</sup> It seems that this circumstance may apply if for example the police forces entrusted with protecting the premises have no other way to survive than by abandoning their post, thereby leaving the IO unprotected. When there is an extremely violent demonstration in front of an IO from which attempts to enter the premises originate, and those attempts cannot be stopped by the agents that are present at that time, without risking their own lives, this article may apply. Also, when a fire commander makes the decision to withdraw its men from fighting the fire because of the life threatening situation, this circumstance may apply.<sup>364</sup>

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*Article 25 – Necessity*

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) The international obligation in question excludes the possibility of invoking necessity; or
- (b) The State has contributed to the situation of necessity.

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The circumstance of necessity is an exceptional circumstance precluding wrongfulness, and applies if the host state had to protect its own interests against a grave and imminent peril. It must be noted however that this may lead the (host) state to, for the time being, not perform some other international obligation *of lesser weight or urgency*.<sup>365</sup> If for example the host state has no other choice than to deploy all the protection means at its disposal to protect the vital elements of its statehood like its territorial integrity or its authority structure (or if the existence of the state itself is threatened), a breach of the due diligence principle may be precluded. When there are mass demonstrations or riots, necessity may be invoked for protecting the ministries of the state against occupation or plundering, at the expense of the protection levels of an IO. However, as becomes clear from art. 25.1 (b), the act or omission should not seriously impair an essential interest of the IO. Thus, when the same peril seriously threatens the IO, invoking necessity for withdrawing police forces assigned to IO protection may not be warranted. After

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<sup>363</sup> ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 78 para. (1).

<sup>364</sup> See generally the commentary on article 24: ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 78-80.

<sup>365</sup> ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 80 para. (1).

all, in such a situation the duty to protect is definitely not an obligation of lesser weight or urgency. It must be noted that despite its incorporation in the draft articles of the ILC, the notion of necessity is not uncontroversial in international law and should be interpreted strictly.<sup>366</sup>

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*Article 26 – Compliance with peremptory norms*

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

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It is very unconceivable that the duty to protect will at any point be contrary to any peremptory norm of international law. Therefore it is unlikely that this specific circumstance precluding wrongfulness can successfully be invoked with regard to the duty to protect an International Organization.<sup>367</sup>

### **11.1.2. The primary rule; contents of the provisions of protection**

As stated above in the introduction of this chapter, the answer to the question of what constitutes a breach of the duty to protect must be sought in the primary rule, being the obligation itself. For this, the explicit provisions as discussed in chapter 10 are used. More specifically, we look at the schematic enumeration of elements as has been made for every 'standard' provision as found in Dutch seat agreements: the 'ICTY-provision', the 'EUROPOL-provision', the 'ICC-provision' and the 'IUSCT-provision'.

For these standard provisions, three basic elements can be identified which can in some form be found in the provision. These basic elements are the following:

- Qualities of an object benefiting from protection;
- Methods against which protection is required;
- Necessary amount of state conduct.

In the following paragraphs, these three basic elements will be analyzed. It is relevant to point out that one 'element' which is not mentioned above is the same in every provision on the duty to protect: what are the (competent) authorities of the host state endowed with the duty to protect? Regardless of the exact wording employed, it flows from general international law that the whole of the authority system of the host state is imposed with (their part of) the duty to protect an IO; no authorities are excluded.<sup>368</sup>

### **11.2. Qualities of an object benefiting from protection**

#### *Object benefiting from protection*

All provisions concerning the duty to protect determine in some way what aspect of the IO that should be protected. Both the ICTY-provision and the ICC-provision refer to the entity as an undivided whole: 'the Court' or 'the Tribunal'. The EUROPOL-provision and the IUSCT-provision on the other hand refer to the physical form of the IO as it has manifested itself on the territory of the host state: 'the headquarters' and 'the premises of the Tribunal'. A treaty provision must be interpreted in accordance with the ordinary meaning of the text, seen in the context of the treaty and in the light of the object and purpose of the treaty.<sup>369</sup> The ordinary meaning of the text of the provision itself allows for some difference in interpretation between the two, as showed above. But the title of the provisions on the duty to protect clarifies the matter: both the ICTY-

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<sup>366</sup> See generally the commentary on article 25: ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 80-84.

<sup>367</sup> See generally the commentary on article 26: ILC Commentary to Articles on State Responsibility (ILC Report 53<sup>rd</sup> Session), p. 84-85.

<sup>368</sup> See also art. 2(a), 4 and 6 of the ILC Articles on State Responsibility.

<sup>369</sup> Art. 31.1 Vienna Convention on the Law of Treaties between States and International Organizations 1986 (VCLTIO). See also article 31 of the VCLT 1969.

provision and the ICC-provision have the following title: “*Protection of the premises [...] and their vicinity*”.<sup>370</sup> Thus the duty to protect refers to measures taken to protect the physical forms of the IO. It seems that this is a commonality for all IO’s enjoying any form of the duty to protect.<sup>371</sup>

The vicinity of the premises of the IO is a recurring element in all provisions of the duty to protect, although not in a way as is suggested by the titles of the ICTY- and ICC-provisions. These titles may lead to the erroneous assumption that a host state is also obliged to protect the vicinity of the headquarters. However, as is seen in the contents of the article, the protection concerns only the premises, while disturbances in the vicinity of the premises may lead to impairment of *qualities* of the premises: disturbances in the vicinity of the premises may impair the *tranquillity* of the premises itself. Thus, it remains the premises itself for which protection is required. This will be explained further below.<sup>372</sup>

#### *Qualities of the object*

The duty to protect is not a general duty to protect the premises. The protection is directed at the premises, but only at specific *qualities* that those premises possess. For example, the ICC-provision does not contain a duty to protect the premises, but to ensure the *security and protection* of the premises.<sup>373</sup> Other formulations of such qualities may be discerned: the ‘tranquillity’ of the premises,<sup>374</sup> the ‘peace’ of the premises,<sup>375</sup> and the ‘security and tranquillity’ of the premises.<sup>376</sup> The IUSCT-provision also provides a duty to protect against ‘impairment of its dignity’. This is not a quality of the premises, and is on itself a peculiar feature in the duty to protect an International Organization since it originates from the diplomatic system, and seems more suited in that system due to its roots in sovereignty, protocol and respect, rather than functional necessity. It is submitted that it does not seem to add any real quality to the duty to protect other than the security, protection and tranquillity. It is not further discussed in this chapter.<sup>377</sup>

The question arises what the differences are between the different qualities. The words ‘security’ and ‘tranquillity’ reoccur and it can be assumed that they have the same ordinary meaning in all provisions. But does the supplement ‘[...] and protection’ change the quality of ‘security’ in any significant way? And is the ‘peace’ of the premises the same as the ‘tranquillity’ of the premises?

The literal definition of **security** is ‘safety’, or ‘the freedom from danger or anxiety’, also worded as ‘the condition of being protected from, or not exposed to danger’.<sup>378</sup> The literal definition of **protection** is ‘the state of protecting or being protected’, whereby the definition of ‘**to protect**’ is ‘to keep safe’ or ‘to defend or guard’ from injury, danger, attack etc.<sup>379</sup> So in the ordinary meaning of the provision there doesn’t seem to be a fundamental difference between the two concepts: they are both concerned with the quality of being (kept) safe from danger and injury. This interpretation is in line with the context of the provision and the object and purpose of a

<sup>370</sup> Art. 7 ICTY seat agreement; art. 7 ICC seat agreement. My underlining.

<sup>371</sup> Concepts like ‘headquarters’ or ‘premises’ or often defined in the seat agreement. See Part II of this Report on the inviolability of premises (specifically paragraph 6.1.1). These definitions generally include the terrains around the buildings of the IO, but it is inherent to the definition that the vicinity of the IO premises are excluded from these definitions.

<sup>372</sup> Important to point out is that regardless of its obligations under international law (towards an IO), a host state is under a general duty to maintain public order and security in the vicinity of those IO’s, by virtue of the fact that the ‘vicinity’ is actually an integral part of its own sovereign territory. However, this duty is not necessarily expanded by an international obligation concerning the duty to protect an IO.

<sup>373</sup> See also the ICTY-provision.

<sup>374</sup> ICTY- and ICC-provision.

<sup>375</sup> IUSCT-provision.

<sup>376</sup> EUROPOL-provision.

<sup>377</sup> On the impairment of the dignity of diplomatic missions, see Denza 2008, p. 169-175.

<sup>378</sup> Oxford Student’s dictionary, 2<sup>nd</sup> Ed. 1988; The Shorter Oxford English Dictionary on historical Principles, 3<sup>rd</sup> Ed. (1967), Vol II.

<sup>379</sup> Oxford Student’s dictionary, 2<sup>nd</sup> Ed. 1988; The Shorter Oxford English Dictionary on historical Principles, 3<sup>rd</sup> Ed. (1967), Vol II.

seat agreement.<sup>380</sup> The duty to ensure security logically entails the duty to ensure protection or, phrased differently, it entails the duty to provide protection when this is necessary for the security. However, where the concept of security refers to the freedom from danger, the concept of protection refers to the acts and measures which (intend to) provide that freedom from danger. It is submitted that the quality 'security' is not fundamentally different with or without the quality of 'protection'. However, the addition of the quality of 'protection' provides for a stronger language of the provision, leaving beyond doubt that it is indeed a duty to provide protection.

The literal definition of **tranquillity** is 'a calm, quiet state',<sup>381</sup> or 'free from agitation and disturbance'.<sup>382</sup> A literal definition of **peace**, as it appears to be used in the IUSCT-provision, is 'rest, quiet, calm'.<sup>383</sup> This does not seem to entail any difference from the quality of tranquillity. It is also important to look at the duty to protect as found in article 22 paragraph 2 of the Vienna Convention on Diplomatic Relations 1961, since the IUSCT-provision is identical to this provision on the duty to protect an embassy and the duty to protect an IO has strong connections to its diplomatic counterpart. Denza refers to extensive practice regarding disturbances of the peace through demonstrations in the direct vicinity of embassies. In this context it is noted that what constitutes a breach of an embassy's peace should be assessed in the light of whether the normal embassy activities have been disrupted by the disturbance.<sup>384</sup> This will also be discussed in the next paragraph.

It is also determined in most provisions that the host state must provide to the premises the 'appropriate protection as may be required'. It seems that this is not a specific quality like the security and tranquillity of the premises. Instead, the wording suggests that it refers to the actual protective measures which are taken, or in other words the 'physical' protection which the host state actually provides to the Tribunal. The phrase 'as may be required' thereby seems to refer to the actual protective measures as are required to ensure the protection of the qualities incorporated in the provision: security and tranquillity. The literal definition of 'appropriate' is 'suitable, acceptable or correct for the particular circumstances'. As will be discussed later, this does not appear to add something extra to the duty to protect since it consists of at least a 'due diligence' obligation to ensure protection. After all, the literal meaning of **due** is 'that what is suitable or right in the circumstances' and that of **diligence** is 'careful and thorough work or effort'.<sup>385</sup>

In conclusion, the ordinary meaning of the quality of 'security' (and protection) is that it is (kept) safe from danger and injury. The ordinary meaning of the quality of tranquillity can be considered the same as the quality of 'peace of the Tribunal', being the duty to ensure that the premises' calm, quiet state is not impaired. As will be seen in the next paragraph, this rather broad basic obligation is limited further by a specification of the methods with which this calm, quiet state can be impaired in the sense of the duty to protect. It will also be argued that the amount of disturbance amounting to an impairment of the peace of the IO depends on whether it interferes with the effective functioning of the IO.

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<sup>380</sup> The object a seat agreement may be described as the regulation of the IO-host state relationship while its purpose may be described as to clarify the legal duties of IO and host state in establishing and maintaining an environment where the IO can effectively exercise its functions without interference.

<sup>381</sup> Oxford Student's dictionary, 2<sup>nd</sup> Ed. 1988. The word 'state' in this definition is meant in a generic sense and does not indicate the concept of statehood under international law.

<sup>382</sup> The Shorter Oxford English Dictionary on historical Principles, 3<sup>rd</sup> Ed. (1967), Vol II. Definition is for 'tranquil' as basic form of tranquillity.

<sup>383</sup> Oxford Student's dictionary, 2<sup>nd</sup> Ed. 1988.

<sup>384</sup> Denza 2008, p. 169-173.

<sup>385</sup> Oxford Students dictionary, 2nd Ed. 1988.

### 11.3. Methods against which protection is required

The qualities discussed above cannot be seen separate from the ways in which, according to the provisions, these qualities can be violated and thus against which the host state must protect the IO's. An example of the specification of such a method is "*to ensure that the tranquillity of the Tribunal is not disturbed by the intrusion of persons or groups of persons [..]*"<sup>386</sup>.

The specification of methods clearly entails a limitative list of ways which are to be reckoned with under the duty to protect. For the qualities that do not have any methods specified, the methods discussed here are of course not excluded, it simply entails that the quality can be impaired in any possible way in the sense of the duty to protect.

Different methods can be discerned:

- By intrusion of (groups of) persons from outside the premises;<sup>387</sup>
- By attempting unauthorized entry into the premises;<sup>388</sup>
- By any intrusion or damage;<sup>389</sup>
- By disturbance in the immediate vicinity of the premises;<sup>390</sup>

#### *Intrusion of persons from outside the premises; unauthorized entry*

The first method clearly deals with persons, whether acting alone or in groups, who attempt to actually intrude the premises. More interesting is what is excluded by this method. The specification 'from outside the premises' specifies the direction of the attempted intrusion. It excludes persons who are already present on the premises and violate the tranquillity 'from within'. Examples of such disturbances falling outside the scope of this category are demonstrations of (the union of) staff members and individual incidents involving staff members or supporting personnel such as caterers, but also visitors of for example the open hearings of a tribunal. This is logical because the internal security and tranquillity is the responsibility of the IO itself. The host state cannot be obliged to prevent such impairments since they do not originate from the territory of the host state.

The intrusion of persons is generally linked to the quality of tranquillity, but it has a considerable overlap with the more generally phrased duty to prevent the impairment of the security of premises. After all, in the vast majority of cases an intrusion of the premises will certainly amount to an impairment of the security. As such, this method of impairing the tranquillity seems to be a residual clause for unlikely scenarios like host state nationals mass-celebrating the victory of their national football-team, thereby trespassing on the premises of an IO. The trespassers in such a scenario do not intend to impair the security, but such an orange-coloured mass will certainly impair the tranquillity of the premises.

How a method can function as a considerable limitation of the duty to protect is illustrated by the use of this method in the EUROPOL-provision. Here the intrusion of persons is not only linked to the tranquillity, but also to the security of the premises. This entails that all threats to the premises that are not connected to persons attempting to intrude, seem to fall outside the scope of this duty to protect. The same construction can be found in the UN-USA Headquarters Agreement of 1947. Theoretically, this limitation of the duty to protect is considerable. After all, it focuses the duty to protect solely on the notion of *security* (conscious human actions) thereby excluding the concept of *safety* (technical failures, human errors, disasters etc.). While the provisions of the Europol seat agreement and the Eurojust seat agreement are clear, it is submitted that the general interpretation of the duty to protect warrants inclusion of both *security* and *safety*.<sup>391</sup> In any case, regardless of this specific international obligation to protect, host state policies should be directed at both security and safety in order to ensure the continued effective functioning of all IO's on its territory.

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<sup>386</sup> art. 7.1 ICTY seat agreement 1994. My underlining.

<sup>387</sup> ICTY-provision and ICC-provision.

<sup>388</sup> EUROPOL-provision.

<sup>389</sup> IUSCT-provision.

<sup>390</sup> ICTY-provision, EUROPOL-provision, ICC-provision and (arguably) IUSCT-provision.

<sup>391</sup> See also chapter 10 of this report on the fundamental questions concerning the duty to protect.

If interpreted even more strictly, the Europol provision even provides for limitations within the notion of *security*, excluding certain 'non-intrusive' forms of conscious human actions. An extreme theoretical example illustrates this. If a group of dissidents mount an attack on an IO with the use of for example a rocket launcher, without the intention to actually intrude the premises but merely with the intention to inflict as much damage as possible, it could be argued that this falls outside the scope of the duty to protect the security as laid down in the EUROPOL-provision. However, it is the opinion of this author that such an interpretation of the provision does not do justice to the object and purpose of the seat agreement. It is clear that the example as described above would flagrantly impair the effective functioning of the IO. In addition, there was enough concern with the security of the IO to incorporate an explicit duty to protect the premises in the seat agreement. It would seem unwarranted to have the duty to protect restricted by such a factual method as intrusion by persons. If the intention of the drafters was indeed to limit the duty to protect only to people actually trying to get onto the premises, it is the opinion of this author that it would seem unlikely that such a limitation would have been incorporated in the present day.

*Disturbance in the immediate vicinity of the premises; demonstrations*

It is clear that the first method is very closely linked to the qualities of security and protection, since it involves a physical act of intrusion onto the premises. The impairment method of disturbances in the immediate vicinity however clearly operates on the (lower) scale of tranquillity of premises.

The method of disturbance in the immediate vicinity of premises seems to extend the duty to protect to the vicinity. However, the 'disturbance' must affect the premises in order to fall within the scope of the duty to protect. With regard to the duty to prevent disturbance of the peace of an embassy, the US Supreme Court determined that "*given the particular context for which the clause is crafted, it is apparent that the prohibited quantum of disturbance is determined by whether normal embassy activities have been or are about to be disrupted*".<sup>392</sup> This can be considered as equally applicable to IO's, by virtue of the principle of functional necessity: privileges and immunities are granted in order to guarantee the effective functioning of an IO. If a 'disturbance' in the immediate vicinity of an IO clearly does not affect the effective functioning of an IO, it does not constitute a 'disturbance' in the meaning of the duty to protect. As such, the question what exactly constitutes the 'immediate vicinity' of an IO is not so much determined by geographical considerations as by the facts of the case and especially the 'quantum of disturbance'. It is important to stress that while the effective functioning must be impaired, it is by no means necessary that the disturbance was created with such intent. In principle, construction works opposite the IO, which disturb the IO officials in their work due to the constant drilling of the foundations, constitute 'disturbances in the immediate vicinity'. Arguably, even simple occurrences like traffic jams are not principally excluded from the provision, if such occurrences impair the effective functioning – or 'normal activities' – of the IO. Other possible examples are disturbances like music festivals, although when these take place at night, when probably no-one is working on the premises, it is not sufficient to constitute a disturbance in the sense of the duty to protect. But for all examples, and for the general scope of the provision, this will ultimately depend on the facts of the case.

Examples of 'disturbances' which arguably do not amount to a disturbance against which the host state is obliged to respond, are demonstrators who employ silent methods like a sit-in and who do not obstruct the entrance of the premises. Another important element in that respect is the balance of interests between the IO and the individual protesters; the right of free gathering and right on demonstration must be taken into account. This friction between the different rights and duties does not automatically result in a situation that favours either party (demonstrators or IO). Demonstrations are not categorically forbidden, and IO's are not obliged to endure every (form of) demonstration because of the right of gathering and demonstration. Most case-law on this subject concerns demonstrations in front of embassies, not situations in front of IO's.

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<sup>392</sup> US Supreme Court *Boos et al. v. Barry* (22/03/1988), 488 US 312, 99 L Ed. 2d 333, 108 S Ct. 1157; Denza 2008, p. 171.

Nevertheless, the same problems and considerations play a role. The general consensus seems to be that when the work of the IO can continue normally, and when the access to the premises are unhampered, there is no reason to infringe on the human rights of the demonstrators.<sup>393</sup> In the case of embassies some additional considerations may play a role, because of the duty to also prevent 'the impairment of the dignity' of the diplomatic mission.<sup>394</sup> This dignity is generally based on the sovereign dignity of another state. An IO however only enjoys privileges and immunities insofar these are necessary for the effective functioning of the IO. Therefore the issue of demonstrations should be dealt with from the perspective of functional necessity rather than impairment of dignity. If demonstrators would for example place a number of wooden crosses opposite to the premises of an International organization, to emphasize the number of casualties the IO was unable to prevent, this would not constitute a disturbance of the tranquillity of the IO since it does not effect the functioning of the IO. For embassies, the impairment of dignity-issue may fuel other considerations.<sup>395</sup>

#### *General threats not aimed at impairing the effective functioning of an IO*

It is important to point out that the impairment-method of occurrences in the immediate vicinity usually is not explicitly incorporated with regard to the quality of security of the premises. But due to the character of that quality, it logically encompasses all threats to the security of the premises, whether they manifest themselves as directed towards the premises or they merely manifest themselves in the vicinity of the premises, but are capable of damaging the premises.<sup>396</sup> An example of the latter is an accident like a gas explosion in a private residence or office building next to the premises. But also floodings are in principle not excluded from the duty to protect. Here two important issues come into play. First of all, the importance of the circumstances precluding wrongfulness, as part of the secondary rules on state responsibility which are discussed above. Floodings are a textbook example of *force majeure*.<sup>397</sup> But secondly, the difference between preventive protection and reactive protection plays an important role. Since it is unlikely that damage as a result of flooding or gas explosion could have been entirely prevented, despite a host state's best efforts to generally protect an IO, the duty of preventive protection will not easily be breached in such instances. But the 'best efforts' of a host state are of paramount importance in reacting on such accidents and instances of *force majeure*. If the host state neglects to act in order to (for example) limit the effects of such occurrences, it can certainly be in breach of its duty to protect the premises.<sup>398</sup>

In conclusion, specific qualities of IO premises, together with the limitation of methods in which these qualities can be impaired, form the limitation of the 'ratione materiae' of the duty to protect. Depending on the combinations of qualities and possible methods, the scope of the duty ranges from extremely broad<sup>399</sup> to remarkably limited in some ways.<sup>400</sup> In general, it can be stated that an IO requires protection against more than just threats with the intention to impair the effective functioning of the IO. This can be rephrased as follows: the scope *ratione materiae* of the duty to protect is that of objective threats to the IO rather than subjective threats.

#### **11.4. Necessary amount of state conduct**

It is the necessary amount of state conduct that lies at the core of what the practical implications are of the duty to protect. Firstly, as stated earlier and will be discussed again below, it is an obligation of effort, not an obligation of result. Secondly, it provides the effort level that all host state authorities must maintain in order to fulfil the duty to protect. From a policy perspective, the necessary amount of state conduct should be leading in shaping the policies concerning the

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<sup>393</sup> See for a good overview of the different aspects of the duty to protect and demonstrations concerning embassies: Denza 2008, p. 169-175.

<sup>394</sup> Art. 22.2 VCDR 1961.

<sup>395</sup> See on such a case Denza 2008 p. 171-172, where a case is described of demonstrators in Australia which took such a course of action against the embassy of Indonesia.

<sup>396</sup> With the possible exception of the Europol and Eurojust provisions.

<sup>397</sup> See further Chapter 11 para. 1 on the secondary rules of state responsibility.

<sup>398</sup> As also addressed above, if the EUROPOL-provision is interpreted very strict, such occurrences are excluded from the scope of the duty to protect that IO.

<sup>399</sup> ICC-provision.

<sup>400</sup> EUROPOL-provision.

duty to protect. However, this is made difficult by the abstract manner in which this necessary amount is laid down in treaties. In this paragraph, an attempt will be made to specify and clarify what this necessary amount of state conduct actually entails. But at the outset it must be noted that while a more detailed analysis is possible, it will never be able to substitute for the general provisions and the flexibility of those provisions. At the heart of the duty to protect will always lie some abstractness, due to which the specific circumstances of any given case will be decisive for the question whether a certain amount of state conduct was sufficient to fulfil the duty to protect.

Below, three different concepts which are used to describe the necessary amount of state conduct, are discussed. They flow from the different 'standard provisions' on the duty to protect: 'due diligence',<sup>401</sup> the 'special duty to take all appropriate steps',<sup>402</sup> and 'all effective and adequate measures'.<sup>403</sup>

#### 11.4.1. 'Due diligence'

*The concept of due diligence in international law*

The concept of due diligence can be considered an element of an obligation, and is as such part of a primary international rule.<sup>404</sup> Due diligence can not be seen as an independent definition within an obligation, but must be seen as a standard for conduct of a state, in the light of the circumstances and the context of the obligation.<sup>405</sup> Nevertheless, it is possible to specify to some extent what the character is of a due diligence obligation. For this, we first look at the ways in which due diligence was interpreted and codified through the development of the international law on state responsibility.

The concept was first dealt with in a thorough manner by the Arbitral Tribunal in the *Alabama Claims* matter in the year 1872.<sup>406</sup> This matter dealt with the duties of neutral states in an international conflict, the relevant legal obligations were laid down in the so-called Washington Rules, or Treaty of Washington of 1871. In the assessment of these claims, the due diligence obligation was one of the issues in need of interpretation. Great Britain, one of the parties in the Claims, submitted a 'restrictive' approach to the concept: a lack of due diligence meant "a failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation".<sup>407</sup>

The other party in the Alabama Claims, the United States of America, submitted an approach of 'active diligence', commensurate with the magnitude of the results of negligence. The Tribunal interpreted the concept of 'due diligence' largely in conformity with the views put forward by the USA. The due diligence, as applicable in the Alabama Claims matter, entailed that due diligence needed to be exercised in 'exact proportion to the risks to which either of the belligerents might be exposed, from a failure to fulfil the obligations of neutrality'.<sup>408</sup>

Based on this reasoning, the Tribunal decided that Great Britain had failed to employ due diligence, by omitting, notwithstanding the warnings and official actions to point out the danger by the party to which the obligation was owed (the USA), to take any effective measure of prevention, in due time.

Following the Alabama Claims Arbitration, the '*Institut de Droit International*' attempted to clarify the primary obligations as laid down in the Washington rules, stating that "*il est tenu de prendre les mesures necessaries pour les empêcher [...]*". The limitations on responsibility in this

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<sup>401</sup> ICTY-provision, Europol-provision, arguably the IUSCT-provision.

<sup>402</sup> IUSCT-provision, article 22.2 Vienna Convention on Diplomatic Relations 1961.

<sup>403</sup> ICC-provision.

<sup>404</sup> Blomeyer-Bartenstein in EPIL 1992, p. 1113, 1114.

<sup>405</sup> Commentary to Article 10 of the Harvard Law School 1929 Draft on state responsibility: HLS, Research in International Law, Vol. II, responsibility of states (1929) p. 228 *et seq.*

<sup>406</sup> Arbitral Award in the *Alabama Claims*, 14 September 1872; see also Blomeyer-Bartenstein in EPIL 1992, p. 1110.

<sup>407</sup> As quoted by Blomeyer-Bartenstein in EPIL 1992, p. 1111. My underlining.

<sup>408</sup> Blomeyer-Bartenstein in EPIL 1992, p. 1111.

context were also made clear: “*pour qu'on puisse admettre qu'il a violé son devoir, il faut la preuve soit d'une intention hostile (Dolus), soit d'une négligence manifeste (Culpa)*”.<sup>409</sup> In short, either (malicious) intent or manifestly negligent conduct can entail responsibility under this interpretation of the due diligence concept.

In the XIIIth Hague Convention (18 October 1907)<sup>410</sup> the treaty rules which formed the legal basis for the Alabama Claims were reformulated, but instead of using the concept of due diligence, the concept was replaced by ‘*employ the means at its disposal*’.<sup>411</sup> This could be seen as a specification of the due diligence principle, although the emphasis is less on the efficiency and care of the state, and more on the instrumentalities available to the state.<sup>412</sup>

ILC Special Rapporteur García Amador, in article 7 of his revised draft on State Responsibility (1961) attempted to identify the different elements of due diligence.<sup>413</sup> The Special Rapporteur conducted this attempt fully in the context of the state responsibility for injuries caused to an alien. He described the following elements:

- [...] if authorities were manifestly negligent in taking measures which, in view of the circumstances, are normally taken to prevent the commission of such acts;
- the circumstances mentioned above include, in particular, the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with resources available to the state;
- inexcusable negligence in apprehending the individuals who committed the injurious act also imposes responsibility. Reason for this is the impossibility of satisfaction, punishment and reparation.

As is clear from these elements, the scope of due diligence is primarily determined in the context of fault. As the Special Rapporteur pointed out in his earlier work, “*the rule of 'due diligence' is the expression par excellence of the so-called theory of fault (culpa), for if there is any category of cases in which it cannot be said that responsibility arises through the simple existence of a wrong it is surely the category dealt with [...]*”<sup>414</sup>

#### *Core of the concept of 'due diligence': faulty conduct and regular efforts*

Due to developments briefly described above, a better understanding was reached about the contents of the concept of due diligence. The concept starts to take on a discernable form, wherein the duty of a state is to employ generally sufficient, or ‘normal’ conduct. Breaching the concept of due diligence thereby implies the concept of ‘fault’, seeing that a breach occurs chiefly in case of faulty conduct of state organs; organs acting wilfully not to observe the necessary care, or negligently failing to do so. Triggers for responsibility are the knowledge of impending injury or circumstances which would justify an expectation of probable injury, and failing to take measures which should normally have been taken to prevent, redress, or inflict punishment for the acts causing these injuries.<sup>415 416</sup>

While this is primarily a negative way in defining due diligence, it can also be construed from a positive (or ‘active’) perspective: due diligence is closely related to, or can be defined as, an

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<sup>409</sup> Institut de Droit International, Hague Session 1875, Conclusion V; Blomeyer-Bartenstein in EPIL 1992, p. 1111, 1112.

<sup>410</sup> In: 2 AJIL (1908) Supp., p. 202.

<sup>411</sup> See Blomeyer-Bartenstein in EPIL 1992, p. 1111.

<sup>412</sup> Blomeyer-Bartenstein in EPIL 1992, p. 1111.

<sup>413</sup> YILC 1961 Vol. II, p. 46. See also YILC 1957 Vol. II p. 104, 122 for García Amador’s second report and his comments on due diligence therein.

<sup>414</sup> YILC 1957 Vol. II p. 104 at p. 122. Crawford and Olleson maintain that affirmative state action tends to attract objective responsibility, while a state’s failure to act, or omission, typically triggers subjective responsibility: see Crawford and Olleson in Evans 2006, 464-466.

<sup>415</sup> Commentary to Article 10 of the Harvard Law School 1929 Draft on state responsibility: HLS, Research in International Law, Vol. II, responsibility of states (1929) p. 228 e.v.; Blomeyer-Bartenstein in EPIL 1992, p. 1112-1113.

<sup>416</sup> Of course, the rules described above all primarily apply in the context of a state’s responsibility for the protection of aliens, since that is the area in which the concept of due diligence was developed.

obligation on the host state to make its 'regular efforts'. It flows from the literal definition of due diligence: the literal meaning of **due** is 'that what is suitable or right in the circumstances' and that of **diligence** is 'careful and thorough work or effort'. This is supported by the wording like 'what may reasonably be expected' and 'ordinarily employ in its domestic concerns', as discussed above. International law also imposes a 'best efforts' obligation on states in fighting terrorism originating from its territory, which is closely linked to the due diligence concept.<sup>417</sup>

As Blomeyer-Bartenstein correctly points out, the concept of due diligence implies at least a level of care (or: degree of diligence) equal to *Diligentia quam in suis*: the care that a state employs for its own affairs (i.e. protection of its institutions) should also be employed for the affairs of the other party.<sup>418</sup> In addition, he submits that this basic standard may not always be sufficient and that a higher standard may be required in international relations.<sup>419</sup> It is interesting to see that the standard of treating the affairs of the other party in a way equal to the treatment of a (host) state's own affairs can already be found in the host state – IO relationship. In numerous seat agreements, amongst which the seat agreement between the UN and the USA and almost all seat agreements concluded by the Netherlands which also contain a duty to protect, it is determined that the host state should give the same priority to IO premises as it does to its own institutions, when dealing with a failure of vital infrastructures such as public services.<sup>420</sup> It would seem an acceptable minimum standard for the due diligence concept in the duty to protect to employ the concept of *diligentia quam in suis*.

One remark is in order with regard to this concept. Already in the Roman law system, where this originates, it was acknowledged that the concept had an inherent problem: what if the party burdened with the duty of equal treatment, treated his own affairs with insufficient care as well? In the Roman days, it was stated that it was the responsibility of the one trusting his affairs to the other party, to make sure that the other party employs a sufficient level of care.<sup>421</sup> In other words, choosing a careless person as caretaker of your affairs was at your own risk. In international law, this interpretation may not hold up since it is likely that there is a minimum amount of effort which a host state is obliged to make.<sup>422</sup> However, in the practice of choosing a suitable host state, the IO's which are specifically concerned with their security and protection will not likely choose a host state where the level of effort for (state) security is lower than they would like. So in a pragmatic sense, the Roman rule of being careful who you choose to fulfil the obligations of care is applied to a considerable extent.

#### *Relevant case-law and state practice*

Other conditions and elements of the due diligence principle can be discerned when one looks at different case law relevant to the subject. This caselaw generally confirms the twofold definition of faulty conduct and 'regular efforts', thereby clarifying that the principle of due diligence imposes on the (host) state the obligation to act promptly, efficiently and effectively,<sup>423</sup> thereby employing appropriate means.

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<sup>417</sup> Glennon in Barnidge 2008, p. V.

<sup>418</sup> See for this concept Tjong Tjin Tai 2006, p. 78-79; Zimmermann 1996, p. 210-212.

<sup>419</sup> Blomeyer-Bartenstein in EPIL 1992, p. 1112. He discusses the concept in the context of neutrality and the Alabama Claims.

<sup>420</sup> Art. 7 Section 17 of the UN – USA Headquarters Agreement 1947; art 9.3 ICC seat agreement 2007; Art 9.3 STL seat agreement 2008; Art. 7.2 EUROPOL seat agreement 1998; art 5.2 EUROJUST seat agreement 2006; art. 9.2 OPCW seat agreement 1997; Art. 12.3 ICTY seat agreement 1994 (see also ICTR and SCSL seat agreements).

<sup>421</sup> Zimmermann 1996, p. 463; Tjong Tjin Tai 2006, p. 79.

<sup>422</sup> See for a comparable issue the protection of foreign nationals required from a state under the international human rights system. Different schools of thought pleaded either the 'national treatment standard' or the 'international minimum standard', the latter being an objective standard regardless of the treatment of the state's own nationals. It seems that the international minimum standard has prevailed in the development of international human rights.

<sup>423</sup> 'Effectively' must be read in the context of the fundamental character of the duty to protect: that of obligation of effort, and not of result.

Within the context of injuries to a foreign national, a US/Mexico General Claims Commission determined in 1926 that the state had breached its due diligence obligation because of “a *failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer*” of a US national.<sup>424</sup> This suggests that with regard to reactive protection, a due diligence obligation entails prompt and efficient, or effective, action. In another case before the same General Claims Commission, it was determined that a due diligence obligation is violated when the state is aware of its duty to protect and of the necessity to act, but fails to make ‘proper efforts’ to prevent the injuries or to punish or apprehend the perpetrators.<sup>425</sup> In a decision by the Italy-Venezuela Mixed Claims Commission (1903) it was determined that a state cannot be held responsible for the actions of non-state actors (in this case revolutionaries) “*unless it clearly appears that the government has failed to use promptly and with appropriate force its constituted authority*”.<sup>426</sup> However, whether state responsibility exists should also be determined “*in proportion to [the state’s] ability to avoid evil*”.<sup>427</sup> The state thus had an obligation to make a prompt and appropriate effort when it has a duty of care, but the fact that injury occurs will not constitute a breach of this duty if the state was not capable of preventing it, despite its best efforts.<sup>428</sup>

In 1965 the International Centre for the Settlement of Investment Disputes (ICSID) dealt with a dispute usually referred to as the AAPL case.<sup>429</sup> Here the company AAPL had invested in farms in Sri Lanka, which were destroyed by the Tamil Tigers during fighting with the Sri Lankan security forces. The centre determined that despite the fact that it weren’t the security forces which destroyed the farms, a state “*may nevertheless be responsible for what its authorities do or not do to ward the consequence, within the limits of possibility*”.<sup>430</sup> It further determined that Sri Lanka “*through said inaction and omission, violated its due diligence obligation which requires undertaking all possible measures that could reasonably expected to prevent the eventual occurrence of killings and property destructions*”.<sup>431</sup>

Barnidge makes mention of an interesting piece of diplomatic correspondence between the Netherlands and the Soviet Union in 1971, concerning an explosion on 15 April 1971 in the Soviet trade mission in Amsterdam. The Soviet Union maintained that the Dutch government was put on notice of an elevated threat level towards Soviet missions and that the explosion was a direct result of the failure to exercise due diligence by neglecting to take *effective* measures and ensure the *security* of the Mission, and create normal conditions for its work. In this context, Barnidge correctly points out that evidence of elevated threat levels would increase the effort level for a state in his obligation to act with due diligence.<sup>432</sup>

#### **11.4.2. ‘Special duty to take all appropriate measures’**

As stated earlier in this Report, only the IUSCT has a duty to protect that follows the exact wording of the Vienna Convention on Diplomatic Relations (article 22.2). This entails that at least concerning the IUSCT, the duty to protect under the organizational system and the duty to protect under the diplomatic system are similar. However, it has also been stated repeatedly in this report that when it comes to the content of specific privileges and immunities, both systems as a whole are considered similar. This would mean that what is considered applicable under the diplomatic system, can also be considered applicable in the organizational system. This is a strong argument to look at a piece of case-law that arguably is the most important judgement concerning the duty to protect: the judgment by the International Court of Justice in the *United States Diplomatic and Consular Staff in Tehran (hostages)* case of 1980.<sup>433</sup>

<sup>424</sup> *Janes (Mexico/USA)* 1925, RIAA Vol. IV, p. 85; See also Barnidge 2008, p. 71.

<sup>425</sup> *Youmans (Mexico/USA)* 1926, RIAA Vol. IV, p. 111-114.

<sup>426</sup> *Sambiaggio (Italy/Venezuela)* 1903, RIAA Vol. X, p. 513.

<sup>427</sup> *Sambiaggio (Italy/Venezuela)* 1903, RIAA Vol. X, p. 509; See also Barnidge 2008, p. 79.

<sup>428</sup> Barnidge 2008, p. 79.

<sup>429</sup> *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, 30 ILM (1991) 577.

<sup>430</sup> *AAPL v. Republic of Sri Lanka*, 30 ILM (1991) 577, at 610.

<sup>431</sup> *AAPL v. Republic of Sri Lanka*, 30 ILM (1991) 577, at 616. My underlining; See Barnidge 2008, p. 100.

<sup>432</sup> Barnidge 2008, p. 94.

<sup>433</sup> Hereinafter ‘Tehran Hostages’-case.

In this case the ICJ has pronounced on the 'special duty' to protect an embassy under article 22.2 VCDR 1961. Although this obviously dealt with the protection of *embassy* premises against demonstrators and angry mobs, it is very illustrative for the (due diligence) duty of a host state towards an IO. In the Tehran Hostages case, the USA instigated a procedure before the ICJ against the state of Iran, because of the forceful occupation of the US embassy in Tehran during the 1979 revolts in Iran. The court spoke of two different situations: first it dealt with the level of protection needed when the manifestation of a threat was imminent but not yet had occurred. There was sufficient reason to assume that protection of premises was actually needed, and this protection was also requested numerous times by different US authorities. Nevertheless, the Iranian authorities failed to provide the necessary protection, and the threat (intrusion of embassy premises) manifested itself, resulting in the occupation of the US embassy in Tehran. Secondly the Court dealt with the subsequent situation, where the threat had manifested itself and the clear duty was to react to that manifestation in limiting its consequences and restoring the old situation. Although the first situation seems an issue of taking preventive measures, the threat was already imminent. In other words, it was clear what the specific threat was and what the risks were that the threat entailed. As such, in both situations the measures which Iran needed to take were reactive protection measures.

With regard to the first situation, the Court determined that Iran "*failed altogether to take any appropriate steps*" to protect the Embassy and subsequently to take "*any steps either to prevent this attack or to stop it before it reached completion*". Furthermore, the ICJ determined that this failure of Iranian authorities "*was due to more than mere negligence or lack of appropriate means*".<sup>434</sup>

The wording of the ICJ strongly suggest that the duty of a receiving state has a due diligence character, or at least an obligation requiring the state to make appropriate efforts.<sup>435</sup> The latter determination clarifies the view of the Court that there certainly was a subjective element to the state responsibility in this case, to the effect that some form of intent (*dolus*) at the part of the state is suggested. This is more than sufficient to establish a breach of a due diligence obligation.

In determining the responsibility of Iran in the first situation, the Court summed up four elements in this situation which inevitably led to the responsibility of Iran. This enumeration has a clear character of describing a due diligence obligation to protect the premises and can serve as a test whether such an obligation has been breached.<sup>436</sup> It was determined that the Iranian authorities:

- "(a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the security of such other persons as might be present on the said premises ;*
- (b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part ;*
- (c) had the means at their disposal to perform their obligations ;*
- (d) completely failed to comply with these obligations.*"<sup>437</sup>

In short, the ICJ states that a state breaches its obligations if it is fully aware of its legal obligations, sees the pressing need for action, possesses the means to address the situation and subsequently fails to do so. To be clear, the Court does not specifically refer to them as criteria, but they are presented in a clear (cumulative) enumeration. Dupuy points out that this enumeration suggests that the obligation has the character of an obligation of effort, or more precisely one that requires the state's "*best efforts*". According to Dupuy "*if Iran had been willing*

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<sup>434</sup> ICJ *Tehran Hostages* 1980, para. 63.

<sup>435</sup> See also Barnidge 2008, p. 96.

<sup>436</sup> Barnidge 2008, p. 97, 109.

<sup>437</sup> ICJ *Tehran hostages* 1980, para. 68.

and able to demonstrate that it had actually taken all appropriate steps to avoid the taking of diplomats as hostages, then it would not have been held responsible by the Court".<sup>438</sup> Below, each of the 4 elements, as presented by the ICJ, will be elaborated upon.

### 1. Fully aware of its legal obligations

Since a state should in principle be fully aware of its treaty obligations, there is a strong presumption that this criterion is fulfilled. Nevertheless, when it is less clear or obvious what the scope and contents of specific treaty obligations are, it may be possible that this criterion becomes relevant. With regard to the duty to protect, it is clear that such a duty exists. Also, it is clear that such a duty should entail sufficient, or 'adequate' protection, against a very wide range of situations. In the judgment, reference is made to previous situations from which it becomes clear that Iran is fully aware of its duty to protect embassies against such threats.<sup>439</sup>

### 2. Sees the pressing need for action

The wording "seeing the pressing need" is somewhat ambiguous. It can be interpreted as "*the party knew, or should have known [...]*", in accordance with some national legal systems. It can also be interpreted as a factual criterion, only concerned with the question whether or not the state was in fact aware of the (emergency) situation and the need for reactive measures. The latter form of interpretation is suggested by Denza, who speaks of the instance when the receiving state '*has been made aware of a any unusual threat*'.<sup>440</sup> This would for example not be the case if the host state was in no way notified by the IO with regard to a threat, like a bomb threat or announced terrorist attack. This also seems to be the main issue in the present judgment, since explicit referral is made to the requests for help by the diplomatic mission.<sup>441</sup>

While in this kind of situations the "should have known"-supplement perhaps does not alter the situation greatly, there is a big difference between the two concepts. In the former, there is an additional responsibility of enquiry, research and patrol enclosed in the criterion, while in the latter there is only a factual determination whether or the authorities were in fact aware of a situation in which host state action should be required. When the argument is accepted that a host state also has its own responsibility to make inquiries regarding the security situation of the embassy, and perhaps even maintain its own system of periodical threat analyses, this would significantly expand the duty of protect of the host state, entailing also a duty to have its intelligence services focus on IO's as well. This would seem to be in line with the concept *Diligentia quam in suis*, which requires employing the same care for other objects for which the state has a duty to protect, as it employs for the protection of its own authorities and vital objects (like for example ministries).

### 3. Possesses the means to address the situation

It is always possible that a situation occurs where neither the host state nor the IO itself has adequate means to address the situation and to prevent the (possibly severe) consequences. A strong illustrative situation would be a tsunami approaching the Dutch coast line. There is awareness there is a pressing need for action, but it just does not lie within the power of the host state to take such action. As pointed out earlier, this is also covered by the secondary rules on state responsibility, being the circumstances precluding wrongfulness. Other, more common situations in which the means may not be sufficient to address the situation is when the size of the police force of the host state just isn't adequate to prevent a specific threat from manifesting itself. This must be seen separate from the question whether or not the host state actually deployed the means necessary. This falls within the fourth criterion, which is discussed below.

An interesting issue arises however when one looks at the allocation of means to the police department and other law enforcement and protection agents. If, for example, there is a structural shortage of available protection units due to the lack of financial resources for these

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<sup>438</sup> Dupuy in 10 EJIL (1999), p. 379.

<sup>439</sup> ICJ *Tehran Hostages* 1980, para. 64.

<sup>440</sup> Denza 2008, p. 166.

<sup>441</sup> See for example ICJ *Tehran Hostages* 1980, para. 64.

agencies,<sup>442</sup> there may be some responsibility for the host state. Since the host state has neglected to provide sufficient means in the first place, the argument that it just didn't have the means to address the situation is without merit. This is especially important in a situation where the lack of means was pointed out earlier by the organization, or within the authorities themselves. The most interesting, and difficult question, to be answered in the light of the facts of the case, is when absence of capacity shades into absence of will.<sup>443</sup>

#### 4. *Fails to do so*

This is the most important criterion for the existence of a violation of the treaty obligations, because this directly relates to the due diligence aspect; the obligation of making an effort to protect. When the amount of police forces present to prevent violent demonstrators from intruding the premises of an IO turns out not to be sufficient, this does not always amount to state responsibility. If it is clear that the host state deployed all law enforcement units which it has at its direct disposal, but even this police presence is just not enough to prevent the trespassing due to the force or quantity of the demonstration, this cannot be seen as violation of the duty to protect since it is after all an obligation of effort: the state has in such an instance acted with due diligence. This is supported to some extent by Dupuy, but he focuses more on the measures being appropriate than on the measures being all that the host state can provide.<sup>444</sup> Depending on the circumstances of the case, this may be the same, but not always. When determining if all 'available' units have been deployed, units which are necessary for other 'essential' services such as emergency assistance and the vital protection of for example other IO's will arguably not have to be redeployed. Due to the principle of appropriateness and reasonability, it may not be necessary to allocate police units 'at all costs' and thus at the detriment of national security etc. But the same principles also prescribe that the allocation of police forces by the host state to the premises of the IO may at least seem sufficient or adequate in light of the circumstances of the case.

#### *The duty to react in case of continuing duration of the threat*

The views of the Court regarding the second situation, where the siege of the embassy was completed, are also interesting for the purpose of determining what is expected from a host state under the reactive duty to protect, because it illustrates clearly how the required effort level for the due diligence obligation rises, amounting almost to an obligation of result. The concept of making its 'best efforts' is filled in by the Court as doing absolutely everything in its power to obtain the necessary result: end the intrusion of premises and fully restore the status quo. In the words of the Court:

*"Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage".*<sup>445</sup>

#### *Conclusion regarding the character of the IUSCT-provision*

It is clear that the obligation of the 'special duty to take all appropriate measures' clearly has the characteristics of a due diligence obligation: it is breached in case of faulty conduct, and it requires prompt, efficient, and effective action. The incorporation of the requirement to take all 'appropriate' measures can be seen as inherent to the due diligence, or best effort, character of the provision. It is further interesting to see that in the context of reactive protection measures this duty amounts to making every effort, and taking all appropriate (or: 'adequate') measures specifically directed at promptness and maximum efficiency and effectiveness, thereby coming

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<sup>442</sup> This creates an interesting link with the recent strikes of the police forces in The Hague. It was determined by a Dutch court that specific sections of the police force, which were entrusted with the specialized task of monitoring and guarding the premises of embassies and IO's, were not allowed to go on strike since their specialized knowledge/skills were not easily replaceable. The case is currently under consideration of the The Hague Court of Appeals.

<sup>443</sup> Glennon in Barnidge 2008, p. V.

<sup>444</sup> Dupuy in 10(2) EJIL 371 (1999), at 379.

<sup>445</sup> ICJ *Tehran hostages* 1980, para. 69. My underlining.

very close to amounting to an obligation of result. It is submitted that everything stated about the 'special duty' equally applies to the standard-provisions containing a 'due diligence' duty to protect (ICTY-provision and Europol-provision).

#### 11.4.3. 'All effective and adequate measures'

In the light of the analysis of the concept of due diligence (or 'special duty') as set out above, the question rises whether there is a functional difference between exercising 'due diligence' and taking 'all effective and adequate measures', as this is the only difference between the ICC-provision and the other 'standard provisions' when it comes to the necessary amount of state conduct.

The literal definition of **effective** is 'producing the result that is wanted or intended; producing a successful result'. The literal definition of **adequate** is 'enough in quantity, or good enough in quality, for a particular purpose or need'.<sup>446</sup> This ordinary meaning of the two concepts suggests a very result-oriented approach to the obligation. However, as has been pointed out earlier in this report, the duty to protect fundamentally remains an obligation of effort. As such, it can be maintained that the duty to provide 'all effective and adequate measures' at least amounts to the due diligence-obligation as discussed above. So every 'effective and adequate'-obligation is a due diligence obligation, but this does not automatically entail that every due diligence obligation also amounts to an 'effective and adequate'-obligation. 'Effective and adequate' suggests an approach more oriented at the effect (or: result) of the measures that are taken. However, more from the general perspective that the duty to protect is not meant to amount to an obligation of result, it may be interpreted to mean that all measures 'which (may) achieve the desired effect' are taken.

As has been discussed above, there is a significant difference between the reactive duty to protect and the preventive duty to protect. It is submitted that there is no fundamental difference between due diligence and 'effective and adequate' when dealing with the reactive duty to protect. This duty is evidently breached if a host state for example neglected to deploy a team of police anti-riot forces, when it was clear that the law enforcement presence was not sufficient to stop the threat. A measure which may very well have been effective was not taken, so the obligation has been breached. As can easily be shown in this simple example, the duty to exercise due diligence in reacting to a threat is no different from the adequate and effective obligation. For if a host state would neglect to deploy a better equipped contingent while it is clear that this may have had the desired effect, the host state authorities did not act diligently to the situation.<sup>447</sup> It is also clear from the judgment of the ICJ in the *Tehran Hostages* case that with respect to the reactive protection required of the host state, there is no real difference between the due diligence-provisions and the 'effective and adequate' provisions, since the wording used by the Court to describe that due diligence-obligation (or 'special duty') amounts to the duty to take all effective and adequate measures.

However, with regard to the duty of preventive protection there does seem to be a difference between the due diligence-duty and the 'effective and adequate'-duty. The difference can be found in one fundamental and inherent characteristic of preventive protection: that of anticipating on situations that may or may not occur. 'Preventive' means taking measures 'before the fact', in order to prevent it to become a fact in the first place. A large measure of (un)predictability is thrown into the mix, obscuring what may or may not be adequate and effective. The 'best effort' obligation takes on another meaning, or at least it is likely that it will. Because in the world of prevention of calamities and (terrorist) attacks, different approaches can be found as to what amounts to 'effective and adequate'. the clearest example of this can be given in a setting of no specific threats. Exercising 'due diligence' in preventing that threats

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<sup>446</sup> Oxford Advanced Learner's Dictionary, 7th Ed. (2005).

<sup>447</sup> In this example, it also becomes clear how the circumstances precluding wrongfulness can play a role. For if the threat (the demonstration or plundering) occurs in the setting of a major flooding, making it impossible to deploy the contingent to the vicinity of the IO, the duty to protect is not breached. This line of reasoning is confirmed on the Tehran hostages case, where the Court speaks of the means at the state's disposal.

manifest itself could simply consist of regular police surveillance or perhaps structural police surveillance by the standards of the host state. However, would this measure also amount to taking *all adequate and effective* measures in order to *prevent* threats manifesting itself? This latter approach seems to suggest more a 'better safe than sorry'-approach than a 'reasonable amount of measures'-approach, as can be read into the 'due diligence'-provision.

It can be argued that the 'effective and adequate'-provision, when viewed from the preventive perspective, entails a more result-based (or effect-based) obligation than does the 'due diligence' obligation. The latter concentrates more on reasonableness and discretionary power of the host state than the former. An important argument for this line of reasoning is the incorporation of the word 'all [...] measures' in the 'effective and adequate' provision.

#### **11.5. Appropriate protection and adequate (police) protection**

In all standard provisions except the IUSCT-provision, several additional references are made to providing the '*appropriate protection as may be required*<sup>448</sup> or the '*required [...] adequate police protection*'.<sup>449</sup> The question arises whether this part of the provision on the duty to protect has any added value to the rest of the provision, or whether it is actually a repetition, or specification for that matter, of what is already provided. It emphasises the physical character of the duty to protect, making explicit that the duty is not limited to seeking legislation or making assessments, but that it also entails real physical security measures around the IO. It also confirms the importance of appropriate and adequate actions in fulfilling a due diligence obligation. It implicitly confirms the discretionary powers of a host state in determining what is appropriate and adequate: subject to the principles of good faith and cooperation, it is the state which has to fulfil the obligation to choose the means to fulfil that obligation. These phrases do not entail an absolute right on the part of the IO to request specific numbers of police forces, or to request specific measures. It is my view that this fundamental character of the duty to protect remains the same even when such phrases as the need it is not made explicit in the relevant provisions. Thus, implementation of this phrase is laudable for the sake of clarity, but it is not an absolute necessity.

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<sup>448</sup> Art. 7.1 ICTY – NL seat agreement 1994; art. 7.1 ICC – NL seat agreement 2007.

<sup>449</sup> Art. 5 Europol – NL seat agreement 1998.

## 12. The duty to 'facilitate'; providing the IO's with necessary services.

In several seat agreements it is provided that IO premises shall be provided with the necessary public utilities. This duty to facilitate can easily be construed from the overall duty of the host state to ensure the effective functioning of the IO. It supports the argument that a host state is also obliged to ensure the effective functioning by reactive protection, in the sense that the host state is under an obligation to restore public services when these are compromised due to an incident. Not all seat agreements contain an explicit provision to this effect. Nevertheless, it is advisable that a host state undertakes sufficient efforts to ensure that every IO can benefit from the public services, since the lack of those services may very well have a negative influence on the effective functioning of the IO. This is contrary to the general idea that the host state ensures the effective functioning of the IO, and it may also entail an infringement on the principles of cooperation and good faith.

Below, several provisions from seat agreements are presented, and several note-worthy issues are briefly discussed.

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### *Article 9. Public services for the premises of the Court (ICC – NL seat agreement 2007)*

1. The competent authorities shall secure, upon the request of the Registrar or a member of staff of the Court designated by him or her, on fair and equitable conditions, the public services needed by the Court such as, but not limited to, postal, telephone, telegraphic services, any means of communication, electricity, water, gas, sewage, collection of waste, fire protection and cleaning of public streets including snow removal.
2. In cases where the services referred to in paragraph 1 of this article are made available to the Court by the competent authorities, or where the prices thereof are under their control, the rates for such services shall not exceed the lowest comparable rates accorded to essential agencies and organs of the host State.
3. In case of any interruption or threatened interruption of any such services, the Court shall be accorded the priority given to essential agencies and organs of the host State, and the host State shall take steps accordingly to ensure that the work of the Court is not prejudiced.
4. Upon request of the competent authorities, the Registrar, or a member of staff of the Court designated by him or her, shall make suitable arrangements to enable duly authorized representatives of the appropriate public services to inspect, repair, maintain, reconstruct and relocate utilities, conduits, mains and sewers on the premises of the Court under conditions which shall not unreasonably disturb the carrying out of the functions of the Court.
5. Underground constructions may be undertaken by the competent authorities on the premises of the Court only after consultation with the Registrar, or a member of staff of the Court designated by him or her, and under conditions which shall not disturb the carrying out of the functions of the Court.

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As can be seen from the provision above, the public services are extensively described and the host state is placed under an active obligation to prevent interruption of those services, or in case of interruption to restore those services with priority. Such an obligation can also be found in the seat agreement of the STL (art. 9). Interesting to note is that in the STL-provision, the non-limited enumeration in paragraph 1 is extended with a reference to 'local transportation'. In the seat agreement of Eurojust, a similar reference can be found:

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*Article 5. Special Services to the Headquarters (Eurojust – NL seat agreement 2006)*

1. The Host State authorities shall exercise, as far as it is within their competence, and to the extent requested by the Administrative Director on behalf of the College, the respective powers to ensure that the Headquarters shall be supplied, on fair conditions and on equitable terms, with the necessary services including, among others, electricity, water, sewerage, gas, post, telephone, telegraph, local transportation, drainage, collection of refuse, fire protection and snow removal from public streets.
2. In case of any interruption or threatened interruption of any such services, Eurojust shall be accorded the priority given to essential agencies and organs of the Government and the Government shall take steps accordingly to ensure that the work of Eurojust is not prejudiced.
3. The Administrative Director, on behalf of the College, shall, upon request, make suitable arrangements to enable duly authorised representatives of the appropriate public service bodies to inspect, repair, maintain, reconstruct or relocate utilities, conduits, mains and sewers within the Headquarters under conditions which shall not unreasonably disturb the carrying out of the functions of Eurojust. Underground work may be undertaken in the Headquarters only after consultation with the Administrative Director on behalf of the College, and under conditions which shall not disturb the carrying out of the functions of Eurojust.

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In the seat agreement of the ICTY, which is also relevant for the ICTR and the SCSL, article 12 contains a comparable enumeration of public services. However, concerning the duty of the host state to ensure restoring the public services, it seems that the host state should only give priority when it is caused by *force majeure*:

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*Article 12. Public services for the premises of the Tribunal (ICTY-NL seat agr. 1994)*

1. [...]
2. [...]
3. In case of *force majeure* resulting in a complete or partial disruption of the aforementioned services, the Tribunal shall for the performance of its functions be accorded the priority given to essential agencies and organs of the Government.
4. [...]

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This seems to exclude a possible intentional disruption by terrorists or other individuals, which provides for an awkwardly limited provision. art. 16 EPO – NL seat agreement 2006 provides for a more nuanced view on the responsibilities of the host state when it refers explicitly to the duty to 'make every effort' in establishing and maintaining 'the proper functioning of the [...] facilities'.

*Telecommunication and publication*<sup>450</sup>

Several seat agreements also contain a specific provision on the technicalities of telecommunication as provided to (or used by) the IO's. While several of these provisions are quite elaborate and technical, a basic example of such a provision the seat agreement of the IUSCT, which is strongly influenced by the VCDR (1961):

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*article 6 IUSCT – NL seat agreement 1990*

1. The Netherlands Government shall permit and protect free communication on the part of the Tribunal for all official purposes, and notably with the Parties to the Claims Settlement Declaration.

2. The official correspondence of the Tribunal shall be inviolable. Official correspondence means all correspondence relating to the Tribunal and its functions.

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In some instances, such provisions also extend to the right to free publication by the IO. The other provisions are generally more in conformity with the basic example of the IUSCT.<sup>451</sup>

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<sup>450</sup> See generally Muller 1995, p. 211-232.

<sup>451</sup> See for example art 13 ICC – NL seat agreement 2007; art 13 STL – NL seat agreement 2007; art. 11 ICTY – NL seat agreement 1994 (see also ICTR and SCSL); art. 10 OPCW – NL seat agreement 1997; art. 8 and 9 IOM – NL seat agreement 1990; art. 5 ESA – NL seat agreement 2006; art. 7 Eurojust – NL seat agreement 2006; art. 8 Europol – NL seat agreement 1998 (this provision only refers to a wireless transmitter to be used by Europol).

## 13. Conclusions and recommendations

### 13.1. Conclusions of Part I – the legal systems of Privileges and Immunities.

#### *Functional necessity; abstain and protect*

The most important conclusion concerning the legal basis of privileges and immunities of International Organizations, is that the principle of functional necessity is still paramount. IO's are only entitled to those privileges and immunities that are necessary for their effective functioning. Effective functioning entails that the IO is enabled to function independently, without influence from the host state or third parties, and also that the IO is enabled to function with continuity. From the perspective of the host state: the host state must abstain from interfering with the functioning of the IO, and the host state must ensure that the functioning of the IO is not threatened by security or safety risks (see also under paragraph 13.3). These two elements can be found in several issues of international institutional law, and are in short referred to as the duty to abstain and the duty to protect.

#### *Cooperation and good faith*

Another set of principles that is of great importance, is cooperation and good faith. The ICJ stated in an Advisory Opinion that these principles are the very essence of the relationship between an IO and its host state. The principles are not merely of moral value, but of great practical value as well; every professional host state should incorporate these concepts as much as possible into their policy towards IO's. The set of principles at least entails open and efficient communication, preferably of a structural character. The principles can also help regulate and guide the discretionary powers of the host state vis-à-vis the IO, concerning issues like threat analyses, preparative measures and the issue of assuming consent to enter the premises in case of emergency (see below). Cooperation and good faith also fuel the concept of due diligence as one of the guiding concepts in IO – host state relationships.

#### *Lack of sovereignty and reciprocity*

It is obvious that neither the principle of sovereign equality nor the concept of reciprocity are a strong factor in the system of organizational privileges and immunities. They are however factors of paramount importance for the system of diplomatic privileges and immunities. Since the P&I of IO's have been influenced considerably by the diplomatic P&I, remnants of both concepts may sometimes still be found in seat agreements and other relevant legal instruments. It must be stressed that sovereign equality and reciprocity are powerful elements that have a direct effect on the way the relationship between the receiving state and the sending state is conducted. The lack of these elements provides challenges to the relationship between an IO and its host state.

### 13.2. Conclusions of Part II – the premises of International Organizations.

#### *Nature of inviolability of premises*

The inviolability of premises of an IO can be considered as a fundamental privilege for every International Organization. It can be convincingly argued that it is part of customary international law, and inherent to the international legal personality of the IO. Thus, it must be assumed that the premises of every IO are inviolable, even in the absence of a relevant treaty provision to that effect. The inviolability of premises is one of the fundamental privileges of an IO that shapes a host state's duty to abstain. Since it is based on the principle of functional necessity, the definition of premises is usually formulated in a functional way, encompassing all buildings that are used for the exercise of the functions of the IO. This may include detention centres and conference halls when these are (temporarily) used by the IO.

#### *Effect of inviolability of premises*

Inviolability of premises does not alter the status of the territory on which the IO is situated. The territory remains a full part of the sovereign territory of the host state. This entails that laws and regulations principally apply to the premises of an IO. This is notwithstanding the IO's right to issue regulations concerning its premises, since it has authority and primary responsibility on

those premises. Such regulations supplement the laws and regulations of the host state rather than revoke them, except when those regulations are inconsistent with the laws of the host state. In that case, the regulations of the IO prevail.

#### *Core of the duty to abstain*

Inviolability of premises prescribes first and foremost that the host state cannot enter the premises of the IO in any way, including on official or legal authority, except without the consent of the IO. In addition to that, interference through legal or quasi-legal means is also considered prohibited by the inviolability of premises. Thus, the core of the duty to abstain revolves around consent. Without it, the host state has no means to exercise its jurisdiction over the premises of the IO, even when the host state has *de jure* jurisdiction.

#### *Assuming consent in emergencies*

Multiple seat agreements contain a provision on the basis of which a host state can assume consent to enter the premises, when this is necessary for effectively responding to an (imminent) emergency on the premises. Such a provision must always be explicit; it is at this point not maintainable that a so-called 'emergency clause' is inherent to the inviolability of IO premises or has become part of customary international law. In that light, it is recommendable that the host state and the IO regulate the issue in some way, through for example an exchange of notes, when there is no 'emergency clause' in the relevant legal instruments.

Since an emergency clause creates a considerable discretionary power for the host state, it must be interpreted strictly. The requirement that attempts must have been made to contact the IO authorities is of great importance, since it is proof of due diligence and good faith of the host state if that criterion is fulfilled. It is highly recommendable to create databases with relevant contact data of the IO staff members that are involved in giving consent and dealing with emergencies on the premises. It is also recommendable that ways of conduct in time of emergency are communicated to the IO, and implemented in strict cooperation with the IO.

### **13.3. Conclusions of Part III – duty to protect International Organizations.**

#### *Nature of the duty to protect*

The duty to protect is an obligation of effort, not an obligation of result. This entails that a manifestation of a threat, resulting in damage of some kind, does not necessarily entail international responsibility of the host state. It also entails that the host state has a considerable discretionary power to determine the threat levels for the IO's it is obliged to protect, and to decide on the ways in which it wants to shape the protection measures.

The duty to protect must be considered as encompassing both the security and safety of an IO. In other words: not only threats originating from conscious human actions must be considered, but also all other elements that may form a threat to vital infrastructures and safety of the IO: technical failures, human errors, accidents, natural disasters, etc. There are provisions on the duty to protect that seem limited to only the security aspect of protection, but it is advisable to the host state to devise policy on both elements nevertheless.

The duty to protect can be divided into two main elements: preventive protection and reactive protection. Measures that fall within the scope of preventive protection are taken before any threat manifests itself, and consists of the following categories of measures: pro-active measures, preventive measures, and detection measures. Measures that fall within the scope of reactive protection are generally taken after the manifestation of a threat, or when a threat is imminent. However, one category of measures requires action before manifestation of a threat. This is the category of preparative measures. The other categories of reactive protection are repressive measures and corrective measures.

### *Application of the duty to protect*

A host state is under an obligation to provide every IO on its territory with reactive protection, regardless of whether there is an explicit treaty provision to that effect. Since reactive protection also requires preparative measures, which need to be taken before manifestation of a threat, it is not only a responsive duty but it also entails a pro-active attitude of the host state. It may include the training of host state authorities, the creation of communication databases and conducting emergency exercises involving the IO's.

A host state is only under an obligation to provide preventive protection when there is an explicit treaty provision stipulating a duty to protect for the host state. As stated, such preventive protection requires considerable measures before any threat has manifested itself. It may include conducting threat assessments, installing technical equipment for the purpose of situational awareness or policy measures on the transport of dangerous substances or related industry in the vicinity of IO premises. Preventive protection is provided in addition to reactive protection.

### *Scope and content of the duty to protect*

The duty to protect forms an international obligation of the host state. If it fails to fulfil that obligation, the host state may incur international responsibility. Although the secondary rules on state responsibility are not part of the scope and content of the duty itself (a primary rule of international law), it may provide for some guidance and illustration as to that scope and content. The circumstances precluding wrongfulness, as codified in the ILC Draft Articles on State Responsibility are useful for this purpose, especially the notion of *force majeure*.

The duty to protect consists of three elements: the qualities of an object benefiting from protection, the methods against which protection is required, and the necessary amount of state conduct. The qualities of an object benefiting from protection are for example the concepts of 'security and protection' and 'tranquillity', while the object that benefits from protection is generally the premises of an IO. The methods against which protection is required are concepts like 'intrusion by (groups of) persons' or 'disturbances in the immediate vicinity'.

The necessary amount of state conduct is arguably the most difficult element to define. It is usually indicated by concepts like 'due diligence', 'all effective and adequate measures', or 'a special duty to take all appropriate steps'. Concerning these concepts, the core principle seems to be 'due diligence'. This may be defined in two ways, which should not be seen as concurrent but rather as supplementing each other. The first entails a negative definition: due diligence requires that there is no faulty conduct from the side of the host state in fulfilling its obligation to provide protection. While conduct may be both an action or an omission, the latter is more common when failing to comply with the duty to protect. The second definition of due diligence can best be described by the Latin phrase *diligentia quam in suis*: the care that a state employs for its own affairs (i.e. protection of its institutions) should also be employed for the affairs of the other party. Due diligence thus requires a regular effort of the host state in providing protection to IO's as it would also employ in providing protection to its own state elements that face threats of either security or safety character. It must be assumed that a state thus in fact employs its *best efforts*.

While due diligence is the core principle, it may be argued that the other concepts that are used to describe the necessary amount of state conduct provide for a – slightly – different scope. The wording as used in the seat agreement of the STL and the ICC ('all effective and adequate measures') could indeed suggest a higher effort level than *regular* effort of the host state, but it is submitted that the duty to protect as a whole should be construed as an obligation entailing the *best efforts* of the host state. At least the effort must be appropriate, adequate, effective, prompt and preferably efficient. Furthermore, the reference to 'all measures' may suggest a less wide discretionary power of the host state in determining which measures it will take and which measures it will not.

#### *Cooperation and good faith as policy instruments*

In general, the duty to protect requires considerable effort on the part of the host state. It is highly recommended to the host state to employ in its dealings with the IO the principles of cooperation and good faith. At the core of this lies efficient and structural communication, which is of paramount importance for the effective fulfilment of the duty to protect the IO's. As such, cooperation and good faith may not only be the moral core of the relationship between a host state and an IO, but it also represents one of the most effective tools in fulfilling its obligations towards IO's, including the obligation to provide protection. In this regard the possible duty to facilitate IO's, as provided for in several seat agreements, must be seen as an important duty for any professional host state, regardless of an explicit provision to that effect. However, it may not always be a legal obligation.

#### **13.4. Is there a need for alteration of the systems?**

A question which arises is whether the current legal framework for the relationship between IO's and their host states is sufficient for dealing with the threats and problems of today's society. Concerning the inviolability of premises, it seems that the *status quo* is by far the most effective and efficient way to shape the duty to abstain while at the same time create a strong legal setting for exercising the duty to protect. As was discussed above, the level of protection for IO's is made flexible and functional through the core principle of due diligence and related concepts. These principles together guarantee that there is enough room within the existing legal framework to adapt effectively to changing circumstances. As was also discussed, some seat agreements of IO's do not have specific paragraphs on the duty to protect. But when the argument is accepted that the reactive duty to protect is inherent to the inviolability of the IO, regardless of the presence of a specific paragraph on this duty, the protection of IO's is sufficiently regulated. The principle of functional necessity does not warrant the conclusion that every IO is in need of the full range of protective measures that can be taken by a host state. So even in changing circumstances and threat levels, also if it concerns IO's which were not expected to be in need of such protection, the legal framework as was created over time lacks little in functionality and effectiveness when it comes to modern threats.

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### Seat Agreements

NB. For sake of clarity a way of citation is chosen which instantly clarifies the IO (or organ of IO) to which the seat agreement applies, followed by the state with which the seat agreement has been concluded: “[IO] – [state] seat agreement [year of conclusion]”. It is however stressed that this does not necessarily mean that the seat agreement has been concluded between with the (organ of) the IO that is mentioned. For example, the first seat agreement, concerning AMSCO, has been concluded with the International Finance Corporation (IFC), of which AMSCO is a part. Accordingly, the ICTY seat agreement is concluded by the Netherlands with the UN instead of the ICTY itself.

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