



Universiteit
Leiden
The Netherlands

The third-party liability of international organisations: towards a 'complete remedy system' counterbalancing jurisdictional immunity
Henquet, T.S.M.

Citation

Henquet, T. S. M. (2022, June 7). *The third-party liability of international organisations: towards a 'complete remedy system' counterbalancing jurisdictional immunity*. Retrieved from <https://hdl.handle.net/1887/3308350>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/3308350>

Note: To cite this publication please use the final published version (if applicable).



Universiteit
Leiden

THE THIRD-PARTY LIABILITY OF INTERNATIONAL ORGANISATIONS

*Towards a 'Complete Remedy System'
Counterbalancing Jurisdictional Immunity*

Thomas Servaas Marie Henquet

THE THIRD-PARTY LIABILITY OF INTERNATIONAL ORGANISATIONS

*Towards a 'Complete Remedy System'
Counterbalancing Jurisdictional Immunity*

PROEFSCHRIFT

ter verkrijging van
de graad van doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het college voor promoties
te verdedigen op dinsdag 7 juni 2022
klokke 16.15 uur

door
Thomas Servaas Marie Henquet
geboren te Maastricht
in 1973

Promotor: Prof. dr. N.M. Blokker

Promotiecommissie: Prof. dr. R.A. Lawson

Prof. dr. K.E. Boon (Seton Hall University, South Orange, NJ, USA)

Prof. dr. P. Palchetti (Université Paris 1, France)

Prof. dr. A. Reinisch (University of Vienna, Austria)

Prof. dr. N.J. Schrijver

To Barbara,
Emma and Jules

ACKNOWLEDGMENTS

I am most grateful to all those who have encouraged and supported me in the pursuit of this dissertation.

Particular gratitude goes to my supervisor, Professor Niels Blokker, for his continual mentorship and intellectual stimulation, dating back to our days at the International Law Division of the Ministry of Foreign Affairs of the Netherlands.

I would also like to sincerely thank the members of the Doctorate Committee for their time and thoughtful consideration.

In conducting this study, I have benefited tremendously from discussions with colleagues and friends. In particular, I would like to acknowledge Brooks Daly, Juliette Luycks, Alejo Mattaar, Guénaél Mettraux, Miša Zgonec-Rožej and Marten Zwanenburg. I am grateful to Samantha Tirthdas van der Kleij, who provided editorial assistance with the manuscript.

I am indebted to my successive employers during this study: the Ministry of Foreign Affairs of the Netherlands granted PhD ‘seed time’ and PhD leave when I began the study; and the International Criminal Court granted a leave of absence for the final stretch. I would also like to thank the T.M.C. Asser Instituut for welcoming me as a visiting researcher at an early stage.

I am most thankful for the support of my mother, and my father in spirit, and for the encouragement and interest of my sister and brother, my late stepfather, and my extended family in the Netherlands, Ireland and England.

Throughout this process, I have been inspired by Emma and Jules, who have shown great patience and curiosity. And to Barbara, I am forever grateful for her constant encouragement, loving support and critical legal mind.

PREFACE

This study builds on a series of publications by the author on the subject of the jurisdictional immunity of international organisations, dating back to 2010, in addition to the experience the author has acquired on the subject throughout his career in practice.

The text of this study was completed on 23 December 2021, with certain additions made in the first months of 2022.

The author is currently a staff member of the International Criminal Court. The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court, or any of his previous employers.

The Hague, the Netherlands

April 2022

CONTENTS

ACKNOWLEDGMENTS	v
PREFACE	vi
ABBREVIATIONS	ix
1 INTRODUCTION	1
1.1 Introduction	1
1.2 Research objective and research questions	8
1.2.1 Case studies: introduction	10
1.2.2 The rule of law	12
1.3 Structure and outline of the study	15
2 THE INTERNATIONAL ORGANISATIONS LAW FRAMEWORK GOVERNING THIRD-PARTY REMEDIES	18
2.1 Introduction	18
2.2 The Legal Status of International Organizations in Domestic Legal Orders and the International Legal Order	19
2.2.1 Domestic legal personality, and privileges and immunities.....	20
2.2.2 International legal personality	22
2.2.3 Interim conclusions	35
2.3 How Are International Organisations, and the UN in Particular, Bound by International Law?	35
2.3.1 Treaty law, general international law and jus cogens	37
2.3.2 Sources of obligations specific to the UN.....	44
2.3.3 Interim conclusions	47
2.4 International Human Rights Law	48
2.4.1 Primary rules	48
2.4.2 Secondary rules: the ‘right to a remedy’	53
2.4.3 Interim conclusions	72
2.5 Conclusions	73
3 SECTION 29(A) OF THE GENERAL CONVENTION	75
3.1 Introduction	75
3.2 The UN is bound by the obligation under Section 29 of the General Convention	75
3.2.1 The General Convention is binding on the UN.....	76
3.2.2 Failure to implement Section 29 of the General Convention and jurisdictional immunity 78	
3.3 Overview of practice of the UN under Section 29(a) of the General Convention	85
3.3.1 Key documents setting out the practice and regulations of the UN.....	85
3.3.2 The UN’s practice per category of dispute.....	89
3.3.3 From Srebrenica to Haiti: introduction to case studies	110
3.4 Discussion: ‘a complete remedy system to private parties?’	118
3.4.1 General observations regarding Section 29 of the General Convention	119
3.4.2 ‘Private law character’	127
3.4.3 ‘Provisions for appropriate modes of settlement’	160
3.5 Conclusions	226

4	THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANISATIONS IN THE NETHERLANDS AND THE VIEW FROM STRASBOURG	229
4.1	Introduction	229
4.2	Immunity from jurisdiction	231
4.2.1	Rationale	231
4.2.2	Sources	234
4.2.3	Procedural aspects.....	238
4.2.4	‘Functional immunity’	241
4.3	Immunity from jurisdiction and ‘access to court’	248
4.3.1	Waite and Kennedy	250
4.3.2	‘Reasonable alternative means’: beyond Waite and Kennedy	256
4.3.3	Absence of reasonable alternative means: Mothers of Srebrenica.....	280
4.4	Reducing ‘accountability gaps’: a role for national courts?	319
4.5	Conclusions	322
5	TOWARDS A ‘COMPLETE REMEDY SYSTEM’ FOR THIRD-PARTIES UNDER SECTION 29 OF THE GENERAL CONVENTION	325
5.1	Introduction	325
5.2	Proposed solutions	328
5.2.1	The legal character of third-party disputes.....	328
5.2.2	(Standing) claims commissions.....	329
5.2.3	Arbitration	332
5.3	The Mechanism for the Settlement of Disputes of a Private Law Character	342
5.3.1	Amicable and contentious dispute resolution under the auspices of the PCA.....	343
5.3.2	Establishment and legal framework of the Mechanism	370
5.3.3	Other international organisations	376
5.4	Conclusions	379
6	FINDINGS AND CONCLUSIONS	382
6.1	Findings	382
6.2	Concluding observations	387
	BIBLIOGRAPHY	392
	TABLE OF CASES	403
	SAMENVATTING (DUTCH SUMMARY)	408
	CURRICULUM VITAE	413

ABBREVIATIONS

ACABQ	Advisory Committee on Administrative and Budgetary Questions
AJUN	Administration of Justice at the United Nations
CAHDI	Committee of Legal Advisers on Public International Law of the Council of Europe
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EPO	European Patent Organisation
ESA	European Space Agency
EUROCONTROL	European Organisation for the Safety of Air Navigation
FAO	United Nations Food and Agriculture Organization
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILOAT	International Labour Organization Administrative Tribunal
IMF	International Monetary Fund
KFOR	Kosovo Force
MINUSTAH	United Nations Stabilization Mission in Haiti
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
ONUC	United Nations Operation in the Congo
OPCW	Organisation for the Prohibition of Chemical Weapons
OSCE	Organisation for Security and Co-operation in Europe
PCA	Permanent Court of Arbitration
UN	United Nations
UNAT	United Nations Appeals Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNDT	United Nations Dispute Tribunal
UNEF	United Nations Emergency Force

UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNMIK	United Nations Mission in Kosovo
UNPROFOR	United Nations Protection Force
UNRRA	United Nations Relief and Rehabilitation Administration
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTS	United Nations Treaty Series
WTO	World Trade Organization