The third-party liability of international organisations: towards a 'complete remedy system' counterbalancing jurisdictional immunity

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6 FINDINGS AND CONCLUSIONS

6.1 Findings

This study has examined the third-party liability of international organisations from the perspective of Section 29(a) of the General Convention. To recall, that provision requires the UN to 'make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'.

The UN is significantly exposed to a broad variety of third-party claims due to its many and diverse operations across the world. In interpreting and implementing Section 29(a) of the General Convention, the third-party liability practice of the UN, being the quintessential international organisation, is instructive for many other international organisations. This is particularly so due to the considerable similarity amongst the legal frameworks of international organisations—many are subject to provisions akin to Section 29 of the General Convention. Such provisions complement immunity rules, which are also largely similar amongst international organisations.

As seen in chapter 3 of this study, Section 29 of the General Convention was conceived as the counterpart to the UN's immunity from jurisdiction under Section 2 of the General Convention. As confirmed in chapter 4 of this study, international organisations strongly require jurisdictional immunity. However, for immunity effectively to block the adjudication of disputes against international organisations before domestic courts, alternative remedies are indispensable.

This has been illustrated by the case of the Netherlands, which hosts a large number of international organisations. Dutch courts produce a considerable body of case law regarding the jurisdictional immunity of international organisations. This case law is of general significance: it not only concerns various international organisations, including the UN, but also addresses issues that arise across jurisdictions.

International organisations in the Netherlands enjoy jurisdictional immunity under a variety of sources, including, according to the Supreme Court in the case of *Spaans v. IUSCT*, general international law. The problem regarding the effectiveness of jurisdictional immunity arises as the obligation to respect the immunity conflicts with the obligation to grant access to court under provisions like Article 6(1) of the ECHR and Article 14(1) of the ICCPR.

Immunity can be reconciled with access to court through 'reasonable alternative means'. The ECtHR expounded this in *Waite and Kennedy*, as the Dutch Supreme Court had done in its judgment in *Spaans v. IUSCT*. *Waite and Kennedy* has been refined in subsequent case law, including on the basis of the ECtHR's case law in *Bosphorus* and subsequent rulings regarding the transfer of sovereign powers to

international organisations. Accordingly, alternative means qualify as 'reasonable' if they conform to the essence of the rights under Article 6(1) of the ECHR. In the contemporary era of jurisprudence, the Dutch Supreme Court and the ECtHR have consistently ruled in favour of the immunity of international organisations. They have done so on the basis of the availability of alternative means, except in one case: *Mothers of Srebrenica.*

In upholding the UN's jurisdictional immunity, the reasoning of the courts in that case varies considerably and the ECtHR's decision is ambiguous. Notably, that decision seems to confound two distinct questions. One question is whether the entitlement to jurisdictional immunity is conditional on the availability of alternative recourse. As discussed in chapter 3 of this study, it arguably is not. Another question is whether immunity conflicts with the obligation to accord access to court. Absent reasonable alternative means, it inevitably does.

However, that conflict only arises where the obligation to grant access to court applies—this requires careful consideration in the context of the law of international organisations. Under Article 6 of the ECHR, the matter turns on whether the dispute concerns the 'determination of . . . civil rights'. The ECtHR in *Mothers of Srebrenica* determined that this was the case; however, it arguably should have made that determination under Section 29 of the General Convention as the 'proper law' of the UN.[1748] As submitted in chapter 3 of this study, there are good arguments that the *Mothers of Srebrenica* dispute lacked a 'private law character' under that provision, such that Article 6 of the ECHR did not apply.

Where the obligation to grant access to court *does* arise, it conflicts with the obligation to uphold jurisdictional immunity. In the case of the UN, the latter may take priority under Article 103 of the UN Charter, although the ECtHR in *Mothers of Srebrenica* was unclear on this point, too. Further, aside from Article 103 of the UN Charter, there are legal and policy considerations in favour of prioritising the jurisdictional immunity of international organisations over access to court.

In reality, however, the opposite is not infrequently reflected in the case law of the lower Dutch courts, and reportedly in cases in other jurisdictions. That is, according to such case law, in the absence of alternative remedies, courts prioritise access to court over jurisdictional immunity. In essence, in rejecting jurisdictional immunity, courts apply the reasoning in *Waite and Kennedy*. The risk of domestic courts doing so strongly militates in favour of counterbalancing the immunity by alternative remedies. But even if the immunity is upheld, such counterbalancing is warranted, as immunity without alternative remedies results in accountability gaps. That is irreconcilable with the rule of law—it undermines the legitimacy of international organisations and, in consequence, impairs their effectiveness.

[1748] Cf. Jenks (1962).

The effect of the aforementioned case law is to incentivise the establishment of alternative remedies by international organisations. It is in that way that national courts contribute to enhancing the accountability of such organisations—courts are not well placed to adjudicate cases against such organisations themselves.

Much like international law, through jurisdictional immunity (and privileges and immunities generally), shields international organisations from legal scrutiny at the domestic level, it governs the requirements regarding alternative remedies. This underlies the enquiry into the international organisations law framework governing third-party remedies in chapter 2 of this study.

Upon considering the domestic legal status of international organisations, chapter 2 enquired into the legal status of such organisations under international law. Most international organisations have international legal personality as per the will of their member states, either explicitly or, as in the case of the UN, implicitly. To have such personality means to be *capable* of possessing international rights and duties, but does not clarify *which* are these rights and duties.

International rights and duties flow from treaties to which international organisations have consented; as discussed in chapter 3 of this study, the General Convention is a case in point with respect to the UN. Whilst further enquiry is required with respect to *jus cogens*, general international law arguably applies to international organisations except insofar as the member states determine otherwise. The UN, arguably, is moreover bound by rights and duties flowing from the UN Charter, as specified in the International Bill of Rights, as its constitution.

As regards international organisations generally, international human rights obligations may be said to be binding on them under general international law (more precisely, general principles of law). Where an international organisation breaches such an obligation towards a private party, this amounts to an internationally wrongful act for which the organisation incurs international responsibility towards that party. Whilst the ARIO do not address the legal consequences of such responsibility, Article 2(3) of the ICCPR requires that an 'effective remedy' be provided to private parties in the case of human rights violations under the ICCPR. Whilst that provision arguably is reflected in general international law, it arguably in any event binds the UN under its constitution. That being so, the precise content of the obligation to provide an 'effective remedy' is in development, as illustrated by UN practice. When it comes to the settlement of private law disputes, Article 14(1) of the ICCPR sets forth procedural requirements that are more specific and demanding. That provision, too, arguably binds the UN under its constitution.

Contrary to the procedural right to a remedy, as of yet there seems to be insufficient support for the proposition that general international law sets forth an obligation to provide a substantive remedy for human rights violations.

In addressing the study's first research question, chapter 3 of this study interpreted and assessed the UN's implementation of Section 29(a) of the General Convention, on the basis of available information, in light of the international organisations law framework governing third-party remedies, and against the broader backdrop of the rule of law. Various complexities arise in interpreting Section 29 of the General Convention, not least due to its lack of specificity.

The first problem with the current implementation of Section 29(a) of the General Convention is that the UN unilaterally determines whether a third-party dispute has a 'private law character'. In so doing, the UN effectively controls its own accountability. This is at odds with core notions of justice and the rule of law, and arguably Article 14 of the ICCPR.

As to the term 'private law character', insofar as the travaux préparatoires of the General Convention provide guidance, the UN's categorical exclusion of disputes based on 'political or policy-related grievances' appears problematic. The same applies to its characterisation of the third-party dispute in connection with the Haiti cholera epidemic.

As to the term 'modes of settlement', to qualify as 'appropriate', they arguably must comply with (the essence of) Article 14 of the ICCPR. They must also not be unduly burdensome, particularly for claimants. And, they must not expose the UN to national court jurisdiction by undermining its immunity from jurisdiction.

The UN's implementation of Section 29(a) of the General Convention has largely developed in practice, which has led to a variety of, rather disparate, 'modes of settlement'. Specific problems arise as regards standing claims commissions for peacekeeping operations. These commissions have never been established and their legal framework is problematic in several respects. Moreover, the UN Liability Rules promulgated in UNGA resolution 52/247 (1998), which make up the applicable law before such commissions, give rise to several legal questions.

Problems also arise with respect to arbitration under the UNCITRAL Arbitration Rules. This is not necessarily an 'appropriate' mode of settlement because it is potentially burdensome, particularly for private claimants. More fundamentally, UNCITRAL arbitration is subject to national court supervision, exposing international organisations to the risk of interference.

These problems indicate the need to structurally revise the implementation of Section 29 of the General Convention. That is necessary to ensure that that provision counterbalances the UN's jurisdictional

immunity, by providing, as the UN Legal Counsel put it in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* proceedings before the ICJ, a 'complete remedy system to private parties'.

Taking the conclusions of chapters 3 and 4 of this study as its combined starting point, chapter 5 of this study addressed the second research question of the study. Thus, in combining and integrating the solutions for the problems identified in chapter 3, it designed the basic features of a 'complete remedy system' for third-parties under Section 29(a) of the General Convention. The proposed Mechanism would be at the centre of that system. Established by the UNGA, complemented by the proposed Convention and operated under the auspices of the PCA, the Mechanism is designed to facilitate the fair and effective settlement of third-party disputes through alternative dispute resolution and, where needed, two-tiered arbitration.

Current UN practice is essential in shaping the Mechanism. Thus, the amicable settlement of disputes would be expanded and institutionalised, coupled with ADR. Whilst arbitration would remain the main technique for contentious proceedings, it would be bolstered by a 'self-contained' arbitration regime to protect the UN against interference by domestic courts. The arbitration rules applied by the Mechanism would be based on proposals produced by the UNSG at the initiative of the UNGA. Standing claims commissions foreseen in SOFAs would be integrated in the Mechanism, which would allow addressing the problems regarding their legal framework and establishment. The consistent interpretation and application of the UN Liability Rules would be facilitated by the Mechanism's Appellate Tribunal.

The legal character of third-party disputes under Section 29(a) of the General Convention would be decided by the Mechanism upon contentious proceedings. That contrasts with current practice and would be a significant innovation from the perspective of the rule of law.

The UNGA resolution establishing the Mechanism as a single, comprehensive mode of settlement under Section 29(a) of the General Convention would contain the Mechanism's statute. The UNGA would have significant further involvement in the Mechanism: it would select its conciliators and arbitrators; approve the Convention that operationalises the 'self-contained' arbitration regime; and approve the UN's engagement with the PCA for the administration of the Mechanism, in furtherance of the historic ties between the organisations. The PCA would be particularly well-placed for present purposes. It has the expertise for the kind of disputes at issue, and its involvement would keep the Mechanism at arms-length from the UN, thus safeguarding the former's independence and impartiality.

The UN has ample experience with a broad variety of courts, tribunals and other dispute settlement bodies. For the UN itself to submit to such a body for the determination of its third-party liability, as proposed by Jenks decades ago, would further testify to the UN's commitment to the rule of law.

Following the practice of the UNAT and the ILOAT, the Mechanism could be made available to the many international organisations that are subject to provisions similar to Section 29(a) of the General Convention. This underscores the leading role played by the UN, as well as the broader relevance of the present study.

6.2 Concluding observations

This study has aimed to contribute to the 'conversation' concerning the accountability of international organisations.[1749] It has done so from a legal perspective, focusing on the third-party liability of such organisations. In closing, several points bear emphasising.

First, the third-party liability of international organisations has a strong procedural dimension, the starting point of this study being the jurisdictional immunity of international organisations. That immunity typically accompanies the domestic legal personality of international organisations. It is designed to block the adjudication by national courts of third-party disputes with such organisations. The immunity is much needed to protect the independence of international organisations. However, the jurisdictional immunity of such organisations requires counterbalancing by alternative remedies, for else domestic courts may reject the immunity in an attempt to close 'accountability gaps'. And, immunity without such remedies would be contrary to the rule of law and impair the legitimacy of international organisations. The verb 'to counterbalance', as used in this study's subtitle, reflects the early conception of Section 29 of the General Convention as the *counterpart* to immunity. Provided that jurisdictional immunity is properly counterbalanced, Jenks' contention that immunity is not 'an insidious encroachment on the rule of law' holds true.[1750]

Second, just like jurisdictional immunity, alternative remedies are governed by international law. Jurisdictional immunity need not each time be matched by alternative remedies to the same degree.[1751] The matter is controlled by Section 29(a) of the General Convention (or similar treaty provisions), which is embedded in the international organisations law framework governing third-party remedies. Only where a dispute has a 'private law character' are 'appropriate modes of settlement' required under Section 29(a) of the General Convention.

Whilst the General Convention dates back to 1946, what is 'appropriate' nowadays is to be interpreted against the broader backdrop of the rule of law and, more specifically, in light of the aforementioned

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[1749] Cf. Boon and Mégret (2019), at 7.
[1750] Jenks (1961), at xiii.
[1751] But see Ferstman (2017), at 206 ('it is important for the UN to affirm that, in accordance with the progressive expansion of its mandate since the [General Convention] was adopted in 1946, it is now obligated to make provision for appropriate modes of settlement for any and all disputes to which it is a party, regardless of whether those disputes stem from acts of a 'private' or 'public' character.' [emphasis added]).

framework. This approach corresponds to that of the ILC Study Group on Fragmentation of International Law, according to which: 'International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles.'[1752]

The international organisations law framework governing third-party remedies notably includes Article 14(1) of the ICCPR. That provision may reflect obligations of international organisations under general principles of law; it is in any event binding on the UN under the UN Charter, as its constitution. The result of interpreting Section 29(a) of the General Convention in conformity with Article 14(1) of the ICCPR is that 'modes of settlement' under the former provision are 'appropriate' if they conform to the requirement of 'a fair and public hearing by a competent, independent and impartial tribunal established by law.'[1753] This is reflected in the problems identified with the current implementation of Section 29(a) of the General Convention, as discussed in chapter 3 of this study, and in the basic design of the Mechanism set forth in chapter 5 thereof.

Article 14(1) of the ICCPR arguably is *lex specialis* in relation to Article 2(3) of the ICCPR, much like Article 6 of the ECHR is *lex specialis* in relation to Article 13 of the ECHR.[1754] The *lex generalis* applies to disputes that do not have a 'private law character'. Thus, disputes concerning the 'performance of constitutional functions'—or disputes of a 'public law character'—arguably require an international organisation to arrange an 'effective remedy' along the lines of Article 2(3) of the ICCPR. That obligation is being increasingly clarified, including due to the UN's efforts in establishing the Ombudsperson for Al-Qaida and ISIL Sanctions, and the HRAP. These examples illustrate that, depending on the circumstances, effective remedies for disputes of a 'public law' character may vary considerably. Constitutional disputes moreover differ significantly amongst international organisations due to the different respective functions of such organisations. For these reasons, the Mechanism's jurisdiction would be limited to disputes of a private law character, which share greater similarity amongst international organisations. This notwithstanding, over time, consideration could be given to expanding the Mechanism's jurisdiction to other disputes.[1755]

Third, the Mechanism is designed as the *exclusive* dispute settlement mechanism for disputes of a 'private law character'. To this end, the proposed Convention would include a provision along the lines of Article 26 of the ICSID Convention: 'Consent of the parties to arbitration under this Convention shall,

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[1752] UN Doc. A/CN.4/l.702 (2006), para. 14(1).
[1753] Cf. the ECtHR's reference to the 'full panoply of a judicial procedure' under Art. 6 of the ECHR, in contradistinction to Art. 13 of the ECHR. See Council of Europe/European Court of Human Rights, 'Guide on Article 13 of the European Convention on Human Rights – Right to an Effective Remedy' (2021), para. 140.
[1754] Ibid.
[1755] Cf. Ferstman (2017), at 206 ('Another possibility (however lengthy and difficult) is for a new protocol to the [General Convention] to be negotiated concerning the regulation of disputes of a 'public' character.').

unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy' (emphasis added). This precludes the involvement of national courts not just in connection with arbitration, but with third-party dispute settlement altogether.[1756] It is a legal basis, additional to jurisdictional immunity, for courts to decline to adjudicate cases against international organisations. Consequently, international organisations enjoy stronger legal protection against domestic interference.

This deference to a dispute settlement mechanism with exclusive competence resembles the situation regarding the settlement of non-contractual disputes with the EU. As Schermers and Blokker explained generally with respect to EU law: 'It may contain lessons for other organisations, or it could indicate possible directions for the future development of the law of these organisations'.[1757] The comprehensive and exclusive jurisdiction of the Mechanism would reflect such lessons in the area of the third-party liability of international organisations.

Fourth, the study has proposed a *systematic* approach to the settlement of third-party disputes under Section 29(a) of the General Convention. That approach, to which the Mechanism and the Convention are central, contrasts with the current practice, which involves a variety of rather disjointed modes of settlement that have largely developed in practice. A systematic approach would foster predictability, as would the Mechanism's adherence to the rule of law. Such adherence would moreover accord legitimacy to the settlement of third-party disputes. As the UNGA stated in the 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International levels':

> 'We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.'[1758]

As seen in the introduction to this study, the concept of the rule of law may be understood to encompass the notion of accountability, understood in its 'legal form'.[1759]

Several aspects of the rule of law have featured in this study. Above all, it is irreconcilable with the rule of law where the jurisdictional immunity of an international organisation is not counterbalanced by alternative remedies, to the extent required under international law. The same applies to the UN's unilateral determination of the legal character of third-party disputes under Section 29 of the General

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[1756] Cf. Schreuer (2009), at 386, para. 132.
[1757] Schermers and Blokker (2018), para. 28.
[1758] UN Doc. A/RES/67/1 (2012), para. 2 (emphasis added).
[1759] International Law Association (2004), at 225-226 ('Accountability of IO-s is a multifaceted phenomenon. The form under which accountability will eventually arise will be determined by the particular circumstances surrounding the acts or omissions of an IO, its member States or third parties. These forms may be legal, political, administrative or financial.' [fn. omitted, emphasis added]).

Convention, for example, in connection with the disputes arising out of the Kosovo lead poisoning and the Haiti Cholera epidemic. The Mechanism would relieve the UN of making that determination.

Furthermore, the Mechanism would be 'consistent with international human rights norms and standards', as required by the rule of law.[1760] Notably, as already recalled, it would provide for 'a fair and public hearing by a competent, independent and impartial tribunal established by law', in compliance with Article 14(1) of the ICCPR.

Moreover, the Mechanism would advance 'legal certainty', which is a further aspect of the rule of law.[1761] This is notably the case with respect to the UN Liability Rules. These rules are central to the UN's nascent liability regime. The coming into being of that regime reflects a development anticipated by Jenks in exploring the 'proper law of international organisations', that is, the 'law governing the legal transactions of international organisations'.[1762] That law, according to Jenks, 'may provide for the application of rules of an international character, including the domestic law of an international organisation.'[1763] The UN Liability Rules are in need of further development to mature fully into such 'domestic law' and provide legal certainty. To this end, these rules need to be interpreted and applied consistently. That would be catered for by the Mechanism, more precisely, through the Appellate Tribunal's extended jurisdiction.

It is in these various ways that the Mechanism would adhere to the rule of law in the settlement of third-party disputes in implementing Section 29(a) of the General Convention. Such adherence would complement the UN's efforts in areas such as the Ombudsperson for UNSC Al-Qaida and ISIL Sanctions,[1764] the establishment of HRAP to oversee UNMIK's human rights compliance,[1765] but also the overhaul of the UN's internal justice system in 2009.[1766]

[1760] UN Doc. S/2004/616 (2004), para. 6; UN Doc. A/66/749 (2012), para. 2; <un.org/ruleoflaw/what-is-the-rule-of-law/> accessed 21 December 2021.
[1761] Ibid.
[1762] Jenks (1962), at xxxi.
[1763] Ibid. See also ibid., at 263 ('an increasing number and proportion of legal transactions will be removed from the domain of conflict to that of common international rules.').
[1764] UN Doc. S/RES/1904 (2009).
[1765] UNMIK/REG/2006/12, 23 March 2006.
[1766] According to the UN website: 'The UN's internal system for the administration of justice is a means for UN staff to try to resolve dispute informally, and if informal means do not work, to resolve disputes formally through the management evaluation process, UN Dispute Tribunal and UN Appeals Tribunal. The current internal justice system was approved by the General Assembly, and came into effect on 1 July 2009. The goal at the time was to create an adequately resourced and decentralized system which is independent, transparent and professional, and whose working methods are consistent with international law, and the principles of the rule of law, and due process.' <un.org/en/internaljustice/overview/about-the-system.shtml> accessed 21 December 2021 (emphasis added).

Fifth, and finally, predictability and legitimacy in the settlement of third-party disputes, through a systematic approach in conformity with the rule of law, is indispensable for international organisations to discharge their mandates effectively. That is the ultimate aim of the revised implementation of Section 29(a) of the General Convention proposed in this study. This revised implementation would moreover serve that aim by enhancing the legal protection of international organisations against interference by states, notably by bolstering the former's immunity from jurisdiction.

The UN's legal framework regarding immunity and third-party dispute settlement serves as a model for international organisations generally. The revised implementation of that framework regarding the latter would pave the way for other international organisations. Not least, the many organisations with provisions akin to Section 29 of the General Convention could avail themselves of the Mechanism.

The increase in third-party disputes is an inevitable corollary of the expanding functions of international organisations. That expansion, like the rising number of international organisations, attests to the significance of such organisations in the globalising world. International organisations, together with their member states, are to take ownership of their third-party liability regimes.[1767] At a time when multilateralism is under pressure, that would certainly be timely, there being a clear need to buttress the effectiveness of international organisations through protection against interference and increased legitimacy.

[1767] Cf. Blokker and Schrijver (2015), at 357 ('In view of the proliferation of both the number and the activities of international organizations, as well of the increased expectation of the international community that they should deliver justice not only in words but also in practice, international organizations and their members should mind the gap and take adequate measures to close it.'); Irmscher, at 492 ('It is each Member State, individually and jointly with the others, which is in a position to ensure the availability of alternative remedies — through establishing treaty obligations for the organization in this regard, by initiating the adoption of corresponding secondary law, or by influencing the relevant policy choices and decisions within the organization. The accountability perspective shows that States as the masters of the organization remain responsible, and cannot simply leave it to the organization to defend itself from undue influence.').